

(1988) 11 PAT CK 0018

In the Patna High Court

Case No : Civil writ Jurisdiction Case No"s. 4510 of 1988, 4365 of 1988 and 4008 of 1988

Rajdeo Prasad and Others

APPELLANT

Vs

The State of Bihar and anr

RESPONDENT

Date of Decision : 07-11-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 19 Rule 3
Constitution of India, 1950 — Article 213(1)
Minimum Wages Act, 1948 — Section 10

Citation : (1990) 2 PLJR 206

Hon'ble Judges : S.B. Sinha, J

Bench : Single Bench

Advocate : Rajendra Prasad Singh, Vijay Kumar Pandey in all the writ petitions, for the Appellant; S.N Jha, Ramesh Jha (in 4510/88); M/s Kamlapati Singh, Prem Nath Singh (in 4355/88), M/s R.P. Mahto and R.K. Singh (in 4008/88) For the State, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha J.

1. These three writ petitions involving common question of law and fact were taken up for hearing together and are being disposed of by this common judgment. The petitioners in all these writ petitions are students of Patna Institute of Technology, Patna; Indian Engineering College. Motihari; Magadh Engineering College, Gaya; Dr. Jagannath Mishra Institute of Technology, Darbhanga; and Vaishali Institute of Technology and Research, Muzaffarpur.

2. C.W.J.C. No. 4510 of 1988 the petitioners were students of Dr. Jagannath Mishra Institute of Technology, Darbhanga and Patna Institute of Technology, Patna C.W.J.C. No. 4365 of 1988 the petitioners were students of Indian College of Engineering, Motihari. In C.W.J.C. No. 4008 of 1988-the petitioners were students of Magadh Engineering Colleges, Gaya.

3. The petitioners were admitted in the year 1980-81 in different Engineering institutions as mentioned hereinbefore.

4. At the material time all such Engineering institutions namely, Dr. Jagannath Mishra Institute of Technology, Darbhanga; Indian Engineering College, Motihari; Magadh Engineering College, Gaya; Patna Institute of Technology, Patna and Vaishali Institute of Technology and Research, Muzaffarpur were being managed privately.

The aforesaid institutions filed applications for recognitions thereof by the State of Bihar in terms of the provisions of the relevant statute.

5. All the students of the aforementioned institutions could not appear in the examination of the Ist year Engineering course owing to the fact that the said institutions were not recognised.

However, the State of Bihar allowed the students of the aforementioned Engineering institutions to appear for the first time in the year 1983 and later on in the year 1986. The result of the said examination was published in December, 1986.

6. In the meanwhile the Governor of Bihar in exercise of his power conferred upon him under Article 213(1) of the Constitution promulgated an ordinance known as Bihar Private Engineering College (Taking over) Ordinance, 1986 whereby and whereunder three private engineering institutions out of the aforementioned five institutions namely, Dr. Jagannath Mishra Institute of Technology, Darbhanga; Magadh Engineering College Gaya and Indian Engineering College, Motihari were taken over with all their assets and liabilities. The aforementioned ordinance came into force with effect from 9th December, 1988.

7. The State of Bihar further adopted a resolution being Resolution No. 2338 dated 23-7-1987 whereby and whereunder it was directed that the students of Patna Institute of Technology and Research Institute, Muzaffarpur be accommodated in the aforementioned three taken over Engineering Colleges.

The said resolution of the State of Bihar dated 23-7-87 is contained in Annexure 2 to the writ petition.

8. From a perusal of the said resolution as contained in Annexure 2 to the writ petition it appears that the State of Bihar adopted the aforementioned policy decision taking a compassionate view of the matter and upon taking into consideration the career and future prospects of the students. However, the students of the aforementioned institutions were to be accommodated after holding screening tests.

9. In terms of the aforementioned resolution, the State of Bihar issued orders along with a list of students of Patna Institute of Technology absorbing them in the aforementioned three taken over engineering colleges.

10. It is asserted by the petitioners that in Jagannath Mishra Institute of Technology, Darbhanga and in Patna Institute of Technology, Patna there was no facilities for imparting education in electrical or mechanical branches as the said colleges did not have any laboratory and workshop.

11. The petitioners have contended that in this circumstances most of the students had been impartd education only in the discipline of civil engineering and not in any other discipline.

