
(1986) 12 PAT CK 0011

In the Patna High Court

Case No : Civil Writ Jurn. Case No. 661 of 1985 (R)

R.P. Raja

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 23-12-1986

Acts Referred:

Bihar Regional Development Authorities Act, 1981 — Section 3, 3(3), 3(7), 4, 5
Constitution of India, 1950 — Article 14, 226, 310, 311

Citation : AIR 1988 Patna 116

Hon'ble Judges : U.P. Singh, J

Bench : Single Bench

Advocate : B.C. Ghosh, P.K. Sinha and D.K. Sarkar, for the Appellant; R.B. Mahto, General and Dilip Jerath, for the Respondent

Final Decision : Allowed

Judgement

U.P. Singh, J.—By this writ application the petitioner has challenged the validity of the Notification of the Government of Bihar dt/-13-6-1985 contained in Annexure 2, by which the Government of Bihar, in exercise of the power under Sub-section (7) of Section 3 of the Bihar Regional Development Act, 1981, removed the petitioner from the post of the Chairman on the purported ground of pleasure of the State of Bihar.

2. The Bihar Regional Development Authority Second Ordinance, 1976, was published in the Gazette in May, 1976 by which the various Regional Development Authorities were constituted and established in the State of Bihar. The Ranehi Regional Development Authority came into existence in accordance with the said Ordinance in 1976. It was later replaced by the Bihar Regional Development Authority Act, 1981 (Bihar Act 40 of 1982). The Act came into force with effect from 25-1-1982. Sub-section (2) of Section 2 of the Act defines "Authority" means Regional Development Authority constituted u/s 3 of the Act. Section 3(1) deals with the constitution of a Regional Development Authority hearing the name of that region and Sub-section (2) says that the authority shall

be a body corporate by the aforesaid name. It shall have perpetual succession and a common seal with power to enter into contract and to acquire, hold and dispose of property both moveable and Immovable and shall by the said name sue and be sued.

Sub-section (3) of Section 3 reads as follows :

"(3) The Authority shall consist of the following members, namely :--

(a) A Chairman, who shall be the Minister of the Urban Development Department of the State of Bihar or any person nominated by the State Government."

3. In exercise of the said power under Sub-section (3) of Section 3 of the Act, by the order of the Governor of Bihar, a Notification was issued on 12th March, 1985 by which the petitioner was nominated as the Chairman of the Ranchi Regional Development Authority for the period of three years from the date of the publication of the notification. In accordance with the same, the petitioner took charge of the post immediately thereafter of the Chairman of the Authority and is continuing and discharging the duties of the Chairman under the Act.

4. Sub-section (3) of Section 3 of the Act deals with other members of the Authority, Chairman and the Vice Chairman and members of the Authority.

Section 4 of the Act envisages disqualification for appointment of a member of the Authority which reads as follows :

"4. Disqualification for appointment of a member of the Authority.-- (1) A person shall be disqualified for being appointed as and for being a member of the Authority if he-

a) has been convicted by a Criminal Court for offence involving moral turpitude, unless such conviction has been set aside;

b) is an applicant to be adjudicated a bankrupt or insolvent or is an uncertificated bankrupt or undischarged insolvent;

c) has, directly or indirectly, by himself or by any partner, employer or employee any share of interest, any contract or employment with, by or on behalf of the Authority.

d) is a director, or a secretary, or a manager or other salaried officer of any incorporated company which has any share or interest in any contract or employment with, by or on behalf of the Authority; or

e) is of unsound mind.

(2) A person shall not be disqualified under Clause (c) of Sub-section (1) or be deemed to have any share or interest in any incorporated company which has any share or interest in any contract or employment either, by or on behalf of the Authority by reason only of his being a share-holder of such company:

Provided that such person discloses to the Government the nature and extent of the share held by him."

5. Section 5 of the Act lays down the procedure for removal of a member of an authority;

"5, Removal of the Member.-- (1) The Government may by notification, remove any member from office -

(a) if he has, without the permission of the Authority, been absent from more than three consecutive meetings of the Authority, or

(b) if he, being a legal practitioner, acts or appears on behalf of any person other than the Authority in which the Authority is interested, either as a party or otherwise or

(c) if he has, in the opinion of the Government contravened the provisions of Section 10, or

(d) if he in the opinion of the Government, had become physically or mentally unable to act as a member:

Provided that when the Government proposes to take action under Sub-section (1) an opportunity of explanation shall be given to the member concerned and no such action shall be taken except after taking into consideration his explanation, if any and after recording the reasons in support of such action.

