
(2000) 04 AHC CK 0001
In the Allahabad High Court
Case No : Special Appeal No. 499 of 1998

State of U.P. and another	Vs	APPELLANT
Irfan Ahmad Siddiqui		RESPONDENT

Date of Decision : 28-04-2000

Acts Referred:

Constitution of India, 1950 — Article 226, 311, 311(2)
Uttar Pradesh Fundamental Rules — Rule 18

Citation : (2000) 3 AWC 2045 : (2000) AWC 2045 : (2000) 2 UPLBEC 1545

Hon'ble Judges : G.P. Mathur, J;A.K. Yog, J

Bench : Division Bench

Advocate : Addl. C.S.C, for the Appellant; Sudhir Agarwal, for the Respondent

Judgement

A. K. Yog. J.

1.State of U. P. through Secretary (Education), U. P. Government, Lucknow and Additional Director of Education (Secondary) U. P., Allahabad have preferred this Special Appeal against Judgment and order dated 5.11.1997 passed by learned single Judge in Writ Petition No. 22407 of 1987. Irfan Ahmad Siddiqui v. State of U. P. and another, under Article 226, Constitution of India, claiming a writ of certiorari to quash the impugned orders dated 31st December 1985. 4th September, 1986. issued by Additional Director of Education (Secondary) U. P. and 17th June, 1987. passed by Director of Education (Annexures-9, 19 and 20 to the writ petition).

2. The facts of the case are as follows :

Petitioner was appointed, after being selected by U. P. Public Service Commission, Allahabad as Assistant Master (Chemistry) in June. 1971. In a Government Inter College-under U. P. Special Subordinate Education Service and at the relevant time, petitioner was posted as Lecturer (Chemistry) in Government Intermediate College. Allahabad.

3. Petitioner, (in response to an advertisement issued by the Government of

Nigeria in the year 1981 inviting application for appointment of teachers in that country) submitted application on 1.5.1981 to the F.A.S., Home Ministry Government of India through respondent No. 2. Additional Director Education (Secondary) for forwarding the same to the Embassy of Nigeria. Advance copy was also sent directly to the said Embassy. Admittedly, said application was not forwarded by respondent No. 2 and no permission granted to participate in any proceedings for selection/or taking up an assignment with the Nigerian Government. Petitioner's request in this connection was rejected vide order dated 2.7.1981 (Annexure-1 to the writ petition). But on receiving telegram from Nigerian Government, he appeared at the interview on August 17, 1982, held at Nigerian High Commission. Petitioner did not challenge the aforesaid order dated 2.7.1981 for more than a year and, in absence of requisite permission to take up assignment outside the country maintaining him on his present post (writ pp. 22), appeared at the interview in defiance of the order refusing permission. In the writ petition, there is no explanation for the period between 2.7.1981 to 17.8.1982. Petitioner's letter dated 21st August, 1982, to the Additional Director of Education (Secondary), Annexure-2 to the writ petition also contains reference to the letter dated 2.7.1981.

4. Petitioner was offered appointment provisionally for two terms of 24 months each by the Nigerian Government vide letter dated 31.8.1982 (Annexure-3 to the writ petition).

5. He again submitted an application for the permission but it was also refused by the Director/ Additional Director of Education (Secondary) vide order dated 14th September, 1982 (Annexure-4 to the writ petition). In this letter. It was reiterated that petitioner was not eligible according to the Government order dated 25th July, 1979. Petitioner sent another application dated 30.10.1982 to the Education Secretary, Government of U. P. with request to allow him to go on deputation or sanction leave without pay for four years so as to enable him to take up assignment offered by Nigerian Government (Annexure-5 to the writ petition). Petitioner alleges that he sent another reminder dated 17th January, 1983, to the Education Secretary, U. P. Government for obtaining "no objection certificate" and permission to take up Job at Nigeria in February, 1983 (writ para 12). Admittedly, petitioner neither received "no objection certificate" nor reply in response to his aforesaid correspondence. Admittedly, left with no option, he sent another application to Additional Director Education (Secondary) on 18th February, 1983 for two years' leave without pay and without waiting for orders on the application, he left India on 20th February, 1983 (writ para 13). From Nigeria, he has sent letter dated 27.2.1983 only to the Principal, Government Inter College, Allahabad under certificate of posting (Annexures-6 and 7 to the writ petition) wherein he disclosed his address of KANO (Nigeria) and requested for informing him about the fate of his application for leave without pay. Admittedly copy of this letter or such information was not sent to the Director or the Secretary U. P. Government. After this he kept quiet. There is no explanation for the period between 27th February, 1983 to 15th December, 1985, when after