12. The petitioners after successful completion of their examination which was held in the year 1986 and the result whereof was published in December, 1986 were allowed to continue in the 2nd year of the civil engineering branch.

13. It can be assumed the classes in respect of the said taken over colleges in 2nd year civil engineering started sometime in January, 1987 and the petitioners were allowed to attend classes therein.

14. So far as the students of Patna Institute of Technology Patna are concerned, it is admitted that they were also allowed to join classes in the civil branch of B. Sc. (Engineering) after the resolution dated 23.7.1987 (Annexure 2) was given effect to. According to the petitioners all of them have been prosecuting their studies only in the civil branch of B. Sc. (Engineering) and at no point of time any class was held relating to the courses of studies meant for Electrical Engineering or Mechanical Engineering of the B. Sc. (Engineering) course. The petitioners have categorically stated that they have not been taught the subjects of Electrical or Mechanical Branch of the B. Sc. Engineering course in their 2nd year.

15. It appears that the State issued a letter dated 30.12.1987, which is contained in Annexure 4 to the writ petition wherein, inter alia, it has been stated that the students be allotted the branches in the engineering course according to the marks obtained by them in the Ist year B. Sc. (Engineering examination).

The concerned Universities published communiques notifying the date of receipt of fees and forms and also the date of commencement of 2nd year B. Sc. (Engineering) examination. The said communique is contained in Annexure 3 to the writ petition.

16. Mr. Rajendra Prasad Singh, the learned counsel appearing on behalf of the petitioners submitted that regard being had to the facts and circumstances of the case that the petitioners had all along been prosecuting their courses of studies in the civil branch of B. Sc. (Engineering), the respondents cannot now force them to appear in the Mechanical or Electrical Engineering examination.

Learned counsel further submitted that the petitioners having been allowed to prosecute their studies only in the Civil Engineering Branch, it does not lie in their mouth now to say that the petitioners will have to sit in the 2nd year B. Sc. (Engineering) examination in the Mechanical or the Electrical Branch.

Learned counsel further submitted that in that view of the matter, the said stand of the respondents being inequitable the petitioners are entitled to an appropriate writ from this Court.

Learned counsel submitted that in any view of the matter the letter dated 30.12.1987 (Annexure 4) will operate prospectively and not retrospectively and as such the same should be held to be not applicable to the case of the petitioners who have already undergone the courses of studies in the civil branch of the B. Sc. Engineering and as such they do not come, within the purview of the aforementioned purported letter.

17. In this case a counter affidavit has been filed only in C.W.J.C. No. 4365 of 1988. The said counter affidavit is sworn by the Under Secretary to the Government, Department of Science and Technology, Government of Bihar, Patna. The contents of the said counter affidavit have been verified as true to the deponent's knowledge derived from the official records, which the deponent believed to be correct but the learned counsel appearing on behalf of the State could not produce the relevant records when called upon to do so.

18. In any event, the statements made in the said counter affidavit are vague and general in nature. In the said counter affidavit the basic facts, as mentioned in the writ petition and as stated hereinbefore, have not been denied or disputed. The only relevant paragraph in the said counter affidavit, which merits attention for disposal of these petition is paragraph 8 which reads as follows :--

That facts narrated in the petition are not the whole truth Since the course of studies for first year Engineering for the three branches Civil, Electrical and Mechanical are the same the question of delineating the branches were taken up during the course of second year Engineering and Merit determined by the Results of First Year Engineering was to be the basis of allotment of branches which was the only rational basis. The choice of the candidates were taken into account according to their merit and accordingly branches were allotted subject to the availability of seats in a particular branch."

19. The learned Advocate General appearing on behalf of the State submitted that the petitioners, who had been students of unrecognised institutions, had absolutely no right to appear in the examinations of B. Sc. Engineering course. The aforementioned ordinance namely, The Bihar Private Engineering College (Taking Over) Ordinance, 1986, according to the learned Advocate General was issued by the State of Bihar only taking into consideration the plight of the students and on compassionate grounds and as such they have derived no right whatsoever on the basis of the said ordinance or otherwise-According to the learned Advocate General the students having not studied in the recognised-institutions during the period 1980 to 1986, their studies in the said institutions could not have been recognised nor have they been deprived of any legal right thereby.

The learned Advocate General further submitted that taking into consideration

the purport and object of the said ordinance as also regard being had to provisions contained in sections 9 and 10 thereof, the State Government has been conferred with an absolute discretion to determine the branches in the B. Sc. (Engineering) course, which may be allotted to the respective students.

