
(2015) 05 GAU CK 0008
In the Gauhati High Court
Case No : Writ Petition (C) No. 1308 of 2011

Rijumoni Das

APPELLANT

Vs

The State of Assam and Others

RESPONDENT

Date of Decision : 07-05-2015

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2015) 146 FLR 554 : (2015) LabIC 2633

Hon'ble Judges : Michael Zothankhuma, J

Bench : Single Bench

Advocate : S.S. Dey, Senior Advocate and S.K. Roy, for the Appellant; B. Gogoi and S.K. Talukdar, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Michael Zothankhuma, J.—Heard Mr. S.S. Dey, learned senior counsel assisted by Mr. S.K. Roy, learned counsel for the petitioner. Also heard Mr. B. Gogoi, learned counsel for the respondent Nos. 2 and 3 as well as Mr. S.K. Talukdar, learned counsel for the respondent No. 1.

2. Petitioner's case is that pursuant to a selection process in terms of the advertisement dated 18.11.2006, he was appointed as Block Accounts Manager on 29.5.2007 on contractual basis and was posted at Halakura PHC, Dhubri and an agreement was executed between the petitioner and the Joint Director of Health Services. Condition Nos. 6 and 8 of the agreement dated 5.6.2007 which governed the term of the petitioner's appointment is reproduced below:

"6. Any action either directly or indirectly of the party for the change of place of posting will be treated as disqualification for the post and the society will have the right to terminate his agreement without any notice for such action.

.....

.....

8. Notwithstanding anything contained herein above, the services of the Party may be terminated at any time by the Society if the Party is found to be guilty of any insubordination, intemperance or other misconduct or of any breach or non performance, it being clearly understood that the Society shall always invoke this clause in consultation with the Chairman of the Society and Member Secretary of the Society."

3. The petitioner's appointment was thereafter terminated on the grounds reflected in the order dated 14.12.2009 issued by the Joint Director of Health Services which is to the following effect:

"3. As the performance of appraisal committee is not satisfied with the performance of the following BPMs and BAMs as they failed to discharge their duties even to the minimum satisfactory levels. So the committee recommended for non-renewal of contract with the following BPM and BAM to be signed by the District Health Society, Dhubri from the date of issue of this letter.

.....

Block Accounts Managers:

4. The petitioner challenged the termination of his service by filing WP(C) 1637/2010 before this Court. WP(C) 1637/2010 was disposed of vide order dated 29.6.2010 with the following observations:

"11.Clause 8 of the agreement though authorises the concerned authority to terminate the services of a contractual appointee as envisaged therein, it does not vest him with unbridled and uncontrolled power to take a decision to the detriment of the person concerned without first adhering to the basic norms of fair play in action. More over it is also not clear as to whether if such an action has been taken under clause 8, the same has been in consultation of the Chairman as well as the Member Secretary of the District Health Society as peremptorily required in terms thereof. The above view finds support from the principle propounded in the decision of this Court in Dharmeswar Baishya Vs. State of Assam and Others, (2004) 3 GLR 291 : (2004) 2 GLT 1253 .

12. The upshot of the above discussion is that the impugned decision is unsustainable in law and is thus interfered with. This Court, having regard to the nature of the imputations made and in the face of the inadequate materials on record has not recorded its findings on the correctness or otherwise thereof vis-a-vis the petitioner. As the judicial intervention has been on account of unfairness in action, no prior notice or opportunity of hearing having been given/afforded to the petitioner, this determination notwithstanding it would be open for the concerned respondent authorities to initiate appropriate action as would be deemed fit and advisable in the facts and circumstances of the case."

5. The Executive Director, NRHM, Assam thereafter issued order dated 11.8.2010 which is to the following effect:

"In pursuance of the order of Hon"ble Guwahati High Court in the WP(C) No. 1637/2010, Sri Rijumoni Das is hereby allowed to join under NRHM as Block Accounts Manager and posted at Chowkiholā BPHC, Karbi Anglong District which is lying vacant. Sri Rijumoni Das will report to the Joint Director of Health Services cum Member Secretary, District Health Society, Karbi Anglong District and sign a fresh contract within 15 days."