about 34 months he sent letter dated 15.12.1985 for extension of Leave without pay (Annexure-8 to the writ petition). Petitioner deliberately did not send all his letters through the Principal nor marked their copies to all concerned. He corresponded by rotation separately and jointly with the Secretary (U. P. Government), Director [Secondary Education) and the Principal as per his choice as part of his game. The petitioner, thus, appears to be interested in ensuring that the concerned are unable to coordinate in the matter. His external acts, on close scrutiny, unravel the truth and indicate, petitioners" secret mind.

6. Additional Director of Education (Secondary) vide notice dated 31.12.1985 (Annexure-9 to the writ petition) sent to the petitioner on his last known address in India (since the Directorate did not have his Nigerian address till that date) reaffirmed the earlier order rejecting his request for permission to go on deputation or to proceed on leave without pay. The aforesaid notice clearly mentioned that petitioner was guilty of indiscipline, fraud, irregularities, etc. and he was required to submit explanation failing which he was deemed to be not interested in service : it also stated that "rejection order" was sent by the Directorate to the petitioner by registered post dated 27.12.1983 as well as through the District Magistrate and also published in leading News Papers on 2nd/3rd January, 1984. As per documents filed by the petitioner, it is not proved that the Government and/or Directorate had his Nigerian address at the relevant time.

7. According to the petitioner, he again sent reminder on 24th August, 1986, to the Additional Director of Education (Secondary) requesting for extension of leave (Annexure-10 to the writ petition). Petitioner, in the writ petition conveniently ignored (i) that he was never granted "Leave" and hence there was no question of its extension, (ii) that he never cared to challenge the order refusing to grant leave or permission, i.e.. order dated 2.7.1981 (Annexure-1 to the writ petition) and (iii) that he did not bother to find out the fate of his application for grant of leave without pay/deputation.

8. Letter dated 21.10.1986 (Annexure-11 to writ petition), shows that Indian High Commission made a request to the KANO State Civil Service Commission at Nigeria to inform the petitioner to report back to his parent department in India. This document is an ample proof of the fact that Government Authorities and/or the Directorate in the State of U. P. made all possible efforts to trace out and communicate with the petitioner who had left the country in a planned manner without leaving address while abroad in flagrant breach of relevant service Rules.

9. Documents dated 13.1.1987, 10.2.1987 and 24.2.1987 (Annexures-12, 13 and 14 to the writ petition) show that no objection certificate was demanded by Ministry of Education KANO State and that renewal of contract in favour of petitioner was made subject to producing "no objection certificate" from India through Indian Embassy.

10. In view of the above, petitioner found it impossible to continue further and

sent letter dated 23.4.1987 (Annexure-15 to the writ petition) informing the concerned authorities in India that he shall report back in October. 1987. This letter from the petitioner shows his unilateral approach and his one-sided decision in the matter.

11. In reply to the aforesaid letter dated 23rd April, 1987 (which was received in the Directorate in May, 1987 as admitted in the counter-affidavit), the last impugned order dated 17th June. 1987, was issued.

12. Attending circumstances of the case clearly show that the petitioner was merely interested in creating web of circumstantial evidence to show his "bona fide" on paper. It has, on the other hand, come on record that concerned authorities did direct for publication of the relevant orders in newspaper (see endorsements below the orders filed as Annexures-9, 19 and 20 to the writ petition).

