

(1992) 01 PAT CK 0022

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 10061 of 1989

Sachidanand Das

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 10-01-1992

Acts Referred:

Citation : (1992) 01 PAT CK 0022

Judgement

S.K. Chattopadhyaya, J.

1. In this writ application, the petitioner has challenged the order dated 21st of November, 1989, passed by Respondent No. 2 terminating the services of the petitioner. The aforesaid order of termination has been passed as per Regulation 2.18 (1) of Staff Regulation with immediate effect and the said impugned order has been annexed as Annexure-1 to this writ application.

2. The fact of the case, in short, is that the petitioner was appointed as General Manager under Respondent No. 3, a Government of India Enterprises. The petitioner was posted on training at Calcutta Unit and after the said training, the petitioner was transferred to Kanpur unit and ultimately, he was posted at Ranchi unit as General Manager. On being transferred from Kanpur unit to Ranchi unit, the petitioner suddenly fell ill and as such on the advise of the doctor, the petitioner filed a written application and prayed for grant of leave. By letter dated 7-7-1989, the petitioner was transferred from Ranchi unit to Bhagalpur unit with effect from 28-6-1989, As the petitioner was undergoing treatment and was on leave, he received a letter dated 25th August, 1989 from respondent No. 2 by which the petitioner was directed to see Respondent No. 2 at Delhi within two weeks of this letter to finalise the modalities of formal separation of the petitioner from the company. This letter dated 25th August, 1989 has been annexed as Annexure-8 to the writ application in which it was alleged that the petitioner was disinterested in continuing with the services of the company. By letter dated 12th October, 1989, the respondent No. 2 informed the petitioner that he (Respondent No. 2) had already rescind the transfer of the petitioner to

go to Bhagalpur unit and it has been mentioned therein that no application for extension of leave beyond September 9, 1989 has been received. The petitioner gave his reply to the said letter, as contained in Annexure-9, by informing the Respondent No. 2 that application with medical certificate (Original) for leave was already sent on 20th September, 1989 under "Certificate of Posting" and prayed for consideration of the same sympathetically. It has been alleged by the petitioner that the said letter was received by Respondent No. 2 and Respondent No. 2 issued the letter dated 25th October, 1989 mentioning therein that leave application and medical certificate are on record. But again Respondent No. 2 repeated that the petitioner is disinterested in continuing with the Organisation and the petitioner is misfit in the Organisation and further directed not to join any where and to settle the terminal dues with the Head Office as soon as the petitioner recovers from his illness. The allegation of the petitioner is that Respondent No. 2 instead of sympathetically considering the representation filed by the petitioner dated 13th July, 1989, took a drastic step by terminating the services of the petitioner and that too without giving any opportunity of being heard in respect of the charges levelled against him. The said representation dated 13-7-1989 has been annexed by the petitioner as Annexure-11 to the writ application. In reply to the said representation (Annexure-11), the petitioner was informed by letter dated 20th July'89 that the representation of the petition is under full consideration and by letter dated 12th October'89 (Annexure-9), the petitioner was informed that the said order of transfer was rescind. The contention of the petitioner is that Respondent No. 2 had no jurisdiction to pass the order, as contained in Annexure-1, terminating the services of the petitioner as he was not the appointing authority of the petitioner.

3. Before admission of this writ application, the petitioner had filed a supplementary affidavit in which he has taken a point that the Staff Regulation 2.18 (1) of Modern Food Industries (India) Limited (Respondent No. 3), under which the impugned order has been passed, is unconstitutional, inasmuch as, this Regulation has granted an arbitrary and unregulated power to the employer and as such violative of Article 14 of the Constitution of India and consequently purported termination of the services of the petitioner must be held to be void and non est.

4. Respondent Nos. 2 and 3 have appeared in this case and have filed a joint counter affidavit. In the counter affidavit, while denying the assertions made by the petitioner in the writ application, it has been stated that the Modern Food Industries (India) Limited (Respondent No. 3) is not "State" within the meaning of Article 12 of the Constitution of India and as such not amenable to the writ jurisdiction. Developing the argument it has been urged that Respondent No. 3 is registered and incorporated as a private company and it functions under its Memorandum and Articles of Association. It has been further asserted that the management of the Company is vested in the Board of Directors and even an employee of the Company can become a share-holder. Further facts have been stated in the counter affidavit justifying the stand of the Respondents that the

Respondent No. 3 is not a "State" within the meaning of Article 12 of the Constitution.