(2) A member removed under the foregoing provisions shall not be eligible for re-election or re-nomination."

6. Sub-clause (4) of Clause (3) of the Ordinance provided that the Vice-Chairman would be a whole time officer and under Sub-clause (5) thereof, the Vice-Chairman was to get such salary as may be fixed and his conditions of appointment would be such as may be fixed. Other non officio members who were not ex officio, were to get such allowances as may be fixed by the State Government. Sub-clause (7) of Clause 3 of the Ordinance provided that the Vice-Chairman, who was a whole time officer would hold the appointment during the pleasure of the Government. There was also a provision for resignation of those who were not ex officio members.

7. While replacing the Ordinance, 1974, the Act made certain changes in the provisions thereof. Sub-section (3)(a) of Section 3 of the Act provided that the term of office of the nominated Chairman would be ordinarily for three years. In Sub-clause (7) of the Ordinance it was provided that the Chairman and the Vice-Chairman both would hold the office during the pleasure of the Government.

Section 4 of the Act and the corresponding clause of the Ordinance lay down the conditions of disqualification for members of the Authority. Section 5 of the Act made provisions for removal of a member of the Authority and laid down conditions and circumstances in which a member can be removed. Proviso to the

same made specific provisions for hearing and recording of reasons before any action could be taken u/s 5 of the Act.

8. It is not alleged that the petitioner was disqualified on any of the grounds mentioned in Section 4 of the Act. None of the conditions or stipulations mentioned in Section 5 of the Act applies in the case of the petitioner for removal from the post of Chairman. No action was taken against the petitioner for removal from the post of Chairman of the Authority u/s 5 of the Act nor any opportunity was given to the petitioner before taking any action in removing him from the post. If a member is to be removed from the Authority, the proviso to Section 5 lays down that when the Government proposes to take action under Sub-section (1), an opportunity of explanation shall be given to the member concerned and no such action shall be taken except after taking into consideration his explanation, if any and after recording the reasons in support of such action.

9. By the impugned notification dt. 13th June, 1985 (Ann. 2), the earlier notification dt. 12th March, 1985(Ann. 1), appointing the petitioner to the post of Chairman for a specified period of three years, was cancelled much before the expiry of that period and exercising the power under Sub-section (7) of Section 3 of the Act, the Minister of Urban Development Department, Government of Bihar, was nominated as Chairman of the Authority.

10. Mr. B. C. Ghosh, the learned counsel appearing for the petitioner contended that the post of a Chairman is a public post and carries on public responsibility and duties to be discharged under the Act and the same could not be unilaterally or arbitrarily cancelled or superseded or rescinded by arbitrary and mala fide act of the State Government by undue influence of the Urban Development Minister who wanted himself to be appointed as the Chairman of the Authority. The question which is specifically raised to be decided is whether the appointment of the petitioner as Chairman made in accordance with Sub-section (3)(a) of Section 3 of the Act for a specific period of three years could be cancelled by exercising the doctrine of pleasure under Sub-section (7) of Section 3 of the Act. The Government has the choice while constituting the authority in the matter of nomination of its Chairman either to nominate the Minister-in-charge himself or any other person, who shall ordinarily hold office for three years. Once the option has been exercised and a choice has been made in favour of a non officio, the power under Sub-clause (a) of Sub-section (3) is exhausted and cannot be re-exercised. Where the nomination has been made for a fixed term of three years, the nominated Chairman cannot be removed from office except u/s 5 of the Act. Any such removal would be illegal and ultra vires. A person so nominated acquires title to the office for the fixed period of three years and that cannot be cut short.

11. The learned Advocate General contended that it was not a case of removal. The Government in exercise of its power under Sub-section (7) of Section 3 of the Act exercised the power of its pleasure and merely cancelled the notification

which it had previously issued under Sub-section (3) of Section 3 of the Act. The act of the Government was not u/s 5 of the Act which operates in different field. It was urged that the cancellation of the notification was not something like a removal of the member. The State Government cancelled the notification as a matter of policy decision.

12. Mr. Ghosh, the petitioner's counsel relied upon a decision of the Supreme Court in the case of Parshotam Lal Dhingra Vs. Union of India (UOI), . The observation of the Chief Justice S.R. Das is relevant to be noticed :

"The appointment to a temporary post for a certain specified period -- the person so appointed has a right to hold the post for the entire period of his tenure and his tenure cannot be put to an end to during that period unless he is by way of punishment, dismissed or removed from the service."