6. The petitioner thereafter joined as Block Accounts Manager at Chowkiholā BPHC, Karbi Anglong on 24.8.2010 and a fresh agreement similar in all respects to the earlier agreement dated 5.6.2007 was executed in Karbi Anglong on 24.8.2010. The petitioner thereafter wrote a letter dated 27.8.2010 to the Medical Officer (i/c), Chowkiholā BPHC, Karbi Anglong requesting five days' casual leave from 27.8.2010 to 31.8.2010 on the ground that he wanted to bring his luggage from Guwahati. Petitioner's further case is that he reached Chowkiholā BPHC and joined his duty on 24.8.2010 by submitting joining letter in the office of the Joint Director of Health Services, Diphu, Karbi Anglong. However, on 4.9.2010 some unknown person threatened him and directed him to fulfill their demand or face consequences. The petitioner reported the matter to the in-Charge of Chowkiholā BPHC who told him that it was a personal matter of the petitioner and that he would not interfere. Thereafter, the petitioner requested the in-Charge of the BPHC to manage a room for him in the official quarter but he was told that there was no room available and that he should manage his own room in his individual capacity. The petitioner feeling helpless, left Karbi Anglong and vide letter dated 8.9.2010 requested the Mission Director, NRHM to transfer him to any other place or to his earlier place of posting at Haulakura PHC, Dhubri. The contents of the letter dated 8.9.2010 are reproduced below:

"With reference to subject cited above I have the honors to inform you that as per the Hon"ble High court's order dated 29-6-2010 passed in W.P.(C) No. 1637/2010 I was allowed to join my duties and posted at Chowkiholā BPHC, Karbi Anglong as Block Accounts Manager (BAM) vide letter dated 11-8-2010. Accordingly, on 24-8-2010 I submitted my joining Letter in the office of Joint Director of Health Services Diphu, Karbi Anglong and on the next day i.e. on 25-8-2010 I joined in my post at Chowkiholā.

On 4-9-2010 when I reached at Chowkiholā BPHC for doing my duties some unknown person came and ask me where from you and why and threatened me my saying that you must fulfill our demand otherwise you will faced the consequence.

Thereafter I informed the matter to the Incharge of the Chowkiholā BPHC and he replied that is your personal matter, you handle it in your own way. He also informed me, that no BAM could stay here more than 3/4 days. I requested the Incharge to manage a room for me at the office quarter but he told me that there is no room for you even for a single day, you manage your room in your own capacity. Being helpless and having no other alternative I left: the place.

Therefore I request you to kindly allow me to join my duties at any other place or in my earlier post at Halakura BPHC, Dhubri."

7. The petitioner thereafter received the impugned order dated 3.1.2011 which is to the following effect:

"Whereas on receipt of the report from Karbi Anglong District vide No. NRHM/DHS/Estd/Order/2010-11/8742 dated 2nd Nov. 2010 against Mr. Rijumoni Das, Block Accounts Manager, Chowkiholder BPHC, Karbi Anglong District regarding his continuous absence after joining office on 24th Aug, 2010, a show cause notice vide No. NRHM/Esst./SCN/10/08-09/22246 dated 4th Dec. 2010 was issued and sent to his office as well as to his residential address and sufficient time was given to him to reply to it but till date no reply is received at NRHM Directorate, Khanapara, Guwahati-22 and he is still absent from his duty, therefore, it is hereby informed that the contract signed with Mr. Rijumoni Das, Block Accounts Manager, Chowkiholder BPHC, Karbi Anglong District's terminated as per Clause 6 of TOC with immediate effect."