13. Respondents (present appellants) in their counter-affidavit paras 13, 14, 17, 22 and 23 specifically stated that the petitioner's application for taking up foreign assignment was rejected as he was not eligible under Government Order dated 25th July. 1979, petitioner voluntarily abandoned the Job of his own, left the country without obtaining "no objection certificate" and without obtaining necessary permission of the Government for taking up assignment in a foreign country. Petitioner acted illegally against service Rules and conditions on the basis of his unilateral decisions against all norms. Relevant letters/notices were sent to the petitioner on his last known address and all possible efforts made to communicate/Inform the same to the petitioner. According to the respondents, petitioner had due notice of the relevant orders. Petitioner deliberately concealed and did not leave his contact address at Nigeria. Ample opportunity was given to the petitioner before passing impugned orders, there is no violation of principle of natural justice or Article 311(2), Constitution of India and "orders" in question are legal and valid.

14. In the rejoinder-affidavit, petitioner has unsuccessfully attempted to dispute the above only on the basis that the Government having approached Indian High Commission Lagos, Nigeria-respondents should have sent letters to his address at Nigeria. This is nothing but begging the question itself.

15. In the judgment impugned in the present Special Appeal (at particular pages 6 to 8 of the certified copy filed in Special Appeal), learned single Judge has made observations affirming above facts.

16. The learned single Judge, however, concluded (at particular pages 12 to 14 of the judgment) as follows :

(a) Rule 18 U. P. Fundament Rule was not attracted as petitioner was absent from employment for less than 5 years (i.e., February. 1983, to September. 1986).

(b) Thus undisputedly the show cause notices were not served on the petitioner".

(c) "If the respondent could contact the Indian High Commission in Nigeria respondent could have served the show cause notice on the petitioner".

(d) "Thus, neither any departmental enquiry has been made nor any show cause notice or opportunity was given to the petitioner to explain his conduct before the order terminating his service was given to the petitioner. The termination order, therefore, being in contravention of the provisions of Article 311, Constitution of India and principle of natural Justice cannot be allowed to stand.

(e) None of the impugned order contained specific order of termination and for termination of services of an employee, specific orders have to be passed and

(f) The learned single Judge on the above conclusion set aside the impugned orders (Annexures-9, 19 and 20 to the petition) with liberty to the respondents to initiate departmental proceedings against the petitioner in respect of alleged "misconduct" in accordance with the provisions of Article 311 of the Constitution. Salary for the period from February, 1983 to 22nd September, 1987, when petitioner "was no more in the present employment" and "not in the instant service, has been refused on the principle of no pay no work. Salary for remaining period i.e., from 22nd September, 1987, onward till date was held payable to the petitioner to be decided in the light of the provisions of Financial Hand Book according to law. In the impugned Judgment and order dated 5th November, 1997 learned single Judge gave declaration to the effect that the petitioner continues in his service on the post of lecturer and is entitled to pay and all consequential benefits in the light of the directions earlier made in the Judgment.

17. We have heard learned counsels appearing on behalf of the appellants - State of U. P. and others and the respondent in the appeal (Irfan Ahmad Siddiqui-petitioner in writ petition) at length.

18. The learned standing counsel, appearing on behalf of the appellants, in his attempt to defend the action of the employer in the facts of the instant case, placed reliance upon the following decisions :

1. The Buckingham and Carnatic Co.Ltd. Vs. Venkatiah and Another,
2. National Engineering Industries Ltd. Vs. Hanuman,
3. Shahoodul Haque Vs. The Registrar, Co-operative Societies, Bihar and Another,

19. In the case of Shahoodul Haque (supra), the Supreme Court (Bench of three Hon"ble Judges) considered the case where the concerned employee did not choose to avail the opportunity and held that in such situation, it cannot be said that there has been violation of principles of natural Justice. In our opinion, facts of case of Shahoodul Haque are parallel to the facts of the present case and its ratio cannot be ignored on any good ground. The other two cases of Buckingham and Carnatic Company Limited and National Engineering Industries Limited, Jaipur (supra) arose from decisions of Tribunals and are not relevant for our

purposes.

20. Petitioner/respondent places reliance on the following decisions :

1. Deokinandan Prasad v. State of Bihar AIR 1971 SC 1499. paras 7 to 10, 18 and 20 to 22.
2. Jai Shanker Vs. State of Rajasthan, .
3. Dinesh Kumar Gandhi v. Director, Family Planning/ Family Welfare, U. P. and others (1994) 3 UPLBEC 1877,
4. Ram Kishore Pandey v. Government of India. 1982 UC 261.