"Article 311 makes no distinction between two classes both of which are equally protected and the decision holding counter view cannot be supported as correct." -- the two classes referred to are permanent and temporary.

13. Once a person has held an office under a particular order and is occupying the office, that cannot be put to an end to by mere cancellation of the order of appointment. There is no provision in the Act for cancellation of such an order of appointment. It tantamounts to removal. Reference may be made to a decision of the Rajasthan High Court in the case of Kanta Devi and Another Vs. State of Rajasthan and Others, , which has been followed by this Court in the case of Syed Shaukat Imam and Others Vs. State of Bihar and Others, . In the Rajasthan case, Chief Justice Wanchoo, as he then was, speaking for the court, held :--

"The question still remains whether the Government can change its mind in the manner in which it has been done in this case and say that the earlier notification is cancelled and nominate other persons in place of the persons nominated previously."

The argument that the members of the Board whether elected or nominated are not members till the first meeting is held on which date, the term of the Board begins and till then it is open to the Government to change its mind is plausible but we have no doubt, as we shall show just now, that it cannot be sustained in law.

What is the nature of the order nominating a person to be a member of the Board? The contention on behalf of the opposite parties is that it is a mere notification and that u/s 21 of the General Clauses Act, 1897, the power to issue a notification, includes the power to add to, amend, vary or rescind it. We are of the opinion, however, that Section 21 has no application to such a case.

It applies to those cases of notifications, which are in the nature of the orders, rules or bye-laws or are of a general nature. The present is notification which, in our opinion, comes u/s 16 of the General Clauses Act, 1897 because the nomination of certain persons to a Municipal Board amounts to their appointment

as members of the Board.

Now u/s 16 of the General Clauses Act which applied to the Act which we are considering, the power to appoint includes the power to suspend or dismiss unless a different intention appears in the law or order relating to the appointment. We have; therefore, to see whether a different intention appears in the Act.

We see no reason why we should assume a power in the Government to cancel the appointment to a nominated member, unless that power is conferred by law. The only provision, as we have already pointed out, is Section 16 of the General Clauses Act, 1897, which gives power of dismissal by the appointing authority but the power u/s 16 is subject to a different intention appearing in the law or order under which the appointment is made.

Now what is the intention of the Act with which we are concerned? That intention in our opinion, can be gathered from Section 14 of the Act. That section gives power to the Government to remove any member elected or nominated under this Act after giving him an opportunity of being heard and after such enquiry as it deems necessary, if such member has been guilty of misconduct etc. The intention of the Legislature obviously was that no member of the Board should be arbitrarily removed and that the removal should only take place after a certain procedure had been gone into.

In so far as an elected member is concerned, it would not be possible for the Government to remove unless procedure provided by Section 14 of the Act is gone through, whether the elected member has taken the oath and whether the term of the Board has begun or not. The same section viz. Section 14 applies also to nominated members, and we fail to see why we should put the nominated members in a less advantageous position and why we should hold that there is a reserve in Government to change the nomination before the term of the Board begins or the member takes the oath of office.

We have, no doubt, that after the appointment is made and a member is nominated to the Board by the Government u/s 9 he becomes a "member nominated under this Act" and just as "a member elected under the Act" cannot be stopped from taking his seat after subscribing to the oath, so also" a member nominated under the Act must have the same rights u/s 14 of the Act.

We are, therefore, of the opinion that the Government having exercised its power u/s 9, to make a nomination once exhausts that power and cannot nominate another person to the same seat. A second order nominating some other person and cancelling an earlier order of nomination, in our opinion, therefore, be beyond the jurisdiction of the Government and first the order must take effect unless it is shown that the first order was issued by mistake of fact. Barring such a case, where the first order would amount to no order at all, it is not open to the Government to change the order of nomination once made u/s 9. This is so because the person nominated immediately on the passing of such order

becomes "a member nominated under this Act and, therefore, he cannot be prevented from taking his seat after subscribing to the oath and can only be removed u/s 14.

This section clearly provides a different intention and, therefore, it is not open to the Government to exercise the power of removal implied in the power of appointment u/s 16 of the Act without recourse to procedure u/s 14 of the Act."

14. In view of the aforesaid provisions of the present Act in question, unlike the Vice-Chairman, the Chairman is not a whole time employee on a paid salary. He is not a servant. He is a statutory authority created by the Statute and can in no manner be described as a Government servant or an employee of the Government. He holds the post which tantamounts to an elective post which in many cases in this country are filled up by nomination. Such a person cannot be a Government servant, and in fact, the Act itself makes the distinction between the Chairman and the Vice-Chairman who is a whole time paid servant, is salaried and provided with remunerations. The Vice-Chairman so appointed holds a civil post and is an employee of the State. Other members also, who are not ex officio, get allowances. The post of the Chairman is honorary. He is nominated because of his position in public life.

