

(2009) 01 PAT CK 0104
In the Patna High Court
Case No : CWJC No. 10359 of 2008

Satish Chandra Jha and Others	Vs	APPELLANT
The State of Bihar and Others		RESPONDENT

Date of Decision : 13-01-2009

Acts Referred:

Constitution of India, 1950 — Article 1, 14, 246(1)

Citation : (2009) 4 PLJR 501

Hon'ble Judges : Chandramauli Kr. Pd, Acting C.J.; Ravi Ranjan, J

Bench : Division Bench

Advocate : Ajay Behari Sinha and Lalit Kishore in 10359, Ashok Kr. Keshri in 13951, R.B. Mahto and Shivendra Kishore, Rama Kant Sharma and L.K. Sharma in 10359, Tara Kant Jha in 13952, Mr. Dharendra Kr. Jha-2 in 10359, M/s Abhay Kumar Singh, Brajesh Kumar in 13951, M/s Dharendra Kr. Jha-2, Amresh Jha in 14200, M/s Ravi Verma, Madhuresh Prasad in 18677, Yugal Kishore in 13952, for the Appellant; J.P. Karn (in 10359), M/s N.K. Sinha, Md. Anis Akhtar (in 13951), M/s Lalit Kishore Satyabir Bharti (in 13952, 18677) for the State, M/s Lalit Kishore, Satyabir Bharti for the Respondent No. 2 (in 14200), M/s P.N.N. Shahi, Nishant Choudhary for the Respondent Nos. 6 and 7 (in 14200), M/s P.N. Shahi, Nishant Choudhary for the Respondent No. 4, 6 and 7 (in 18677) and Mr. Anil Kumar Tiwary for the Respondent No. 2 (in 18677), for the Respondent

Final Decision : Dismissed

Judgement

Prasad, A.C.J. & Ranjan, J.—Petitioners in all these writ applications are Heads of Department in different subjects in the Post-Graduate Departments of the respondents-Universities and their prayer is to declare Sections 3, 4 and 6 of the Bihar State University (Amendment) Act, 2008 (Bihar Act 16 of 2008) substituting sub-clause (ii) in Section 26(6), inserting Clauses 3 and 4 after Section 26(6)(ii) and adding sub-section (7) after Section 36(6) of the Bihar State Universities Act, 1976 (Bihar Act 23 of 1976) respectively as ultra vires. Facts lie in a narrow compass.

2. All the petitioners are presently holding the office of the Heads of Department

in different subjects in the Post Graduate Departments of the respondents-Universities. It is not in dispute that the post of Head of Department as such does not exist with specific scale of pay, but there are several privileges attached to it. Prior to coming into force of the provisions under challenge Head of Department ordinarily used to be the senior most teacher in the subject. Section 26(6) of Bihar Act 23 of 1976 before its amendment by Sections 3 and 4 of the Bihar Act 16 of 2008, read as follows:-

"26. The faculties.-

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6. (i) Each Faculty shall comprise of such department of teaching as may be prescribed by the regulations.

(ii) Where it is proposed to appoint any teacher to be the Head of a Department who is not the seniormost Professor, University Professor or Reader of the Department, no such appointment shall be made without the prior concurrence of the Bihar State University (Constituent Colleges) Service Commission.

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3. Section 3 of Bihar Act 16 of 2008 had substituted Section 26(6)(ii) of the Bihar Act 23 of 1976, which reads as follows:-

"3. Substitution of Section 26(6)(ii) of the Bihar Act 23, 1976.-In the said Act, the Section 26(6)(ii) shall be substituted as follows:-

(ii) Subject to the provisions of this Act and the provisions of the statute made thereunder the Head of the Department shall be appointed by the Vice-Chancellor by observing, as far as possible, the principle of rotation. Such appointments shall be reported to the Syndicate of the University."

4. Section 4 of Bihar Act 16 of 2008 provided for addition of new clauses (iii) and (iv) after 26(6)(ii) of Bihar Act 23 of 2008, same read as follows:-

"A. Addition of a Section 26(6)(iii) and 26(6)(iv) of the Bihar Act 23, 1976:-The following new clauses (iii) and (iv) shall be added after Section 26(6)(ii) of the Bihar State University Act, 1976 (Bihar Act 23, 1976):-

(iii) The Head of the Department shall hold office for a period of three years. A person shall not ordinarily be appointed as Head of the Department for a second consecutive term.