According to the learned Advocate General as in the Ist year only general subjects are taught, the question of the petitioners being prejudiced in any manner if they are directed to sit in the B. Sc. examination in the Mechanical Engineering or Electrical Engineering branch would not arise.

20. Learned Advocate-General in this connection, has placed strong reliance upon a decision reported in AIR 1967 S.C. 993 (Rajalakshmiah Setty and another v. State of Mysore and another). The decision in Rajalakshmiah Setty's case was rendered in a different situation.

In the instant case, the petitioners are not claiming any right by virtue of any concession granted by the respondents by way of an executive fiat but they are doing so in terms of the provisions of the said ordinance itself. The right accrued to the petitioners, therefore, being a statutory right, the same cannot be taken away by an executive order. Such statutory rights are obviously enforceable in a court of law. The petitioners having been admitted in the sic year are entitled to prosecute their studies in terms of the provisions of the ordinance itself. This legal right conferred upon them under the statute cannot be taken away except in accordance with the procedure laid down therein.

The learned Advocate General also placed strong reliance upon the decisions reported in N.M. Nageshwaramma and Others Vs. State of Andhra Pradesh and Another, ; A.P. Christians Medical Educational Society Vs. Government of Andhra Pradesh and Another, ; 1987 PLJR 591 (Amarendra Pratap Singh and others v. L.N. Mithila University).

The decisions cited by the learned Advocate General appearing for the respondents have no application in the facts and circumstances of this case and are wholly irrelevant and as such it is not necessary to deal with the same. Suffice it to say that in the aforementioned decisions. It has been merely held that the students of unrecognised institutions have no right to appear in examinations conducted by the universities.

21. Learned Advocate-General further submitted that the status of the students to be admitted so far as the course of studies to an appropriate branch of the 2nd year was determined by the State in terms of section 10 of the said ordinance and as such the direction as contained in the letter dated 30.12.1987 (Annexure 4) can neither be said to be unreasonable nor arbitrary. The learned Advocate General contended that in that view of the matter the petitioners cannot be said to have derived any legal right whatsoever and as such these writ petitions are fit to be dismissed.

22. True it is that the students of unrecognised institutions have no legal right

whatsoever to appear in the examination held by the university. Institutions which impart technical education are governed by statutes and unless and until the statutory requirements are fulfilled by the management of the said institutions, they are not entitled to obtain recognition of the State of Bihar and consequently the students of such institutions would have no legal right to appear in the examination conducted by the universities.

23. However, in the instant case, the situation is entirely different. It is an admitted position that the State Government itself had taken over three institutions by reason of the said ordinance and also permitted the students of the rest two private institutions as mentioned hereinbefore, to be absorbed in the taken over institutions, The State of Bihar further admittedly permitted them to appear in the Ist year examination.

It is also admitted that the petitioners have become successful in their Ist year B. Sc. (Engineering) examination the result whereof was published in December, 1986.

24. By reason of the provisions of section 3 of the aforementioned ordinance, the said institutions stood transferred to and vested absolutely in the State Government free from all encumbrances.

25. In terms of sub-section (2) of section 3 of the said ordinance all the private Engineering Colleges mentioned in sub-section (1) of section 3 thereof as also of the governing bodies/managing committee thereof including, land buildings, laboratories, workshops, stores, instruments, machineries, vehicles, cash balance, reserve fund capital investment, furniture and fixtures and other things stood transferred to and vested in the State Government free from all encumbrances.

26. In terms of section 8 of the said ordinance the State Government was to start mainly the courses of study in new subjects of engineering in the private engineering colleges taken over by the said ordinance and was also empowered to continue the courses of study in other subjects as per requirements.

It is admitted at the bar that the State Government has not opened any new discipline in the said colleges and are commencing with the old subjects.

27. In terms of section 9 of the said ordinance the State Government have the right to determine the number of students to be admitted in the 1st year subject wise after taking over of the private engineering colleges. But, in the instant case, the said provision has no application as admittedly the petitioners either

were already admitted in the taken over colleges by reason of the said ordinance and/or adjusted in terms of the resolution of the State of Bihar dated 23.7-1987 as contained in Annexure 2 to the writ petition.