21. In para 18 of the Judgment. In the case of Deokinandan Prasad (supra), Supreme Court observed that employee was always ready and willing to do his duty and the respondents illegally prevented him from Joining duty by ignoring the orders of the civil court. The facts of this case are entirely different and its ratio cannot be applied to the facts of the present case wherein employee deliberately avoided, out of his sheer violation, to avail the opportunity to join the post and wants to take shelter behind technical interpretation of law. Case of Deokinandan Prasad (supra) considered the case of Jai Shanker (supra). Facts of each of these cases are distinguishable. Court in this case observed "a person is entitled to continue in service, if he wants, until his service is terminated." It was a case of over-staying leave and not of taking Job elsewhere in complete disregard of reciprocal discharge of service "duties" and "obligations".

22. The case of. D. K. Gandhi (supra), is also distinguishable. On facts in this case, it was contended that the order of termination was passed without giving any opportunity of hearing to the petitioner and being punitive in nature, it was in violation of Article 311. Constitution of India. Para 6 of the Judgment reads.

"Rule 18, U. P. Fundamental Rules, no doubt provided that after five years continuous absence from duty a Government servant ceased to be in Government employment and, therefore, the question to be considered was whether in a case where a Government servant has been absent continuously for five years or more his services will come to an automatic end or his services can be terminated after giving him an opportunity and complying with the provisions of Article 311 of the Constitution of India."

Para 9 of the judgment reads :

"The petitioner was never given information or notice or opportunity of hearing being passing the order It has also been averred that no chargesheet was ever served upon him. Therefore, it is clear that the order terminating the service has been passed in violation of Article 311(2) of the Constitution.

23. The decisions in the case of D. K. Gandhi (supra), is clearly distinguishable inasmuch as in the instant case petitioner was given notice on different stages. The question, in our case, is whether notice is deemed to be sufficient as the

petitioner deliberately avoided to receive the same or the finding in the writ judgment that notice was not served, is correct.

24. The case of Ram Kishore Pandey (supra), was also a case where the employee was absent and over-stayed beyond the leave period. The said fact was denied by the employee. It has come in para 8 of the Judgment that no notice was given before passing of the order of termination and that employee was never called upon to show cause. This case also renders no help to the petitioner-respondent since the learned single Judge has already recorded a finding to the effect that notices were not only issued at the last known address but the same were also published.

25. From the undisputed facts and the observations made by the learned single Judge, it is proved that the employer made all efforts on his part by sending notices and made all efforts to get them served upon employee who avoided it. Moreover, there is no categorical pleading-denying knowledge of the notices as a fact.

26. The notice shall be deemed to be sufficiently served if it is deliberately avoided. Reference may be made to the judgment dated 15.1.1996 in the case of State of M.P. v. Hira Lal and others, arising out of SLP No. 2414 of 1976 reported in 1996 (1) Apex Decisions Supreme Court 874, relevant para 1 of the judgment is quoted :

"In view of the office report, it would be clear that the respondents obviously managed to have the notice returned with postal remarks "not available in the house, "house locked up" and shop closed, "respectively in that view, it must be deemed that the notices have been served on the respondents."

27. Law ever intends that which is reasonable, "Lex semper intenoit quod convenit rationt."

28. Conclusion drawn by the learned single Judge to the effect that "notice was not served." we are afraid, cannot be sustained and hereby set aside.

29. Rule 18. U. P. Fundamental Rules had no relevance as it was not the defence of the employer nor the basis of the impugned orders.

30. Cases of over-staying leave period and when an employee has not taken-up assignment anywhere else stand on an entirely different footing as compared to the case of an employee who neglects his duty, abandons his contract of service, obtains "no objection certificate" or "permission" to take up foreign assignment or leave to maintain his lien for making huge money at the cost of his own institution and the students. The serious offence becomes graver when it is a case of an educational institution.