(iv) The Principal shall hold office for a maximum period of five years in one college."

5. By virtue of Section 6 of Bihar Act 16 of 2008 a new sub-section (7) was added after Section 36(6) of Bihar Act 23 of 1976, hereinafter referred to as the Act same reads as follows:-

"(7) Notwithstanding anything contained in the above clause, if at any time, the Chancellor is satisfied that it is necessary to frame Statute of any subject of common interest after obtaining the advice of the Committee of three Vice-Chancellors constituted by the Chancellor, shall send the Draft Statute to all the Vice-Chancellors for opinion, who shall send their opinion within ten days from the receipt of draft. The Chancellor shall give assent to the Statute with such amendment as he may deem necessary in the light of the opinion of the Vice-Chancellors. The Statute shall be deemed to come into force in the Universities from the date of assent:

Provided that the State Government may also suggest the Chancellor to frame Statute of any subject of common interest of all the Universities."

6. The Chancellor of the Universities in exercise of power u/s 36 (7) of the Act constituted a Committee of three Vice-Chancellors, namely the Vice-Chancellor of Patna University, T.M. Bhagalpur University and M.M.H. Arabic and Persian University to advise it on the issue of appointment of Heads of Department on the principle of rotation. The Vice-Chancellor of the Patna University was made its Convener. The Committee of three Vice-Chancellors so constituted held its deliberations on various dates and sent its report to the Chancellor. The report so received was forwarded to all the Vice Chancellors for opinion and a meeting of all the Vice-Chancellors was held in which the draft statute submitted by the committee of three Vice-Chancellors was discussed and the Vice-Chancellors concurred with that. Ultimately Statute for the scheme of rotation of Headship was assented by Chancellor of the Universities and made applicable to all the Universities of Bihar, except Rajendra Agriculture University and Nalanda University. Statute provides as follows:-

"1. Headship of the Department be rotated only amongst the first four seniormost teachers (Professors and Readers) as the case may be of the subjects concerned.

For Headship in P.G. Departments, first four seniormost teachers shall essentially be posted in the Department concerned.

2. Where there is no Professor, the Headship shall be rotated amongst the four seniormost Readers, or less if the number of Readers in the Department is less than four.

3. If there is neither a Professor nor a Reader in the Department, the Headship of the Department may be rotated amongst teachers of the Department.

The tenure of Headship of the Department will be for three years. If for any reason, the Vice-Chancellor feels that change in the Headship of the Department even prior to the completion of term of existing incumbent is necessary in the interest of the Department, change in the Headship of the Department be made subject to the approval of the Chancellor.

4. During the period of absence or leave of the duly appointed Head of the

Department, the seniormost teacher in the Department shall carry on the office of the Head of the Department provided that if the absence extends over a period of three months or more, the Vice-Chancellor may keeping in view the circumstances entrust the work to the next senior teacher in the subject. If however, the vacancy in the office of Head of the Department is to last or likely to last over a period of one year or more, the Vice-Chancellor may appoint another Head of the Department in accordance with these rules in the vacancy."

7. Mr. Tara Kant Jha, Senior Advocate and Mr. Madhuresh Prasad appear on behalf of the petitioners. Submissions on behalf of the petitioners have mainly been advanced by Mr. Jha. Mr. Lalit Kishore, Additional Advocate General-III, Mr. J.P. Karn Additional Advocate General No. -IX and Mr. N.K. Sinha, Additional Advocate General No. -X had appeared on behalf of the State. Mr. R.B. Mahto, Senior Advocate appears on behalf of the Chancellor of the Universities, whereas the B.R.A. Bihar University is represented by Mr. Ajay Behari Sinha. Mr. Ashok Kr. Keshri appears on behalf of T.M. Bhagalpur University, Mr. Yugal Kishore on behalf of Magadh University and Mr. P.N. Shahi on behalf of L.N. Mithila University.

8. While assailing Section 3 of Bihar Act 16 of 2008, Mr. Jha, contends that the Vice-Chancellor has been given unguided power to appoint the Head of Department. As such according to him the appointment of Head of Department shall be at the whim and caprice of the Vice-Chancellor and conferring such an unguided power by the Legislature to the Vice-Chancellor makes the provision arbitrary and violative of Article 14 of the Constitution of India and thus fit to be struck down on that ground alone. It has been pointed out that use of the expression "as far as possible" in Section 26(6)(ii) of the Act by Section 3 of Bihar Act. 16 of 2008 clearly makes the provision vague and discretion unlimited.