8. Mr. S.S. Dey, senior counsel for the petitioner submits that no show cause notice was issued to his residence and to verify the same he had sent an RTI application to the Senior Superintendent of Post Offices and CPIO, Guwahati Postal Division. The Senior Superintendent of Post Offices and CPIO, Guwahati thereafter wrote a letter dated 17.2.2011 to the Mission Director, NRHM with a copy to the petitioner which is to the following effect:

"An RTI application received from Shri Rijumoni Das (copy enclosed for ready reference), s/o. Shri Promod Ch. Das, North Guwahati, Madhyamkhanda, PO: North Guwahati, Dist. Kamrup in c/w. non-delivery of an official letter to his residential address which was posted by your office on 04/12/2010. Shri Das could not produce the consignment No. of article, so this office is not in a position to furnish the information about the delivery of the article. You are therefore requested, kindly to furnish the consignment number and office of booking of the official letter that was dispatched from your office for making necessary enquiry at this end."

Mr. S.S. Dey thus submits that as no consignment number and office of booking could be furnished by the respondents, it can be safely assumed that no show cause notice was sent to his residential address.

9. Mr. S.S. Dey also relies upon Para 16 of the respondent No. 2's affidavit to submit that no show cause notice was sent to his residence as it has been stated in Para 16 of the said affidavit as follows:

"That as regards to the statements made in paragraph 21 of the writ petition, the deponent begs to state that the show cause notice was sent in the official address of the petitioner. Record of sending show cause notice in the official address is enclosed."

10. Mr. S.S. Dey contends that the above averment made by the respondent No.

2 shows that no show cause notice was sent to the residential address of the petitioner but was sent only to his official address. He further submits that there was no question of the petitioner receiving the show cause notice sent to his official address as the petitioner had left Karbi Anglong in September, 2010. Mr. S.S. Dey thus submits that the principles of natural justice having been violated, the impugned termination order dated 14.12.2009 should be set aside and the respondents should re-consider the petitioner's case for appointment to any BPHC.

11. The petitioner's counsel has placed reliance on the decision of the Apex Court in the case of *State of U.P. and Others Vs. Ashok Kumar Nigam*, (2013) 1 AD 50 : (2013) 1 JT 153 : (2012) 12 SCALE 551 : (2013) 3 SCC 372 : (2013) 2 SCT 42 : (2013) 2 SLJ 424 : (2012) AIRSCW 1644 wherein the Apex Court has held as follows:

"18. In *Shrilekha*, this Court expressed the opinion that it would be alien to the constitutional scheme to accept the argument of exclusion of Article 14 in contractual matters. The arbitrary act of the State cannot be excluded from the ambit of judicial review merely on the ground that it is a contractual matter. The expression "at any time without assigning any cause", can be divided into two portions, one "at any time", which merely means the termination may be made even during the subsistence of the term of appointment and second, "without assigning any cause" which means without communicating any cause to the appointee whose appointment is terminated. However, "without assigning any cause" is not to be equated with "without existence of any cause."

12. Mr. B. Gogoi and Mr. S.K. Talukdar, counsels for the respondents submit that Clause 6 of the contract agreement does not envisage issuance of notice when any employee directly or indirectly makes any attempt for change of place of posting as the same is to be treated as a disqualification for the said post. The respondents' counsels have also submitted that the NRHM Society has the right to terminate the agreement executed between the petitioner and the respondents without issuance of any notice as per the said Clause 6 of the contract agreement. The counsels for the respondents have submitted that the last line of the petitioner's letter dated 8.9.2010 addressed to the respondent No. 2 clearly shows that the action taken by the respondents in terminating the petitioner's appointment is valid. The last line of the petitioner's letter dated 8.9.2010 states "Therefore I request you to kindly allow me to join my duties at any other place or in my earlier post at Halakura BPHC, Dhubri." Condition No. 6 of the contract agreement is again reproduced below:

"6. Any action either directly or indirectly of the party for the change of place of posting will be treated as disqualification for the post and the society will have the right to terminate his agreement without any notice for such action."

Counsels for the respondents have also submitted that the present incumbent of Chowkihola BPHC, namely, Mrinal Borthakur has not been made a party to the

present case and, as such, any order passed by this Court in favour of the petitioner will affect third party rights of the present incumbent of Chowkihola BPHC, Karbi Anglong and, as such, non-joinder of a necessary party is fatal to the present case. The respondents' counsels have also submitted that Clause 6 of the contract agreement not having been put to challenge, there is no illegality in the termination order dated 14.12.2009.