28. The status of the students of the taken over colleges will, therefore, have to

be determined in terms of section 10 of the said ordinance, which reads as follows :

Status of the previously admitted students.--(1) All the students admitted to the private Engineering Colleges before taking over u/s 3 shall be deemed to have been admitted in the first year course and they shall be entitled to appear in the examination conducted by the concerned university. The students, who have qualified in the examination conducted by the concerned university, shall be admitted to the appropriate branch of the second year on the basis of merit, choice and availability of seats :

Provided that such examinations shall be conducted and regulated on the basis of the existing provisions of the concerned university.

(2) The students of the private Engineering College who have qualified in the B.Se. Engineering Ist year special examination conducted by the Bihar University in the year, 1986, before the promulgation of this Ordinance shall be entitled for admission to the second year course.

29. So far as the students of Patna Institute of Technology, Patna are concerned as they have been absorbed in the taken over institutions their status are to be determined in terms of the aforementioned resolution dated 23-7-1987 as also the provisions contained in section 10 of the said ordinance.

30. It is an admitted fact that all the petitioners have successfully completed their Ist year in B.Sc. Engineering course. The State therefore, was bound to admit the students to the appropriate branch of the 2nd year on the basis of merit, choice, and availability of seats.

There cannot be any doubt that the distribution of branches, if carried out, on the basis of the said guidelines would have been in accordance with the provisions of the Act, However, no thing has been stated in the counted-affidavit to show that either in January 1987 in relation to the students of the taken over Institutions or after 23.7.87 in relation to the students of the Patna Institutes of Technology, Patna, the respondents had asked for the choice from the students for being admitted in a particular such nor is there anything on the records to show that merit of the students vis-a-vis availability of seats were taken into consideration.

31. In my opinion, in view of the express language as contained in section 10 of the aforementioned ordinance, the petitioners had a right to indicate their respective choice to study in a particular branch and the said option was bound to be considered by the concerned authorities along with their merits and availability of seats. Nothing has been sated in the counter affidavit nor any records were made available before this court to show that the respondents before directing the students to be admitted in the appropriate branch took any decision on the basis of merit, choice and availability of seats and also directing them to appear only in the examinations in the brunches is which they were

admitted.

32. As the statements made in the writ petition to the effect that the petitioners continued to prosecute their studies in the civil branch of the B. Sc. Engineering course after passing their 1st year examination have not been controverted in the counter affidavits the said assertions made on behalf of the petitioners have got to be accepted as correct.

Further, as noticed hereinbefore, the counter-affidavit filed on behalf of the State has not been properly verified at all.

33. Recently in *Satya Narain Prasad and others vs. State of Bihar and others* (1988 P.L.J.R. 414) I had the occasion to consider the effect of non-compliance of the provisions of Patna High Court Rules or Order 19 Rule 3 of the CPC in the matter of verification, of the counter-affidavit. In the said decision it has been held that an affidavit in support of the writ petition or the counter affidavit must conform to the provisions of the Order 19 Rule 3 of the CPC or the provisions analogous thereto.

34. As mentioned hereinbefore, the respondents in their counter-affidavit have not denied the fact that the petitioners were admitted to 2nd year course wherein they were taught only the subjects meant for civil engineering students in B. Sc. Engineering. It is, therefore, clear that the respondents by their acts of omission and commission did not allot any particular branch to the petitioners and continued to impart education only in the branch of civil engineering.

The respondents have further not denied or disputed the assertions made in the writ petition that no subject in the courses of studies for Mechanical Engineering or Electrical Engineering was taught to them.

In this view of the matter, in my opinion, the respondents must be held to be estopped and precluded from directing the petitioners to appear in the examination of Mechanical Engineering or Electrical Engineering of B Sc. Engineering course.

35. As seen hereinbefore, the petitioners by their acts of omission and commission encouraged the petitioners to be taught the subjects of civil engineering only; and in this view of the matter, in my opinion, they are estopped from taking any other stand before this Court.

36. In the event the respondents intended that the petitioners should appear in the examination meant for Electrical Engineering or Mechanical Engineering of B. Sc. Engineering course, it was their duty to allot the branches to the petitioners as early as possible in terms of section 10 of the said ordinance by inviting options from the petitioners and as per their merit and availability of the seats. This having not been done and further the respondents, having permitted the petitioners, to continue their studies in civil engineering branch, in my opinion, are estopped from contending otherwise and their impugned action is also barred under the doctrine of acquiescence.