9. While challenging the vires of Section 4 of Bihar Act 16 of 2008. It has been pointed out that prohibiting appointment as Head of Department ordinarily for a second consecutive terms also gives unguided power to the Vice-Chancellor.

10. Before we examine the submission of the learned Counsel, we deem it expedient to consider the scope for judicial review for striking down an Act or a provision thereof to be ultra vires. In this connection Mr. Lalit Kishore submits that the Act made by the Legislature or the provision thereof can be declared ultra vires only when it affects one or the other provisions of the Constitution. He submits that the petitioners have not been able to demonstrate that the impugned provisions in any way offends any of the Constitutional provision.

11. It is well settled proposition of law hallowed by time and sanctified by precedent that an Act of the Legislature or the provision thereof can be declared ultra vires only when it affects one or the other provision of the Constitution. A provision in the Act or the Act made by the Legislature, in our opinion can be held to be ultra vires only when it violates one or the other provision of the Constitution. It is also well settled that when two views are possible, one making the Act of the Legislature or the provision thereof to be Constitutional and other

Unconstitutional. the Court in exercise of its power of judicial review shall prefer the former. It is none of the concern of the Court, exercising the power of judicial review to term a Legislation to be unwise and declare the same to be ultra vires. After all an Act of the Legislature represents the will of the people and that cannot be lightly interfered with.

12. As the aforesaid proposition of law is so well settled that no detailed discussion is required. However, in deference to Mr. Lalit Kishore, we may point out that in this connection he has drawn our attention to the judgment of the Supreme Court in the case of Government of Andhra Pradesh and Others Vs. Smt. P. Laxmi Devi, and our attention has been drawn to paragraph 46 of the judgment, which reads as follows:-

"In our opinion, there is one and only one ground for declaring an Act of the legislature (or a provision in the Act) to be invalid, and that is if it clearly violates some provision of the Constitution in so evident a manner as to leave no manner of doubt. This violation can, of course, be in different ways e.g. if a State Legislature makes a law which only Parliament can make under List-I to the Seventh Schedule, in which case it will violate Article 246 (1) of the Constitution, or the law violates some specific provision of the Constitution (other than the directive principles). But before declaring the statute to be unconstitutional, the Court must be absolutely sure that there can be no manner of doubt that it violates a provision of the Constitution. If two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must always be preferred. Also, the court must make every effort to uphold the constitutional validity of a statute, even if that requires giving a strained construction or narrowing down its scope vide Rt. Rev. Msgr. Mark Netto vs. State of Kerala, 13 SCC para 6 : AIR para 6. Also, it is none of the concern of the Court whether the legislation in its opinion is wise or unwise."

13. Reliance has also been placed on a judgment of the Supreme Court in the case of State of Bihar and others, etc. etc. Vs. Bihar Distillery Ltd., etc., to contend that an enactment cannot be struck down by saying that it is arbitrary. It has been pointed out that an Act made by the Legislature represents the Will of the people and that cannot be lightly interfered with and its Constitutionality has to be tested on the anvil of the Constitutional provision and not on the ipse dixit of the petitioner that it is arbitrary. In the said case it has been held as follows:-

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"The Court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. Indeed, any such defects of drafting should be ironed out as part of the attempt to sustain the validity/constitutionality of the enactment. After all. an Act made by the legislature represents the Will of the people and that cannot be lightly interfered with. The unconstitutionality must be plainly and clearly established

before an enactment is declared as void. The same approach holds good while ascertaining the intent and purpose of an enactment or its scope and application. Now, the result of the impugned judgment is that the Amending Act has become an exercise in futility—a purposeless piece of legislation. And this result has been arrived at by pointing out some drafting errors and some imperfection in the language employed. If only the High Court had looked into the minutes of the meeting dated 15.12.1989 and the two letters of the Commissioner aforementioned, it would have become clear that the Amending Act was doing no more than repeating contents of the said letters and placing the legislative imprimatur on them. As the impugned judgment itself suggests, part of the imperfection of language is perhaps attributable to translation from Hindi to English. Indeed, it is surprising that the Court has not even referred to the long preamble to the Act which clearly sets out the context and purpose of the said enactment. It was put in at such length only with a view to aid the interpretation of its provisions. It was not done without a purpose. To call the entire exercise a mere waste is, to say the least, most unwarranted besides being uncharitable. The Court must recognize the fundamental nature and importance of legislative process and accord due regard and deference to it, just as the legislature and the executive are expected to show due regard and deference to the judiciary. It cannot also be forgotten that our Constitution recognises and gives effect to the concept of equality between the three wings of the State and the concept of "checks and balances" inherent in such scheme."