15. The "pleasure theory" cannot apply to him. The "pleasure" is a service concept. Starting from the crown pleasure adopted in the Constitution of India under the various Royal Charters and the Government of India Acts preceding the Constitution and is now embodied in Article 310 of the Constitution.

16. The view is not new. As early as in 1933, the Privy Council dealt with the matter in *Reilly V. R.* 1933 All ER 179 : 1942 All ER 671 at page 777 (sic). In both these English cases, it was specifically laid down that in the conditions for the removal of service, the "pleasure theory" is restricted by the same. In *Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc.*, the same view is reiterated. The whole matter of "pleasure" has been very carefully examined by their Lordships in *Moti Ram Deka's* case. The view in *Moti Ram Deka's* case (supra) has been followed through out these two decades following the same and has been reiterated in the case of *Union of India and Another Vs. Tulsiram Patel and Others*, . It was held;

"In India, the pleasure doctrine has received constitutional sanction by being enacted in Article 310(1). Unlike in the United Kingdom, in India, it is not subject to any law made by Parliament but provided by the Constitution."

"The pleasure doctrine, relates to the tenure of a government servant. "Tenure" means "manner, conditions, or term of holding something" according to Webster's Third New International Dictionary, and "terms of holding, title, authority" according to the Oxford English Dictionary. It, therefore, means the period for which an incumbent of office holds it. It is for this reason that the statement of law relating to the pleasure doctrine in England is given in Halsbury's Laws of England Fourth Edition, Volume 8, Para. 1106, under the

heading "Tenure of Office."

While discussing the scope of the pleasure doctrine, it was held : --

"While u/s 96B(1) of the Government of India Act of 1919 the holding of office in the civil service of the Crown in India "during his Majesty's pleasure" was "subject to the provisions of this Act and the rules made thereunder", u/s 240(1) of the Government of India Act, 1935 the holding of such office during his Majesty's pleasure was "Except as expressly provided by this Act." Similarly the pleasure doctrine as enacted in Article 310(1) is not an absolute one and is not untrammelled or free of all fetters, but operates "Except as expressly provided by the Constitution.""

"The ruling in Moti Ram Deka's case (supra) is that a law can be framed prescribing the procedure by which and the authority by whom, the said pleasure can be exercised. The pleasure of the President or the Governor to dismiss can, therefore, not only be delegated but is also subject to Article 311. The true position as laid down in Motiram Deka's case (supra) is that Articles 310 and 311 must, no doubt, be read together but once the true scope and effect of Article 311 is determined, the scope of Article 310(1) must be limited in the sense that in regard to cases falling under Article 311(2) the pleasure mentioned in Article 310(2) must be exercised in accordance with the requirements of Article 311."

17. From all the aforesaid judgments it follows that "pleasure" does not itself create anything but merely confers as authority. The procedure for termination must be found elsewhere. The Doctrine of Pleasure is merely an empowering one but the manner to exercise the same guideline of which must be held elsewhere. In the case of Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc., and in all subsequent cases following the same, it has been held that this pleasure is limited and restricted by Article 311 of the Constitution. There is unanimity of judicial opinion in the matter of exercise of "Pleasure" under Article 310 which can only be exercised in the manner indicated in Article 311 and not otherwise. By a parity of reasonings, it must be held that the "pleasure" mentioned in Sub-section (7) of Section 3 of the Act can only be exercised in the manner laid down in Section 5 of the Act. The Legislature contemplated it in its endeavour to follow the pattern of the constitutional provisions contained in part XIV of the Constitution.

18. In England, the matter was considered by the House of Lords as a crown prerogative and the Courts held that except in five cases the exercise of crown prerogative was subject to judicial review. They are : (1) making of treaties, the defence of the realm; (2) the prerogative of mercy, (3) the grant of honours; (4) the dissolution of Parliament; (5) appointment of Minister; and finally national security. The rests are all open to judicial review. In the matter of national security as was in (1984) 3 All ER 935, the Court clearly stated that they would have interfered with it, had not been the Minister's affidavit that she had herself been satisfied that it was necessary to make the provision in the interest of

national security. Other cases on the point of judicial review need not be examined in detail and the leading amongst them would be : 1968) 1 All ER 694 , (1975) 1 All ER 697 , (1985) 2 All ER 79 : (1985) 2 All ER 522.

