

(2004) 11 GAU CK 0017
In the Gauhati High Court
Case No : WP (C) No. 5577 of 2004

Siba Kanta Dutta

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 24-11-2004

Acts Referred:

Assam Education Department Selection Rules, 1981 — Rule 7
Assam Non-Government College Management Rules, 2001 — Rule 18
Forest (Conservation) Act, 1980 — Section 2
Industrial Disputes Act, 1947 — Section 33(1), 33(2)
Land Acquisition Act, 1894 — Section 11

Citation : (2005) 3 GLR 343 : (2005) 1 GLT 493

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : A.K. Bhattacharyya and R.B. Dev, for the Appellant; C. Baruah and R.K. Dutta, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—The petitioner who is the Principle of a College has been placed under suspension making a challenge to which the instant writ petition has been filed.

2. The petitioner was appointed as Principal of the D.H.S.K. College, Dibrugarh w.e.f. 1.6.1997. On the basis of purported incident which occurred in his office chamber involving one Smt. Joytismita Dowarah who has been working as Computer Operation in the College Library, said Smt. Dowarah lodged a complaint with the President of the Governing Body of the College on 28.7.2004. As per the said complaint, the petitioner made some obscene behaviour to her. Thereafter, the petitioner has been placed under suspension by the Governing Body of the College as per the resolution adopted by the Governing Body in an emergent meeting held on 31.7.2004. The resolution as indicated in the letter dated 2.8.2004 addressed to the petitioner placing him under suspension, is quoted below:

Resolution No. 3:

That the Principal Dr. S.K. Dutta be placed under suspension with immediate effect until order to facilitate enquiry to be held.

3. The letter dated 2.8.2004 was preceded by letter dated 31.7.2004 addressed to the petitioner by the President of the Governing Body of the College intimating him about the decision of the Governing Body to conduct an enquiry relating to the aforesaid incident and to place him under suspension with immediate effect. By the said communication, the petitioner was directed to handover charge with documents and keys of the office of the Principal along with an inventory. The aforesaid letters dated 31.7.2004 and 2.8.2004 were followed by a show cause notice to the petitioner by which the petitioner was once again communicated about the decision of the Governing Body to conduct an enquiry relating to the charge and asked him to show cause as to why the proposed departmental enquiry should not be initiated against him in accordance with law. The petitioner by his letter dated 5.8.2004 addressed to the Director of Higher Education, Assam made a grievance against the decision of the Governing Body and the aforesaid letter dated 2.8.2004 placing him under suspension without prior approval of the Director of Higher Education, Assam. Thereafter, the petitioner filed the instant writ petition on 6.8.2004 challenging the legality and validity of the order of suspension on the sole ground of violation of the requirement of obtaining the prior approval to do so as per rule.

4. According to the petitioner the entire story made against him is concocted one and to malign him in the society. He, in fact, lodged an FIR with the police on 28.7.2004 against said Smt. Dowarah alleging threat from her and distribution of leaflets with false and undesirable remarks.

5. The respondents-Governing Body of the College represented by its President have filed an affidavit in opposition controverting the allegations made by the petitioner. As per the said affidavit, the writ petitioner went on leave w.e.f. 29.7.2004, i.e., after the alleged incident on 27.7.2004 to 7.8.2004 before filing the writ petition on 6.8.2004. As per the said affidavit, the resolution of the Governing Body have been approved by the Director of Higher Education, Assam and the same was communicated to the Governing Body. The order of approval was issued by the Director of Higher Education, on 23.8.2004. As regards the show cause notice issued to the petitioner, the petitioner by his letter dated 11.8.2004 prayed for time to submit his reply which was acceded to by the Governing Body of the College.