5. As regards the competency of Respondent No. 2 to pass the impugned order, it has been urged that Respondent No. 2 has been duly authorised by the Board of Directors to pass such orders. Further stand of the Respondents that the petitioner was terminated for good reasons, inasmuch as, the petitioner was not complying with the orders/directions of the Management and petitioner started sending medical certificates from 1989 in order to avoid; the order/ direction of the authority concerned. Finding no other alternative, the Management had to act under Clause 2.18 of Staff Regulation for reasons fully explained in the impugned order, as contained in Annexure-1. Regarding allegation of mala fide intention of Respondent No. 2, it has been asserted in the counter affidavit that there is no question of any mala fide intention, inasmuch as the post of General Manager is an important executive position and the incumbent of the post can be posted as the head of any production unit. The petitioner being head of production unit at Ranchi had taken an attitude by defying all the orders/ directions of the Management and this attitude of the petitioner was likely to spread indiscipline in the entire Organisation.

6. Further case of the respondents is that the petitioner took the same attitude in the year 1987 when he was transferred from Kanpur to Cochin unit, inasmuch as, when he was transferred to Cochin in June, 1987 and was relieved in August, 1987 for proceeding to take charge of the Cochin unit, he produced medical certificate and remained on leave until May, 1988. The Company took a lenient view of the matter although the petitioner was on leave for about a month in order to avoid joining at Cochin but even then the Management took a sympathetic view of the matter by cancelling the said transfer order and he was posted at Ranchi when the petitioner joined duty on 17-5-1988. It has been categorically stated in the counter affidavit that though the last medical certificate produced by the petitioner at that time covered the period from 1-5-1988 to 30-5-1988, but as soon as the petitioner received the modified orders of posting to Ranchi dated 11-5-1988, the petitioner obtained a fitness certificate to resume his duty from 16-5-1988 and actually joined at Ranchi on 17-5-1988. This fact, according to the respondents shows that the petitioner was interested in posting only at Ranchi and not in other places. The petitioner was thereafter transferred from Ranchi Unit to Bhagalpur unit by order dated 7-7-1989, as contained in Annexure-6 and again the petitioner adopted the same modalities of feigning sickness and sending medical certificate and as such the Management did not rely on the medical certificate produced by the petitioner. The respondents have admitted that the order dated 12th October, 1989 issued by Respondent No. 2 posting the petitioner to Bhagalpur was rescinded. But the circumstances under which it was rescind have been given and it has been stated that since three months had passed transferring the petitioner to Bhagalpur but the petitioner did not join there, when the labour situation in Bhagalpur needed an immediate head of the unit, the non-joining of the petitioner was considered

by the Management as gross violation of the order/direction of the Management. Though the Management was of the opinion that the petitioner was the competent person to tackle the labour problem at Bhagalpur, but due to this attitude of the petitioner, the management was convinced that he was not going to join at Bhagalpur and as such the said order was rescinded. The petitioner by his letter dated 21st October, 1989 informed the Management that he would be joining at Ranchi on his becoming fit, although he was aware of the order transferring him to Bhagalpur and he was also aware of the fact that he was relieved from Ranchi unit on 11-8-1989 telegraphically.

7. Taking into consideration all these facts, the Management was convinced that the petitioner was not willing to join at Bhagalpur as per the order of the Management rather he wanted to be posted in an unit of his own choice and as such the Respondent No. 2 had no other alternative but to issue the impugned order terminating the services of the petitioner.

8. The learned Counsel appearing on behalf of the petitioner has raised the following points:

(i) The Staff Regulation No. 2.18 (1) of Modern Food Industries (India) Limited is unconstitutional, inasmuch as it is an arbitrary and unregulative power and as such is violative of Article 14 of the Constitution ;

(ii) No show cause notice having been served on the petitioner and without holding any departmental proceeding the termination order was passed and as such it was bad in law ;

(iii) The entire medical leave having been sanctioned by the Management, Respondent No. 2 could not have terminated his service ;

(iv) from perusal of Annexure 7, it would be clear that the petitioner was holding additional charge of the post of General Manager at Bhagalpur unit which will indicate that the petitioner was not at all unwilling to join at Bhagalpur.

9. Learned Counsel appearing on behalf of the respondents has taken a preliminary objection regarding maintainability of the writ application. According to the learned Counsel, the Modern Food Industries (India) Limited is neither a State nor an instrumentality of the State within the meaning of Article 12 of the Constitution and as such no writ can be issued against either Respondent No. 2 or Respondent No. 3.

