
(2009) 03 JH CK 0010

In the Jharkhand High Court

Case No : Writ Petition (S) No. 2874 of 2003

Prof. Swapan Kumar Ghosh

APPELLANT

Vs

The State of Jharkhand and Others

RESPONDENT

Date of Decision : 26-03-2009

Acts Referred:

Bihar State Universities Act, 1976 — Section 58(10)

Citation : (2009) 57 BLJR 1983

Hon'ble Judges : Ajit Kumar Sinha, J

Bench : Single Bench

Advocate : Anjani Kumar Verma, for the Appellant; Arvind Kr. Mehta, J.C. to G.P.-I, Sanjay Piprawal and Mahadeo Thakur for Respondent No. 2 to 4, for the Respondent

Final Decision : Dismissed

Judgement

Ajit Kumar Sinha, J.—The present writ petition has been preferred for the following reliefs:

i) For direction to the Respondent authorities for refund of the amount which has been recovered from the petitioner's salary with retrospective effect i.e. from the year 2000 without any notice to the petitioner after reverting the petitioner from the post of university Professor to the post of Reader giving effect the Section 58(10) of the State Universities Act, however, the same is effective w.e.f. 28.8.1993, and the petitioner was granted promotion to the post of University Professor w.e.f. 21.11.1985 (Annexure-1) issued by the then Bhagalpur University as per the settled principles of law,

ii) For payment of retiral dues to the petitioner such as Gratuity, G.P.F., Leave encashment, Group Insurance etc in the scale of University Professor and also for fixation of final pension as University Professor to the petitioner.

2. A detailed argument has been made with regard to the applicability of Section 58(10) of the State Universities Act, as to whether it will apply retrospectively or

prospectively.

3. The learned Counsel on behalf of the petitioner has referred to and relied upon U.S.P. Srivastava Vs. Vinoba Bhave University and Others, to support his contention that Section 58(10) of the Bihar State University Act will not apply retrospectively.

Section 58(10) is quoted as under:

Notwithstanding anything to the contrary contained in this Act or Statute, Rules or Regulations thereunder promotion given on temporary basis to the post of Reader or Professor or Officer of the University shall not be valid for a period exceeding six months, unless recommendation by the Bihar State University (Constituent Colleges) Service Commission.

4. However, the counsel for the respondent refuted it and submits that a Division Bench of this Court in 2003 (4) JLJR 531 has held it otherwise while relying upon a judgment of the Hon'ble Supreme Court in Dr. B.P. Yadav and Another Vs. Dr. Ratneshwar Prasad Singh and Others, , that Section 58(10) of the Act as promulgated by Act 70 of 1993 will apply retrospectively.

5. In the instant case the petitioner was admittedly promoted on 17.9.1990 w.e.f. 21.11.85 vide Notification No. 78/90 by the Registrar of Bhagalpur University from the post of Reader to Professor, whereas Section 58(10) was incorporated by Act 70 of 1993 on 28.8.93 only.

6. I have considered the rival submissions and pleadings and the impugned Notification No. 78/90 vide which the promotion was granted on the post of Reader to University Professor w.e.f. 21.11.1985 was subject to recommendation of the commission and it is specifically mentioned in the Notification as under:

Their temporary promotion shall cease to be effective immediately in the event of non receipt of the recommendation of the commission concerned.

7. I have considered the Judgment cited as reported in Dr. B.P. Yadav and Another Vs. Dr. Ratneshwar Prasad Singh and Others, in which the Hon'ble Supreme Court at para-21 clearly held that the said provisional promotion cease to be operative consequent upon the enforcement of Section 58(10) of Bihar University Act and in any case the approval by the College Service Commission in law is mandatorily required.

8. The counsel for the petitioner has referred to and relied upon (2001) 10 SCC 698 to support his contention that Section 58(10) of Bihar University Act will not apply retrospectively.

9. Even in this case, Hon'ble Supreme Court dismissed the appeal of the appellant therein and held that the terms of appointment was clear and indicated that it was purely temporary/adhoc and will cease to be effective if the service commission does not approve of the same and accordingly held that the appellant cannot claim a right of continuance in the promoted post.

10. In the instant case also, the promotion was purely temporary and was subject to approval and recommendation of the commission and it was also indicated that the promotion will cease to be effective immediately in the event of non receipt of the recommendation of the Commission.

11. In view of the very nature of the appointment as indicated hereinabove, the appointment order of the petitioner to the post of University Professor and also in view of Section 58 as it existed even prior to the insertion of Sub-section 10 therein that the appointment to the post of University Professor shall ceased to be effective in the event of non receipt of the recommendation of the commission.

12. There is another aspect of the matter which goes to the root of the maintainability of the present writ petition. The petitioner had earlier also filed a Writ Petition (S) No. 479 of 2003 for the same relief and the same was dismissed in default on 25.03.2003. This order has been annexed as Annexure "A" to the counter affidavit and in the rejoinder filed by the petitioner at para-13 it has been admitted that the earlier writ petition was dismissed in default.

13. The main contention raised by the counsel for the petitioner in its rejoinder at para 13 is that if the writ petition has been dismissed for default there is no bar to file a fresh writ petition for the same relief as prayed for.

14. I am afraid this plea and the contention raised is unsustainable in the eyes of law. The remedy available was to get the writ petition restored instead of filing a fresh writ petition.

15. The learned Counsel has referred to and relied upon Pujari Bai Vs. Madan Gopal, to support his contention but this judgment relates to the issue of resjudicata wherein the Hon"ble Supreme Court held that if the writ petition is disposed of after contesting on merits by a speaking order then the question decided in that petition would operate as resjudicata, but not a dismissal in limine or dismissal on the ground of laches or availability of alternative remedy. This judgment does not apply to the facts of the present case where the earlier Writ Petition was dismissed in default and not restored.

16. Considering the aforesaid facts and circumstances of the case, this writ petition is not maintainable and even otherwise devoid of any merit and the same is accordingly dismissed.