6. Emphasizing the need to curb sexual harassment of women at working place as recommended by the National Commission for women vide "Code of Conduct for Women in Working Place" on the basis of the Apex Court decision in Vishaka and others Vs. State of Rajasthan and Others, , the Governing Body of the College in their affidavit have stated that having regard to the seriousness of the offence/misconduct and the public resentment, more particularly amongst the

student community, there was no other alternative that to place the petitioner under suspension. Further stand in the affidavit is that the petitioner has been placed under suspension to facilitate the enquiry without there being any influence. The entire action of the Governing Body is based on written complaint lodged by said Smt. Dowarah. As per the affidavit the Vice-Principal of the College has been made the Principal-in-Charge of the College as per the resolution adopted by the Governing Body in its meeting held on 31.7.2004. In a nutshell, it is the stand in the affidavit that the petitioner was required to be placed under suspension for facilitating the smooth conduct of the enquiry and having regard to the nature of the allegations made, the Governing Body could not wait for the prior approval of the Director of Higher Education, Assam.

7. I have heard Mr. A.K. Bhattacharyya learned senior counsel assisted by Mr. R.D. Dev, learned counsel and Mr. C. Baruah, learned senior counsel assisted by Mr. R.K. Dutta, learned counsel for the respondent-Governing Body. Placing reliance on the following decisions of the Apex Court and this Court, Mr. Bhattacharyya submitted that in absence of the required prior approval towards placing the petitioner under suspension as contemplated under the rules, the order of suspension issued by the Governing Body is nonest and cannot be enforced against the petitioner.

- (1) Ambalal Manibhai Patel Vs. State of Gujarat,
- (2) Rural Litigation and Entitlement Kendra Vs. State of U. P.,
- (3) State of U.P. and Others Vs. Rajiv Gupta and Another,
- (4) Director of Education and others Vs. Gajadhar Prasad Verma,
- (5) (2004) 2 GLR 310 (Governing Body of K.C. Das Commerce College v. Gautam Choudhury)

8. On the other hand, Mr. C. Baruah distinguishing the features "prior approval" and "prior permission" submitted that the meaning of prior approval as contemplated under the rules cannot be stretched that far so as to frustrate the emergent situation as in the instant case. Mr. Baruah placed reliance on the following decision of the Apex Court and this Court:

- (1) The Supreme Court Monitoring Committee v. Mussorie, Dehradun Development Authority and Ors, (1997) 11 SCC 605
- (2) U.P. Avas Evam Vikas Parishad and another Vs. Friends Co-op. Housing Society Ltd. and another,
- (3) 2002 (3) GLT 371 (Sitanath Deka v. Razia Ahmed)

9. The rule applicable in the instant case is the Assam Non-Governing College Management Rules, 2001. The whole issue relating to the prior approval is in reference to Rule 18 of the said Rules which is quoted below:

18. Governing Body to obtain prior approval of the Director in certain matters:

The Minutes of the proceeding of the Governing Body meeting shall be sent to the Director and the concerned affiliating University. No final decision regarding appointment, promotion, suspension, termination, removal or dismissal of teaching or non-teaching staff including that of the Principal or any construction works involving Rs. 50,000 (Fifty thousand) or more shall be undertaken by the Governing Body without the prior approval of the Director:

Provided that so far as Non-Government College are concerned, the Governing Bodies are not required to send the proceedings of the meeting to the Director but it will be open for the Director to call for the proceedings, if any complaint is received against the Governing Body and any direction given by the Director on it shall be final and binding on the Governing Body of the College.

10. In terms of the provision of the above quoted Rules, no final decision regarding suspension of teaching and non-teaching staff including that of the Principal of a College shall be undertaken by the Governing Body without prior approval of the Director of Higher Education, Assam. It is in this context, the whole submission on behalf of the petitioner is that the Governing Body of the College was not empowered to place the petitioner under suspension without the prior approval of the Director of Higher Education. To buttress argument, the above noted cases were referred. In the case of Ambika Quarry (*supra*) the Apex Court interpreting Section 2 of the Forest (Conservation) Act, 1980, held that said provision made it obligatory for the State Govt. to obtain permission of the Central Govt. In the case of Rural Litigation (*supra*) the Apex Court interpreting the same very provisions, held that the requirement of obtaining the approval of the Central Govt. was a mandatory condition precedent to grant as well as for renewal of mining lease in forest area.