10. It is necessary first to dispose of the preliminary objections raised on behalf of the respondents regarding maintainability of this writ application.

11. Mr. J. Krishna, learned Counsel appearing on behalf of the Respondents has submitted that no writ can be issued against either Respondent Nos. 2 or 3, inasmuch as, respondent No. 3 is not a State within the meaning of Article 12 of the Constitution. Developing his argument, Mr. J. Krishna has submitted that Company is not engaged in any monopoly business and it engages itself mainly

in producing fruit juice, bakery etc. The Company has to compete with multi national industries besides local products and moreover the Board of Directors of the Company take independent decision with regard to sales, management etc. The function of the Company is neither of public importance nor they relate to governmental function. He has further submitted that the Company functions under the Memorandum and Articles of Association and it is a Company registered and incorporated as a private limited company. Mr. J. Krishna, in support of his aforesaid contention, has relied on the case of Chander Mohan Khanna Vs. The National Council of Educational Research and Training and other[OVERRULED], .

12. In reply to this argument, the learned Counsel for the petitioner has contended that taking into consideration the Memorandum and Articles of Association of Respondent No. 3, it would be amply clear that Respondent No. 3 is an instrumentality of the State and as such it is amenable to writ jurisdiction.

13. Learned Counsel for the petitioner has strongly relied on Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, and has contended that on consideration of the Memorandum and Articles of Association (in short "Memorandum"), it would be found that the Corporation is an instrumentality or agency of Government and as such the preliminary objections raised by the respondents must be rejected.

14. Before dealing with the case-laws aforesaid, I may point out that in counter affidavit, the respondents have stated that powers to appoint Director, to increase and decrease the share of the Company etc. are vested in the President.

15. From the memorandum it will appear that only share holder is President of India and the persons who were desirous of being formed into a company in presence of the memorandum were the President of India and the Joint Secretary of Government of India, Ministry of Food and Agriculture.

16. Article 96 gives power to the President of India to appoint, remove any Director and to fill up any vacancy in the office of the Directors caused by removal resignation, death or otherwise by fresh appointment.

17. Similarly, Article 106 of the Memorandum empowers the President to appoint Chairman, Managing Director etc. and to entrust to and confer upon the Chairman, Managing Director(s), General Manager(s) for the time being such of the powers which the President may think fit and proper. This Article also confers power to remove or dismiss.

18. Article 158 contemplates as follows:

Notwithstanding anything contained in any of these articles, the President may, from time to time issue any such directives or instructions as he may consider necessary in regard to the affairs of the conduct of the business of the Co. or the Directors thereof, and in like manner may vary and annul any such directives or instructions. The Board of Directors or the Directors, as the case may be shall

duly comply with and give immediate effect to directives or instructions so issued:

Provided that all directives or instructions issued by the President shall be in writing addressed to the Chairman of the Board of Directors or the Managing Director. The Board shall except where the President considers that the interest of the national security requires otherwise, incorporate the contents of directives or instructions issued by the President in the Annual Report of the Co. and also indicate its impact on the financial position of the Company.

19. From the aforesaid fact, it is clear that the share holders of the Company are the President and the Joint Secretary to the Government of India, Ministry of Food and Agriculture. No other share holder is there in the Company. Secondly, from discussions of various Articles of the Memorandum, it will appear that power has been vested with the President of India to appoint remove and even to entrust various functions to such high officials. The respondents have admitted that the President has power to increase and decrease the share of the Company etc. In the case of *Ajay Hasia (supra)*, the Supreme Court, while discussing the tests for determining as to when a Corporation can be said to be an instrumentality or agency of the Government, has relied on *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, and has laid down six tests, one of which is:

One thing is clear that if the entire share capital of the Corporation is held by Government it would go along way towards indicating that the Corporation is an instrumentality or agency of Government.

In Paragraph "11" of the said decision, the Supreme Court has held:

We may point out that it is immaterial for this purpose whether the Corporation is created by a statute or under a statute. The test is whether it is an instrumentality or agency of the Government and not as to how it is created. The enquiry has to be not as to how the juristic person is born but why it has been brought into existence. The Corporation may be a statutory Corporation created by a statute or it may be Government company or a company formed under the Companies Act, 1956 or it may be a society registered under the Societies Registration Act, 1860 or any other similar statute. Whatever be its genetical origin, it would be an "authority" within the meaning of Article 12 if it is an instrumentality or agency of the Government and that would have to be decided on a proper assessment of the facts in the light of the relevant factors. The concept of instrumentality or agency of the Government is not limited to a Corporation created by a statute but is equally applicable to a company or society and in a given case it would have to be decided, on a consideration of the relevant factors, whether the Company or society is an instrumentality or agency of the Government so as to come within the meaning of the expression "authority" in Article 12.