14. Bearing in mind, the principle aforesaid, now, we proceed to consider the submission of Mr. Jha. Section 3 of Bihar Act 16 of 2008 confers power to the Vice-Chancellor to appoint Head of Department by following the principle of rotation and the aforesaid provision itself makes it clear that such an appointment shall be subject to the provisions of the Act and the Statute made thereunder. In that view of the matter, it is difficult to hold that the Vice-Chancellor has been conferred with unguided and uncanalized power. The expression "as far as possible" used in Section 3 of Bihar Act 16 of 2008 is well known in law. There may be exceptional circumstances in which the application of the principle of rotation becomes difficult or impossible and in that circumstance the Vice-Chancellor has been conferred with this discretion. This can be appreciated by citing an example of a Department in the University which may consist of only one teacher and in that circumstance the appointment of Head of Department cannot be by rotation. Therefore, in our opinion, use of the expression "as far as possible" in Section 3 of Bihar Act 16 of 2008 shall not render the provision ultra vires.

15. So far as Section 4 of Bihar Act 16 of 2008 is concerned, it inter alia provides that the Head of Department shall hold Office for a period of three years and a person shall not "ordinarily" be appointed as the Head of Department for a second consecutive term. Use of the expression "ordinarily" in the aforesaid provision according to the petitioners gives unguided authority to the Vice-Chancellor to continue or not to continue a teacher as the Head of Department

for a second consecutive term. This submission of the petitioners is totally on an erroneous assumption that the Vice-Chancellor has been given unguided power. The Legislature while amending the Act seems to be conscious of the position that there may be a case in which rotational system may not be feasible and a person appointed as a Head of Department may have to be appointed again as such, for a second consecutive term. Possible abuse of a provision in the Act cannot be a ground to declare the provision itself ultra vires. In case the Vice-Chancellor of the University makes appointment not in conformity with the provisions of the Act that act of appointment may be declared illegal, but the provision itself on the ground of its possible abuse cannot be declared as such.

16. Similarly, while attacking Section 36(6) of Bihar Act 16 of 2008 which had added sub-section 7 after Section 36(6) of the Act it has been pointed out that Chancellor has been given the power to frame statute of any subject of common interest and in the garb of this power, he may frame statute on any subject and in the process existence of Senate and Syndicate in the University shall be meaningless. It is pointed out that the expression "any subject of common interest" used in Section 36(7) of the Act having not been defined, Chancellor shall exercise the powers to frame statute on any subject. We do not find any substance in this submission. Section 36(7) as inserted by Section 6 of Bihar Act 16 of 2008 starts with non obstante clause and Chancellor has been conferred with the power to frame statute of "any subject of common interest". The expression "common interest" is well known in law. In a case in which the Chancellor chooses to frame statute on a subject not of "common interest" that statute may be declared illegal, but simply on the ground that the Chancellor in the garb of its power u/s 36(7) of the Act may frame statute in respect of all matters itself shall not render the provision ultra vires. Not only this, there are procedural safeguard in Section 36(7) of the Act. The Chancellor has been conferred with the power to make statute on any subject of common interest after obtaining the advice of the Committee of three Vice-Chancellors. Not only this the draft statute is required to be sent to all the Vice-Chancellors for opinion and the Chancellor is conferred with the power to give assent to the statute with such amendment as may be in necessary in the light of the opinion of the Vice-Chancellors. Therefore, the Chancellor's power to frame statute on any subject of common interest is not unguided. Further one cannot loose sight of the fact that the Governor of the State is the Chancellor of the Universities and it is not expected of the holder of such a high office to travel beyond law. In any view of the matter, the provision of law cannot be declared ultra vires on fear of being abused.