31. Law is not meant to come to the aid of those who are guilty of violating the same. Assuming petitioner-respondent would have suffered some loss by not taking foreign assignment as he would have missed an opportunity to earn

additional or extra-money but the injury caused to the students whose academic session was at a crucial stage (as the Board Examination were shortly in the offing) and the loss to third parties, including the loss and inconvenience caused to the educational institution, cannot be comprehended and compensated. The ancient maxim says-"No one should become rich by the inconvenience of an other-Nemo debet locuplesari ex alterius incommodo.

32. Even assuming, as held by the learned single Judge, that there was violation of Article 311(2), Constitution of India, the present petitioner respondent, in the case of an educational institution, is not entitled to the relief of reinstatement after lapse of long gap of 17 years. The Supreme Court Judgments (relied upon by the learned single Judge) arose entirely in different context and set of facts. None of the decision relied upon by the petitioner-respondent dealt with the case of an educational institution. Those cases were with respect to the proceedings arising from Tribunal wherein there was no dispute of fact regarding notice or opportunity. Whether petitioner had notice and knowledge of the orders (Annexures-9, 10 and 20 to the writ petition) is a question of fact-disputed by the petitioner in writ proceedings.

33. On perusal of the entire material on record and in view of the Judgment of Supreme Court in the case of State of M. P. (supra), we come to the conclusion that the petitioner had deliberately avoided to receive relevant orders and, therefore, he cannot complain of want of "notice" and "opportunity" which he voluntarily avoided to avail out of his own volition. For the relief of reinstatement in job, it was not enough for the petitioner to demonstrate technical infraction of law in his favour but he ought to have further proved his "bona fide" to discharge duties at the relevant time. This relevant aspect of the case has been completely ignored.

34. Petitioner cannot claim relief of reinstatement and payment of back-wages for the last 14 years in exercise of Courts discretionary, equitable and extraordinary Jurisdiction under Article 226. Constitution of India unless petitioner also proved equities on his side. We find. In the instant case, petitioner seriously Jeopardized the interest of the students when he took foreign assignment, as an opportunist having no regard to his duties (particularly when there was no unavoidable compulsion). Interest of employer cannot be jeopardized by compelling to pay salary for a long period of 14 years when the employee (petitioner) admittedly did not serve. Coupled with the circumstance that Government on the other hand must have made an alternative arrangement to keep the classes running and paid another incumbent as an alternative hand.

35. Reference may be made to the case of Kayastha Pathshala, Allahabad and Another Vs. Rajendra Prasad and Another, . Supreme Court observed :

"In educational institutions the Court cannot focus only on the individual forgetting all else. The Court must have regard to varying circumstances in the academic atmosphere and radically changed position of the individual sought to

be reinstated. The Court must have regard to the interests of students as well as the institution. It is not unimportant to note that the respondent was out of teaching for over 25 years.....In this gap.....he must have clearly lost touch with Chemistry as well as part of teaching. It must have been also deeply buried and disintegrated.....Reinstatement of such a person seems to be unjustified and uncalled for."

36. The above decision of the Supreme Court in the case of Kayastha Pathshala (supra), in fact follows the old maxim-Bonus Judex Secundum, acquumet bonwn Judicat at ecquitation stricto Juri praefet-A good Judge decides according to Justice and equity in preference to strict law.

37. Petitioner cannot be given reinstatement /back wages as a gift in lieu of his own misconduct was also termed by the learned single Judge on p. 14 of the Judgment. His active attempt to conceal his correct address at Nigeria at relevant time, coupled with undisputed fact of abandoning his duty without leave or sanction for taking foreign assignment to make extra money completely ignoring the interest of his own students at Government Inter College, Allahabad (who were left in lurch) completely non-suit the petitioner. Petitioner-respondent apparently resorted to tactics like bluffing and manipulation. No one shall take advantage of his own wrong and likewise no one can get a right in consequence of his own wrong "Memo ex proprio acto consequitur actionem".

38. In the instant case, request of the petitioner for obtaining permission was rejected vide order dated 2.7.1981 (Annexure-1 to the writ petition). Petitioner has offered no explanation as to why he did not challenge the said order at the earliest or pursue the matter promptly before appropriate forum, to get over the hurdle. He left India without permission, or obtaining "no objection certificate". The petitioner, thus, left his Job in India voluntarily by abandoning his duties without obtaining prior permission or obtaining leave without pay or informing the employer as to how long they had to wait for him. Admittedly petitioner left for Nigeria without intimating his address at Nigeria to the Directorate/ Government of India at the first opportunity. The authorities gave notice, not once but twice by resorting to all possible means under their command.