Whether a company/society/institution is a State within the meaning of Article 12 will depend on the facts of each case.

20 On the other hand in the case of Chander Mohan Khanna (supra) after discussing the memorandum of Association of the National Council of Educational, Research and Training (NCERT), the Supreme Court has come to a conclusion that NCERT is not State, inasmuch as the object of NCERT is to assess and advise the Minister of Education and Social Welfare in the implementation of the Government policy and major programmes involved education particularly school education. Coming to the conclusion, the Supreme Court has held that the Government control is confined only to the proper utilisation of the grant and as such the NCERT largely autonomous body.

21. From the discussions aforesaid, I am of the opinion that the facts of the Chandra Mohan Khanna's, (supra) case is clearly distinguishable from the case in hand. While in the case of Chander Mohan Khanna (supra), the Supreme Court has come to the conclusion that Government control is confined only to the proper utilisation of the grant, in the present case, the over all of control of Company is vested with the President of India and the Government India through President and the Joint Secretary are the share-holders of this Company. While objects of NCERT were not Governmental business, in my considered opinion the objects of the Modern Food Industries (India) Limited (Respondent No. 3) is governmental business and as such relying on the decision of Ajay Hasia's case. I am of the opinion that the preliminary objections raised by the learned Counsel for the respondents must be rejected. It is, accordingly, held that Respondent No. 3, Modern Food Industries (India) Limited is a State instrumentality within the meaning of Article 12 of the Constitution and as such amenable to the writ jurisdiction.

22. Coming to the question of validity or otherwise of Regulation 2.18, the learned Counsel for the petitioner has relied on the case of Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others, .

23. Regulation 2.18 reads as follows:

Termination of Service.-(i) The services of any confirmed employee may be terminated by the competent authority on giving him-

(a) 90 days" notice or pay in lieu thereof, in the case of an employee belonging to category I or II.

(b) 90 days" notice or pay in lieu thereof, in the case of employees belonging to Category III and IV.

(ii) The authority competent to appoint shall be the competent authority for the purpose of this Regulation.

(iii) If an employee is arrested by the police on a criminal charge and bail is not granted, no subsistence allowance is payable. On grant of bail if the competent authority decides to continue the suspension, the employee shall be entitled to subsistence allowance from the date he is granted bail.

24. The learned Counsel appearing on behalf of the petitioner submitted that this Regulation provides for termination of the services of its employees simply by giving 90 days" notice or by payment of salaries for the notice period in lieu of such notice. Developing his argument, the learned Counsel has argued that this Regulation has given an arbitrary and uncanalised power to the authority terminating the services of even the permanent employees and as such it is violative of Articles 14 and 16 of the Constitution.

25. While dealing with the Regulation 9 (b) of Delhi Road Transport Authority (Conditions of Appointment and Service) Regulations, 1952, the Supreme Court has come to a conclusion that Regulation 9(b) which confers power on the authority to terminate the services of a permanent and confirmed employee by issuing a notice or by making payment in lieu of notice without assigning any reason in the order and without giving any opportunity of hearing to the employees before passing the impugned order is wholly arbitrary, uncanalised and unrestricted violating principles of natural justice as well as Article 14 of the Constitution.

26. Proceeding further, the Supreme Court in the aforesaid judgment has observed as follows:

It has also been held consistently by this Court that the Government carried on various trades and business activity through the instrumentality of the State such as Government Company or public Corporations. Such Government Company or Public Corporation being State instrumentalities are State within the meaning of Article 12 of the Constitution and as such they are subject to the observance of fundamental rights embodied in Part III as well as to conform to the directive principles in Part IV of the Constitution.

27. The learned Counsel for the respondents has urged that Regulation 2.18 cannot be held to be ultra vires of the Constitution, inasmuch as, Regulation 2.18 and Regulation 2.19 are reciprocal and beneficial to each other. Developing his argument, the learned Counsel has submitted that both the employee and employer are free to terminate the employment by giving requisite notice or by making payment in lieu thereof and as such these two provisions are based upon freedom of contract and equity, as contained in Article 14 of the Constitution and thus, it is contended, that the provisions 2.18(1), contained in Staff Regulation is not at all violative of Article 14 of the Constitution.