Reference in this connection may be made to recent Division Bench decision of this Court reported in 1988 PLJR 506 (Subhash Mishra v. State of Bihar and another).

37. There cannot be any doubt that respondents in terms of section 10 of the aforementioned ordinance could have admitted the students to the appropriate branch of the 2nd year on the basis of their merit, choice and availability of seats but evidently the petitioners could not be directed to appear in the examination of a particular branch without complying with the aforementioned requirement of law.

38. Even in the order dated 30.12.1987 as contained in Annexure 4 to the writ petition the State has clearly directed that the appropriate branch be allotted to the concerned students in terms of section 10 of the said ordinance, Unless and until the provisions of section 10 of the said ordinance as also the direction of the State of Bihar as contained in the letter bearing no. 4246 dated 30.12.1987 as contained in Annexure 4 to the writ petition are complied with, the petitioners cannot be directed to appear in the examination in a particular branch other than the branch for which they have undergone the courses of studies.

39. The said circular dated 30.12.1987 will also have prospective operation and not retrospective operation as the same is merely an executive instruction.

In any view of the matter, as the respondents were required to comply with certain procedure in terms of the provisions of the said ordinance before it could pass any order directing the students to appear in a particular branch of B. Sc. Engineering course, they were bound to comply with the said statutory requirements and unless the procedure and formalities are complied with the order passed in violation thereof would be subject to judicial review.

40. In Council of Civil Services Union and others vs. Minister for the Civil Service (1984 Vol. 3 All ELR page 935) Lord Fraser stated the law thus :--

But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law. This subject has been fully explained by Lord Diplock in O'Reilly v. Mackman (1982) 3 All ER 1124: (1983) 2 AC 287 and I need not repeat what he has so recently said. Legitimate, or reasonable, exception may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. Examples of the former type of expectation are Re-Liverpool Taxi Owners' Association (1972) 2 All ER 589, (1972) 2 QB 229 and A G. of Hong Kong v. Ng Yuen Shiu (1983) 2 All ER 346: (1983) 2 AC 629. I agree Lord Diplock's view, expressed in the speech in this appeal, that "legitimate" is to be preferred to "reasonable" in this context. I was responsible for using the word "reasonable" for the reason explained in Ng Yuen Shiu, but it was intended only to be exegetical of legitimate. An example of the latter is R v. Hull Prison

Board of Visitors, ex PST German in (1979) 1 All ER 701, (1979) QB 425, approved by this House in O'Reilly v. Mackman (1982) 3 All ER 1124 at 1126 : (1983) 2 AC 237 at 274. The submission on behalf of the appellants is that the present case is of the latter type. The test of that is whether the practice of prior consultation of the staff on significant changes in their conditions of service was so well established by 1983 that it would be unfair or inconsistent with good administration for the Government to depart from the practice in this case. Legitimate expectations such as are now under consideration will always relate to a benefit or privilege to which the claimant has no right in private law, and it may even be to one which conflicts with his private law rights. In the present case the evidence shows that, ever since GCHQ began in 1947, prior consultation has been the invariable rule when conditions of service were to be significantly altered. Accordingly, in my opinion, if there had been no question of national security involved, the appellants would have had a legitimate expectation that the minister would consult them before issuing the instruction of 22 December 1983. The next question, therefore, is whether it has been shown that consideration of national security supersedes the expectation.

This aspect of the matter has also been considered by Lord Scarman in his speech in the aforementioned judgment.

However, the leading speech in that case is that of Lord Diplock and the learned Law Lord has stated the law thus :--

My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural, impropriety". This is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well established heads that I have mentioned will suffice."

"By "illegality" as a ground for judicial review I mean that the decision-maker power and must give effect to it. Whether he has or not is *par excellence* a justiciable question to be decided, in the event of dispute, by these persons, the judges, by whom the judicial power of the state is exercisable."

"I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because

susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.

41. The aforementioned decision of House of Lords has recently been followed by the Supreme Court reported in *Ranjit Thakur's case*, 1987 P.L.J.R. 79 (SC).

42. It is also a settled law that the authorities are bound by the procedures laid down by them and in that view of the matter it was obligatory on the part of the concerned respondents to comply with the procedural requirement as contained in section 10 of the said ordinance.

In this view of the matter, in my opinion, the impugned order cannot be sustained. In the result, these writ petitions are allowed but without any order as to costs.