39. Petitioner cannot be permitted to find fault with the same when he has nowhere in the writ petition categorically stated that as a fact he had never acquired knowledge of the orders/letters and the publication in question from any other source. Absence of pleading on this "key" aspect is conspicuous by itself. Petitioner has also not disclosed the source from where he got copies of the concerned documents including the impugned orders (annexed with the writ petition). The petitioner has nowhere specifically denied respondents' categorical averment that he did not intimate his contact address Just before or immediately after leaving the country or taking up Job at KANO (Nigeria). Accusator post rattonabile tempus non est audiendus, nisi se bene de omisllone excusaverit : He who excuses should not be heard after the lapse of a reasonable time, unless he can explain satisfactorily the delay.

40. One may ask what is to be done when violation of service rules is admitted to the employee, when he had literally abandoned his job and admittedly left India without obtaining "no objection certificate" or entered into contract of service without obtaining permission to maintain his lien on the post in India and took foreign assignment at Nigeria in breach of all norms.

41. The question is what kind of enquiry is to be made when assertions of fact of the relevant aspects are not in dispute? The situation would have been different if the petitioner would have promptly challenged the order dated 2.7.1981 rejecting his application for grant of permission was first rejected (Annexure-1 to the writ petition).

42. Grievance of the petitioner has no substance as he himself attempted to create confusion and, therefore, now he cannot take advantage of it. He has to thank himself for his own self-created problem. Present is not only the case of "Silence" only but also of deliberate concealment and, therefore he is not to be heard who boast of his own wrong action. It cannot be said that the petitioner could not, in spite of his best efforts, report on duty for any valid reason beyond his control. Principle of natural justice cannot be stretched to ridiculous limit. Reasonable opportunity was offered but petitioner ensured to avoid it and willingly failed to avail the same. In such a situation he can not be permitted to take the plea of absence of "opportunity".

43. In the case of Union Territory, Chandigarh and others v. Mohindra Singh. (1997) 3 SCO 68 (Para 6). Supreme Court observed that reasonableness and practicability are relevant factors before a decision is held to be bad being in violation of Article 311(2). 44. In the case of Avinash Nagra Vs. Navodaya Vidyalaya Samiti and Others, , the Apex Court held that the enquiry before awarding punishment shall vary with exceptional facts of a particular case.

45. In the case of Dharmarathmakara Raibahadur Aroot Ramaswamy Mudaliar Educational Institution Vs. The Educational Appellate Tribunal and Another, , wherein a teacher was granted extra-ordinary leave, left for higher studies on furnishing declaration that in case teacher fails to resume duties after expiry of the leave the authorities will be entitled to terminate the service. The concerned teacher neither Joined the higher course for which leave was granted nor resumed duties after the expiry of the leave. Employer issued show cause notice and on not being satisfied with the explanation of the teacher, terminated his services. The Apex Court observed that on the facts and circumstances of the case it could not be said that there was any violation of principles of natural Justice. Court observed-"The facts speak for themselves.

46. In the case of M.C. Mehta Vs. Union of India (UOI) and Others, , Supreme Court referred to "useless formalities" and "admittedly indisputable facts" held that grant of a writ will be a futile exercise. In our opinion, similar is the position in the facts of the instant case.

47. Similar view was taken by the Supreme Court in case of M.C. Mehta Vs.

Union of India (UOI) and Others, , wherein Supreme Court laid down "it is not always necessary for the Court to strike down an order merely because the order has been passed against the petitioner in breach of natural justice."

48. In view of the reasons given above. Judgment and order dated November 5, 1997, passed by learned single Judge in the writ petition cannot be sustained and is liable to be set aside. Writ petition deserves to be dismissed, as the petitioner is not entitled to the reliefs claimed in the writ petition.

49. Consequently, Judgment and order dated November 5, 1997 allowing Writ Petition No. 22407 of 1987 is set aside. The writ petition stands dismissed.

50. In the result, Special Appeal is allowed.

51. No order as to costs.