28. In view of the aforesaid authoritative pronouncement of the Supreme Court and taking into consideration the scope of Regulation 2.18, I am of the opinion that Regulation 2.18 confers uncanalised and arbitrary power on the authority to terminate the services of a permanent employee without recording any reason and without conforming to the principles of natural justice. Staff Regulation 2.18 which provides for termination of the services of the employees of the Corporation simply by giving 90 days" notice or by payment of salary in lieu thereof is violative of Articles 14 and 16 of the Constitution, inasmuch as, it

expressly exclude the application of the rule of law and principle of natural justice. It is well settled principles of audi alterant partem, which in essence, enforces the equality clause in Article 14 of the Constitution is applicable not only to quasi, judicial order but to administrative order affecting prejudicially the party in question unless the application of the rule has been expressly excluded by the Act or Regulation or Rule which is not the case here.

29. In view of my aforesaid observation, I am of the opinion that Staff Regulation 2.18 must be struck down as unconstitutional, inasmuch as, it violates the conditions as laid down in Article 14 of the Constitution. Having found that Staff Regulation 2.18 is unconstitutional. I am of the opinion that on this ground alone, the impugned order, as contained in Annexure-1 must be set aside, inasmuch as, Respondent No. 2 had no jurisdiction to pass the impugned order under Staff Regulation 2.18.

30. In spite of this finding whether petitioner be ordered to be reinstated or the Management should be asked to pay compensation in lieu of reinstatement, as submitted on behalf of the Respondent is to be decided.

31. The learned Counsel appearing on behalf of the petitioner has submitted that except the allegations made in Annexure-1, there is nothing on the record to show that any adverse remark was there against the petitioner. He has further submitted that the Management has admitted that the petitioner was a competent man who could solve the labour problem at Bhagalpur and as such his posting was necessary at Bhagalpur. He urges that taking into consideration this fact, the order of reinstatement should be made. On the other hand, learned Counsel appearing for the respondents has argued that the relationship between the employee and the Management has become so strained that there is no point of return and as such the Management cannot go with the petitioner and is ready to compensate the petitioner in lieu of reinstatement in accordance with law.

32. Taking into consideration the facts and circumstances of the case, I am of the opinion that the petitioner definitely had shown scant respect for the orders and directions given, from time to time, by the Management. The petitioner has also adopted some sort of peculiar method by filing repeated medical certificates whenever he was transferred. From the facts it is clear that the petitioner was interested to be at Ranchi unit only for the reason best known to him. When the petitioner was transferred from Kanpur to Cochin, he filed medical certificate but when he was transferred to Ranchi unit, he did not do so. When he was given additional charge of Bhagalpur unit along with Ranchi unit, he was at Bhagalpur for a very limited period, but when the Company found that the petitioner was the person who could manage the affairs of the unit at Bhagalpur and to solve the labour problem facing Bhagalpur, the petitioner was transferred from Ranchi unit to Bhagalpur unit, immediately the petitioner filed application along with medical certificate. Not only this, the petitioner was well aware of the fact that he was relieved from Ranchi unit for joining Bhagalpur unit but even then after he was fit he informed the Management that he was ready and willing to join at

Ranchi unit. It would have been a bona fide attitude of the petitioner that if after he became fit, he would have informed the Management that he was ready and willing to join at Bhagalpur unit. This attitude and behaviour of the petitioner clearly shows that though the petitioner was holding a responsible post of a General Manager, he refused to care the order or direction of this superior, which attitude reasonably cannot be appreciated by any employer.

33. However, taking into consideration the facts and circumstances of the case and also the present situation in securing a fresh employment, I am of the opinion that justice and equity demands that the petitioner should be reinstated with the condition that he will not be entitled to get any back salary in between the period of termination dated 21-11-1989, as contained in Annexure-1, till date that is 10-1-1992.

It will also be open to the Corporation, if it still thinks necessary and worthwhile, to hold such disciplinary enquiry as it may deem fit in regard to the acts of misconduct alleged against the petitioner.

34. In the result, the application is allowed, the order terminating the services of the petitioner, as contained in Annexure-1, is set aside and the respondent No. 3 is directed to reinstate the petitioner in service forthwith, but the petitioner will not get any back salary in between the period of termination till date.

35. The writ application is allowed with aforesaid observation. However, in the facts and circumstances of the case there will be no order as to costs.