11. In the case of State of U.P (*supra*) the Apex Court noticing that no award could be made by the Collector under the provision of Section 11 of the Land Acquisition Act, 1894, held that the prior approval of the State or authorised Officer in the particular context was necessary. Likewise in the case of Director of Education (*supra*) the Apex Court noticing that u/s 9 of the U.P High School and Intermediate College (Payment of Salary of the Teachers and other Employees) Act, 1971 requiring the management to obtain prior approval of the Director or any other authorised officer for creation of the additional post of clerk, held that such prior approval of the Director or the empowered officer was a condition precedent and mandatory.

12. In the case of Governing Body of K.C. Das Commerce College (*supra*) the Division Bench of this Court interpreting the aforesaid Rule 18 of the 2001 Rules, observed as follows:

4. It is from this rule that the minutes of the proceedings of the Governing Body meeting are required to be sent to the Director and also to the concerned affiliating University. Rule 18 prohibits finality of the decision of the Governing Body regarding appointment promotion, suspension, termination, removal or

dismissal of teaching and non-teaching employees without prior approval of the Director. Thus, any decision taken by the Governing Body regarding appointment, promotion, suspension, termination, removal or dismissed would attain finality with the approval of the Director unless and until there is approval of the Director on the decision taken by the Governing Body it will not come into existence nor it can be executed. For decision to become final and operative the Governing Body is to seek and obtain approval of the Director. This is the simple reading of Rule 18 of the Rules 2001. In the present case, the petitioner who was appointment as Accountant has been removed from service on the basis of the decision taken by the Governing Body, but that resolution has got no sanction from the Director of Higher Education. By virtue of Rule 18 of the Rules 2001 any decision taken by the Governing Body without approval of the Director will not come into force nor can it be made effective. Under the circumstances, the decision taken by the Governing Body for removal of the petitioner from service without approval of the Director is illegal and cannot be enforced. Consequently as the post does not become vacant the same cannot be filled in by issuance of advertisement.

13. Now I proceed to examine the decisions on which Mr. Baruah, learned counsel for the respondents placed reliance. In the case of Supreme Court Monitoring Committee (supra) the Apex Court noticing the aforesaid Forest (Conservation) Act, 1989 held that non-forest activities for which prior approval of the Central Govt. was necessary but permission was granted in some cases by the State Govt. issued direction to enlist such cases such cases and to forward the same to the Central Govt. for ex-post facto approval.

14. In the case of Uttar Pradesh Avas Evam Vikas (supra) the Apex Court discussing the distinction between "approval" and "permission" observed that in the first case the action holds good until it is disapproved while in other case it does not become effective until permission is obtained. The permission subsequently granted may validate the previous Act. The relevant observation of the Apex Court in paragraphs 6 and 7 of the judgment are quoted below:

6. This Court in Life Insurance Corporation of India v. Escorts Ltd. considering the distinction between "special permission" and "general permission", "previous approval" or "prior approval" in para 63 held that: "We are conscious that the word "prior" or "previous" may be implied if the contextual situation or the object and design of the legislation demands it, we find no such compelling circumstances justifying reading any such implication into Section 29(1) of the Act". Ordinarily, the difference between approval and permission is that in the first case action holds good until it is disapproved, while in the other case it does not become effective until it is disapproved, while in the other case it does not become effective until permission is obtained. But permission subsequently granted may validate the previous Act. As to the word "approval" in Section 33(2) (b) of the Industrial Disputes Act, it was stated in Lord Krishna Textiles Mills Ltd. v. Workmen, the Management need not obtain the previous consent before taking any action. The requirement that the Management must obtain approval

was distinguished from the requirement that it must obtain permission, of which mention is made Section 33(1).