19. In view of the above legal position, the contention of the learned Advocate General has to be rejected and I have no hesitation in holding that Sub-section (7) of Section 3, in so far as it is made applicable to the case of Chairman, is ultra vires. The pleasure is a constitutional privilege conferred on the Governor. There is nothing in the Constitution providing for extension of the pleasure to non-service man. Nor is the pleasure, a matter of legislative enactment either in the body of the Constitution or in the VII Schedule. The State has no authority to legislate on the pleasure of the Governors. The Governor's pleasure is what is stated in Article 310 of the Constitution and it cannot be taken away; so also it cannot be extended His Lordship Mr. Justice Gajendragadkar has in his judgment referred to this matter while criticising the judgment of Naidu, J. in the Assam High Court in *Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc.*, . Therefore, Sub-section (7) of Section 3 of the Act which has incorporated the word, is to that effect ultra vires.

20. Sub-section (7) of Section 3 of the Act, if it is not controlled by Section 5 of the Act is clearly ultra vires. Apart from that, it confers arbitrary and unguided, uncanalised and unbridled power on the Government. If Section 5 does not control it, there is no guideline for the exercise of power. The concept under Article 14 of equality between two persons cannot be given a go-bye. In a most illuminating and exhaustive judgment in the case of *A.L. Kalra Vs. Project and Equipment Corporation of India Ltd.*, , his Lordship Mr. Justice Desai has after close examination and full consideration dealt with this arbitrary exercise of power as violative of Article 14 of the Constitution. Similar view has been expressed in *Sudhir Chandra Sarkar Vs. Tata Iron and Steel Co. Ltd. and Others*, as follows :

"Viewed from a slightly different angle our Constitution envisages a society governed by rule of law. Absolute discretion uncontrolled by guidelines which may permit denial of equality before law is the anti-thesis of rule of law. Absolute discretion not judicially reviewable inheres the pernicious tendency to be arbitrary and is, therefore, violative of Article 14. Equality before law and absolute discretion to grant or deny benefit of the law are diametrically opposed to each other and cannot co-exist. Therefore, also the conferment of absolute discretion by Rule 10 of the Gratuity Rules to give or deny the benefit of the rules cannot be upheld and must be rejected as unenforceable.

A similar view has been taken by the Supreme Court in the case of *West Bengal State Electricity Board and Others Vs. Desh Bandhu Ghosh and Others*, . It is not necessary to multiply these cases.

21. The question of State policy came up for consideration in the case of *His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala*, , wherein their

Lordships dealt with the provisions of the Constitution that a declaration that it was far-reaching effect that state policy could not be questioned in any court. Chief Justice Sikri has dealt with it in paras 431, 442 and 443. All the Hon''ble Judges had knocked down the constitutional provision debarring judicial review. Thus even on the ground of state policy judicial review cannot be ruled out. In a recent case, the court even overruled an argument of commercial policy. As had been held by the House of Lords in (1984) 3 All ER 935 at page 944, that fair and reasonableness will have to be examined by the court of law and has to be established by cogent evidence and material.-- "I have already explained by reason for holding that if no question of national security arose, the decision making process in this case would have been unfair and if it were not for the Minister''s affidavit, the court would have held it to be ultra vires."

22. It was then contended by the learned Advocate General that there has been uniformity in the matter of the application of this pleasure theory to all the five Regional Development Authority but, curiously, the assertion of the petitioner in para 8 of the Rejoinder Affidavit has not been answered. The categorical assertion is that there is no other Regional Development Authority where similar conditions occurred necessitating removal. In Patna, the Chairman became a Minister and naturally the post felt vacant, in all other cases the Chairman''s term had expired, and instead of nominating a non-official Chairman, the Urban Development Minister has crept in. Thus, there could be no analogy of those cases with the case of the petitioner. In the case of the petitioner alone, the fixed term has been cut down. The respondent No. 2, the Minister of Urban Development, has by this process put himself at the helm in of all Authorities. The petitioner has challenged his action as mala fide, solely, motivated with the object of grabbing this Authority. He has not come forward to deny anything much less file an affidavit himself. A clerk was set up to make all sorts of comments. No evidence has been placed before this Court by the respondents to justify that it was fair and reasonable.

23. In this view, the notification dt. 13th June, 1985 (Annexure-2) is quashed and the application is allowed. There well, however, be no order as to costs.