13. The counsels for the respondents have also submitted that the petitioner does not have a right to be posted to a particular place. This is also made clear by the petitioner's own letter dated 8.9.2010, in which his request is for a transfer to "any other place". They thus submit that the petitioner is willing to be posted at any BPHC except Chowkihola PHC. They also submit that issuance of a notice before termination is not required as per Condition No. 6 as the petitioner's contractual engagement is regulated by the terms and conditions of contract agreement. They also submit that the vacancy in Halakura BPHC has already been filled up.

14. On a query put to the petitioner's counsel, Mr. S.K. Roy, Advocate has submitted that the petitioner did not report the matter of him being threatened by an unknown person to the police.

15. The Condition No. 6 of the contract agreement not being challenged by the petitioner, the impugned order dated 3.1.2011 is valid as it is issued within the confines/parameters of Condition No. 6. I am also of the view that the respondents have not served a copy of the show cause notice dtd. 4.12.2010 to the petitioner in his residential address as per the documents available in the case record and the averments made in the writ petition. Also there was no question of the petitioner receiving the show cause notice in his official address as he had left Karbi Anglong in September, 2010. With regard to whether the issuance of a show cause notice prior to the issuance of the termination order prejudiced the petitioner, it will have to be seen whether the facts of the case would have changed if the petitioner had been given an opportunity to give his reply to the show cause notice dated 4.12.2010. In the present case, Condition No. 6 having specifically provided that any action directly or indirectly of the party for the change of place of posting will be treated as a disqualification, if the petitioner has made a such an endeavour, the same will amount to a disqualification. The Condition No. 6 further states that the society will have the right to terminate his agreement without any notice for such action. As the petitioner has admitted in his pleadings and even in his letter dated 8.9.2010 that he had made a request for change of place of posting, the facts speak for themselves. Natural justice is not based on any straightjacket formula. It cannot be stretched that far, in which, nothing could be established more beyond what has been established even without any notice. In the present case, nothing more needs to be established by the petitioner or the respondents.

16. In the case of Channabasappa Basappa Happali Vs. The State of Mysore, AIR 1972 SC 32 : (1971) 1 SCC 1 : (1971) 2 SCR 645 , it had been held by the

Supreme Court that there is no distinction between admission of fact and admission of guilt. Though the fact situation is different in the present case, the ratio of the said case can be applied to the present case to show that reply to any notice would not have changed the facts of the present case. It was held in Channabasappa Happali vs. State of Mysore (supra):

"..... We do not see any distinction between admission of facts and admission of guilt. When he admitted the facts, he was guilty. The facts speak for themselves. It was a clear case of indiscipline and nothing else. If a police officer remains absent without leave and also resorts to fast as a demonstration against the action of the superior officer, the indiscipline is fully established. The learned Single Judge in the High Court was right when he laid down that the plea amounted to a plea of guilty on the facts, on which the petitioner was charged and we are in fully agreement with the observations of the learned Single Judge."

17. In M.C. Mehta Vs. Union of India (UOI) and Others, AIR 1999 SC 2583 : (1999) 5 JT 114 : (1999) 4 SCALE 267 : (1999) 6 SCC 237 : (1999) 3 SCR 1173 : (1999) 2 UJ 1254 : (1999) AIRSCW 2754 : (1999) 6 Supreme 265 , it has been held by the Apex Court that the Court need not issue a writ because of violation of the principles of natural justice if on the indisputable factual position, only one conclusion is possible and permissible.

18. In view of the fact that Condition No. 6 of the contract agreement has not been challenged and as the termination order has been issued on the basis of proved facts mentioned in the said condition, I am of the considered opinion that the plea of violation of the principles of natural justice is not open to the petitioner to be raised as no prejudice is caused to him by non-issuance of a notice. After hearing the counsels for the parties at length, I am of the view that the petitioner has no right to be transferred to a particular BPHC. There is accordingly no illegality in passing the impugned order dated 3.1.2011

19. Accordingly, this writ petition is dismissed.

20. The petitioner may, however, file a representation to the authority for consideration of his case for reinstatement on contractual engagement in any vacancy that may be available in the BPHCs.