7. It is seen that the approval envisaged under Exception (iii) of Section 59(1) (a), is to enable the Parishad to proceed further in implementation of the scheme framed by the Board. Until approval is given by the Government, the Board may not effectively implement the scheme. Nevertheless, once the approval is given all the previous acts done or actions taken in anticipation of the approval get validated and the publications made under the Act thereby become valid.

15. The Division Bench of this Court in the case of Sitanath Deka (supra) interfering with the judgment of the learned Single Judge in interfering with the order of suspension issued by the Managing Committee of the School held that Rule 7 of the Assam Education Department Rules and Orders permits issuance of an order of suspension if the charges are serious which may result in imposition of the punishment of dismissal or removal, if they are proved. Having regard to the factual matrix of the case and considering the nature of the charges, the Division Bench held that it would not be just, fair or proper to permit the writ petitioner to continue as Head Mistress.

16. It is on the basis of the aforesaid provisions of the rules and the decisions of the Apex Court on which the learned counsel for the parties placed reliance, the order of suspension will have to be judged. It is an admitted position that the petitioner was placed under suspension by the Governing Body of the College without the prior approval of the Director of Higher Education. It is also an admitted position that immediately after the resolutions were adopted deciding to place the petitioner under suspension and to conduct an enquiry against him relating to the incident, same were sent to the Director of Higher Education for his approval. It is also on record that approval has been granted by the Director. It is with this background the decision will have to be arrived at and decisions on which the learned advocates placed reliance will have to be understood.

17. In none of the cases on which Mr. Bhattacharyya placed reliance, a similar fact situation as in the instant case was involved. In none of the cases the question as to whether the ex post facto approval would meet the requirement of the law was involved. It is true that if a particular act is required to be done in particular manner, same will have to be done in that manner only and not otherwise and in the event of any violation in that regard same may invalidate the act itself. But his proposition will have to be understood in the fact situation involved in each case. Needless to say that the ratio of a case will have to be understood in the background of the facts of that case. It has been said since long time ago that a case is only an authority for that it actually decides, and not what logically follows from it (see Lord Halsbury in *Queen and Leathern* - 1901 AC 449). Even in the case of *Director of Education* (supra) on which Mr. Bhattacharyya placed reliance, the Apex Court after noticing the provision relating to prior approval, held that so long as prior approval had not been given, though the respondents might have been appointed by the management without

such prior approval, the Govt. is not obliged to reimburse the salary paid to such clerk. This was a case relating to appointment of clerk by the Management without the prior approval of the Director. It was in that context, the Apex Court held that for the period of service rendered by the clerk pursuant to the appointment made by the Management without prior approval of the Director, he would not be entitled to any salary and that the Govt. was not obliged to reimburse the salary paid to him by the Management would bear the expenditure from its own resources without claiming any reimbursement from the Govt. Thus, the embargo relating to consequence of not obtaining prior approval from the Director so long as the prior approval had not been given is noteworthy. The Apex Court observed - "what is material is whether prior approval of the Director or the empowered officer has been obtained before creating that post. It is not the case of the respondents or the Management that such prior approval has been obtained or given by the competent officer. Therefore, so long as prior approval had not been given, though the respondents might have been appointed by the Management, the Govt. is not obliged to reimburse the salary paid to such clerk."

18. Thus, in the aforesaid case the Apex Court recognised the principle of ex post facto approval in the case of prior approval. In the case of Governing Body (supra) also the Division Bench of this Court emphasized that Rule 18 prohibits finality of the decision of the Governing Body without prior approval of the Director. It held that until and unless there is approval of the Director on the decision taken by the Governing Body it will not come into existence nor it can be executed. It went on to add that for a decision to become final and operative the Governing Body is to seek and obtain approval of the Director.

19. In the case of Moussorie Dehradun Development Authority (supra) also the Apex Court after noticing the absence of prior approval of the Central Govt. issued direction to the Central Govt. to consider such cases in accordance with rules and directed the State Govt. to enlist the cases in which they gave permission for non-forest activities and to forward the case for ex-post facto approval of the Central Govt. Thus, in that case prior approval, rather directed the enlistment of such case and to forward the same to the Central Govt. for its ex post facto approval.