17. It has been further contended that for appointment as Head of Department the statute requires determination of seniority and the seniority list having not been prepared, the statute is unworkable. It has been pointed out that Article 1 of the Statute provides that the Headship of the Department shall be rotated only amongst the first four seniormost teachers and the seniority being one of the consideration, in the absence of the gradation list, it cannot be given effect

to. It has also been pointed out that while framing the statute only four seniormost teachers have been made eligible also smacks of arbitrariness. This submission in our opinion has no substance. Various contingencies have been provided under the statute for appointment of Head of Department. It provides for rotating the Headship of Department amongst the first four seniormost teachers (Professors and Readers) and in case there is no Professor it shall rotate amongst four seniormost Readers or less if the number of Readers in the Department is less than four. It has also provided that in a case of non-availability of either a Professor or Reader in the Department, the Headship of the Department may be rotated amongst teachers of the Department. Thus, the statute has taken note of various contingencies. At the first instance, it has to be rotated amongst four seniormost teachers (Professor and Reader). The allegation that the seniority list of the teachers does not exist, though has been denied by the respondents, but even if we assume in favour of petitioners that there is no published gradation list that itself shall not make the Statute unworkable. For giving effect to the provisions of the Statute, nothing prevents the Universities to prepare the gradation list and make appointment as Head of Department.

18. It has next been contended that applying the provisions, as amended, shall deprive the present incumbents to continue as Heads of Department and consequently deprive them the various privileges attached to it. According to the petitioners application of the statute to the Heads of Department presently holding that Office is arbitrary. We do not find any substance in the submission of the petitioners. As stated earlier there is no post of Head of Department and no specific scale of pay is provided for the post. True it is that certain privileges are attached to that office, but deprivation of that itself shall not make the provision illegal. In the absence of any post of Head of Department, it cannot be said that the petitioners have vested right to continue as Heads of Department. As the petitioners have no vested right to continue as the Heads of Department, deprivation of those privileges on their relinquishing the office of Heads of Department shall not make the provision arbitrary. It is worth mentioning here that Section 26(6)(iii) of the Act as inserted by Bihar Act 16 of 2008 had fixed the tenure of the Office of the Head of Department for a period of three years. Section 2 of Bihar Act 16 of 2008 in specific terms provides that it shall come into force at once. When Section 26(6)(iii) of the Act provides that the Head of Department shall hold office for a period of three years for the purpose of calculation the Office held by an incumbent prior to commencement of the Act has to be taken into account. It is well settled that prospective legislation can cover those cases in which the person had held the office prior to its commencement. Reference in this connection can be made to a decision of the Supreme Court in the case of Sajjan Singh Vs. The State of Punjab, in which it has been held as follows:-

"A statute cannot be said to be retrospective "because a part of the requisites for its actions is drawn from a time antecedent to its passing" (Maxwell on Interpretation of Statutes, 11th Edition, p. 211; see also The State of

Maharashtra Vs. Vishnu Ramchandra, . Notice must be taken in this connection of a suggestion made by the learned counsel that in effect sub-sec. (3) of S. 5 creates a new offence in the discharge of official duty, different from what is defined in the four clauses of S. 5(1). It is said that the act of being in possession of pecuniary resources or property disproportionate to known sources of income, if it cannot be satisfactorily accounted for, is said by this sub-section to constitute the offence of criminal misconduct in addition to those other acts mentioned in cls. a, b, c and d of S. 5(1) which constitute the offence of criminal misconduct."

19. Reference in this connection can also be made to a decision of the Supreme Court in the case of Dilip Vs. Mohd. Azizul Haq and Another, in which it has been held as follows:-

"The High Court further concluded that the amendments have no retrospective effect. The provision came into force when the appeal was pending. Therefore, though the provision is prospective in force, it has "retroactive effect". This provision merely provides for a limitation to be imposed for the future which in no way affects anything done by a party in the past and statutes providing for new remedies for enforcement of an existing right will apply to future as well as past causes of action. The reason being that the said statutes do not affect existing rights and in the present case, the insistence is upon obtaining permission of the Controller to enforce a decree for eviction and it is, therefore, not retrospective in effect at all, since it has only retroactive force."

20. It has lastly been submitted that some of the petitioners had held the office of the Head of Department for long time and they are to superannuate from service very soon and hence it shall be unequitable to deny them the privilege of the office of the Head of Department. Equity comes into picture only when the law on the subject is silent. It is the wish of the legislature to make the office of Head of Department to be rotational and in the face thereof any direction by this Court for continuance of such Heads of Department till their retirement shall stare at the face of the Legislature. The wish of the Legislature is meant to be obeyed and this Court in exercise of power of judicial review would not like to curtail the same. In the result, we do not find any merit in these applications and they are dismissed accordingly, but without any order as to cost.