20. In the instant case, although there was no prior approval of the Director of Higher Education towards placing the petitioner under suspension, but the resolution adopted by the Governing Body of the College to place the petitioner under suspension and to conduct an enquiry against him relating to the incident have been approved by the said Director on receipt of the said resolutions of the Governing Body. The Governing Body of the College adopted the resolutions and forwarded the same to the Director and at the same time placed the petitioner under suspension in the extreme urgent situation as explained above.

21. The petitioner was placed under suspension by Annexure-C impugned communication dated 2.8.2004 and the Director of Higher Education granted his

approval to the resolutions adopted by the Governing Body of the College towards placing the petitioner under suspension and to conduct an enquiry against him by his order dated 23.8.2004. within three weeks of the impugned Annexure-3 communicated on 2.8.2004, the Director approved the resolution of the Governing Body. Thus, although there was no prior approval towards placing the petitioner under suspension by the communication dated 2.8.2004, such approval came into being on 23.8.2004 with the issuance of the order dated 23.8.2004 approving the impugned resolution No. 3 dated 31.7.2004 by which the Governing Body of the College resolved to place the petitioner under suspension.

22. It will be pertinent to mention here that the order dated 23.8.2004 approving the impugned resolution No. 3 dated 31.7.2004 adopted by the Governing Body is not under challenge in this proceeding. Thus, even if the Annexure-C communication dated 2.8.2004 is held to be inoperative, in absence of the prior approval of the Director, same became operative with the approval of the Director of Higher Education on 21.8.2004.

23. Legal formulations cannot be divorced from fact situation of the case. Rules and procedures are to be followed for doing substantial justice and not for completing the mere ritual without possibility of any change in the decision. Things would have been different had there been no approval at all or refusal on the part of the Director to accord the approval to the resolution deciding to place the petitioner under suspension. The concept of ex post facto approval comes into play in such a situation. In the Black's Law Dictionary, the term "ex post facto" has been defined as below:

After the fact; by an act or fact occurring after some previous act or fact, and relating thereto; by subsequent matter; the opposite of ab initio. Thus, a deed may be good ab initio, or, if invalid at its inception may be confirmed by matter ex post facto.

24. In the instant case the Annexure-C impugned communication dated 2.8.2004 placing the petitioner under suspension got validated with the approval granted by the Director by his order dated 23.8.2004. There is another aspect of the matter. The Governing Body of the College took the resolution No. 3 resolving to place the petitioner under suspension on 31.7.2004 and sent the same to the Director for his approval. The Director granted the approval by his order dated 23.8.2004. Thus, leaving aside the impugned communication dated 2.8.2004 placing the petitioner under suspension, the petitioner is automatically placed under suspension with the approval granted by the Director to the impugned resolution of the Governing Body dated 31.7.2004. Thus, on both the counts, ex post facto approval to the impugned resolution and coming into effect the impugned decision to place the petitioner under suspension with effect from the date of approval of the resolution by the Director, the petitioner cannot escape the liability of the fact situation that he is under suspension and continues to be so till revocation of the same by the competent authority. This is also precisely

the reason as to why the Apex Court in the case of Canara Bank and Others Vs. Shri Debasis Das and Others, while discussing in detail the concept, manner object scope and applicability of "natural justice" observed that though in all cases post-decisional hearing cannot be a substitute for a pre-decisional hearing, in a given case the position might be different.

25. For the foregoing reasons and discussions, the writ petition fails. The interim order passed on 24.8.2004 stands vacated. The petitioner shall continue to be under suspension till revocation of the order of suspension by the competent authority. It is expected that the respondent shall conclude the proposed enquiry against the petitioner with utmost expedition.

26. The writ petition stands dismissed, without, however, any order as to costs.