(2008) 12 PAT CK 0079

In the Patna High Court

Case No : LPA No. 303 of 2006

The Bihar State Bar Council and Others — APPELLANT

Vs

Ashok Kumar Singh — RESPONDENT

Date of Decision : 08-12-2008

Acts Referred:

Advocates Act, 1961 — Section 11, 3, 5, 6

Citation : (2009) 1 PLJR 261

Hon'ble Judges : R.M. Lodha, C.J;Kishore K. Mandal, J

Bench : Division Bench

Advocate : Tara Kant Jha, Amish Kumar, Arun Kumar Jha and Prem Kumar Jha, for the Appellant; S.N. Jha and Kripa Nand Jha, for the Respondent

Final Decision : Allowed

Judgement

1. Bihar State Bar Council and its Secretary are the appellants before us. They are aggrieved by the order dated 27th March, 2006 Reported in Ashok Kumar Singh Vs. The Bihar State Bar Council and Another, passed by the Single Judge whereby the writ petition filed by the present respondent came to be allowed and a declaration has been made that the present respondent is continuing even up to date as Secretary of the Bihar State Bar Council and should be paid his remuneration accordingly. We shall refer the present respondent, ''the petitioner'' and the present appellants, ''State Bar Council''.

2. The petitioner was admitted as an Advocate on the roll of the State Bar Council on 28th August, 1990. Pursuant to the notice issued by the State Bar Council inviting applications, inter alia, for the post of Secretary, published in English daily "Hindustan Times" on 10th August, 2003, the petitioner applied alongwith necessary certificates and a bank draft of Rs. 500/-. That the petitioner fulfilled minimum qualification for the post of Secretary is not in dispute. The petitioner and the other applicants were asked to appear in the written test which was fixed on 12th October, 2003. Viva voce test was fixed on 15th October, 2003. The petitioner appeared in the written test as well as viva

voce and seems to have secured the highest marks. By a letter dated 29th October, 2003 the petitioner was appointed to the post of Secretary, Bihar State Bar Council in the pay scale of Rs. 6500-100-6900-EB-150-7500-250-11000 plus admissible allowances and he was directed to join the post on 1st November, 2003 at 10.30 A.M. and take charge of that post. The petitioner, accordingly, joined as Secretary, Bihar State Bar Council on 1st November, 2003. It appears that the subject concerning the appointment of the petitioner as Secretary, State Bar Council was placed before the General Body of the State Bar Council in its meeting fixed for 16th November, 2003. There seemed to be some dispute amongst its members in this respect and, accordingly, the subject matter was adjourned to 7th December, 2003. The meeting dated 7th December, 2003 could not be held and it was adjourned to 4th January, 2004. On 4th January, 2004 the General Body of the State Bar Council vide its resolution No. 1/ 04 disapproved the appointment of the petitioner as Secretary. One Ashok Kumar was authorized to work as officiating Secretary. In compliance of the resolution dated 4th January, 2004, the petitioner was communicated vide letter dated 5th January, 2004 that he was being removed and consequently, the petitioner ceased to be Secretary, State Bar Council from that date. It is this action of the State Bar Council that was put in issue by the petitioner by filing writ petition.

3. The State Bar Council responded to the writ petition by filing counter affidavit and explained the circumstances under which the services of the petitioner were brought to an end. The State Bar Council justified its action in the light of the statutory provisions contained in the Advocates Act, 1961 (for short, ''Act, 1961'') and the Bar Council of Bihar Rules, 1962 (for short, ''Rules, 1962'').

4. The Single Judge heard counsel for the parties and was persuaded to hold that the action of the State Bar Council in removing the petitioner from service was unjustified. The Single Judge held that the Executive Committee was competent to appoint Secretary as per Bar Council of Bihar Rules and that the petitioner having been appointed as Secretary after following the procedure, it could not have been set at naught by the State Bar Council in an arbitrary manner. The Single Judge held that they permitted the petitioner to work as Secretary for the period November, 2003 till 4th January, 2004 and, therefore, the State Bar Council could not unceremoniously dump the petitioner and ask some body else, a chosen person of the members of the Bar Council, and not a selectee, to discharge the duties of the Secretary to the Bar Council. Having held so, the Single Judge by his order dated 27th March, 2006 set aside the order (Reference No. 14 of 2004 dated 5th January, 2004) removing the petitioner from the post of Secretary, State Bar Council.

5. The State Bar Council has come up in appeal aggrieved by this order of the Single Judge.

6. A brief survey of statutory provisions (Act, 1961 and Rules, 1962) may appropriately help in considering the controversy raised in the appeal.

7. The State Bar Council is a statutory body constituted u/s 3 of the Act, 1961. It, inter-alia, provides that there shall be a Bar Council for the State of Bihar. Section 5 provides that the Bar Council has perpetual succession and a common seal. The functions of the State Bar Council are provided in section 6 of the Act. Section 11 which has direct bearing in the case may be reproduced by us. It reads thus :

"(1) Every Bar Council shall appoint a Secretary and may appoint an accountant and such number of other persons on its staff as it may deem necessary.

(2) The Secretary and the accountant, if any, shall possess such qualifications as may be prescribed."

8. The Rules, 1962 are the rules framed under the Act, 1961. Chapter IX thereof deals with Committees. Rule 1 of Chapter IX speaks of various committees for carrying out the provisions of the Advocates Act; Executive Committee is one of such committees of the State Bar Council. The Executive Committee is the Chief Executive Body of the Bar Council. Its powers and duties are provided in Rule 14 of Chapter IX. Clause (v) of Rule 14 (Chapter IX) is as follows :

"To appoint officers and staff of the Bar Council, define their duties and powers and determine all matters concerning their employment provided that the Chairman may take temporary appointments for a period up to one month."

9. We may also notice here Rule 2 of Chapter IX as well which provides thus:

"The Committees shall exercise, subject to the general control and supervision by the Bar Council, the powers, duties and functions conferred or imposed upon or assigned to each of them by the Act, and these rules and other rules made under the Act and by directions or resolutions of the Bar Council."

10. Rule 13 of Chapter IX is as follows:

"The proceeding of the committees shall be placed before the Bar Council."

11. The appointment of Secretary of a State Bar Council is mandatory. This is indicative from the use of word "shall" in Section 11 of the Act, 1961 that reads, ''every Bar Council shall appoint a Secretary''. Under the Rules, 1962 the Executive Committee being the chief executive body has been empowered to appoint Officers and staff of the Bar Council. This means that the Executive Committee has been empowered to appoint Secretary of the State Bar Council. There appears to be no doubt about it. It is not necessary to go into the process followed for selection and appointment of the Secretary; suffice it to say that the Executive Committee after calling the applications from qualified candidates for appointment to the post of Secretary and after holding written examination and Viva-voce, the appointment letter was issued to the petitioner on 29th October, 2003 appointing him to the post of Secretary and he was asked to join his duties on 1st November, 2003 and, in fact, he joined his duty on 1st November, 2003 and took charge. The first General Body meeting of the State Bar Council

thereafter was fixed on 16th November, 2003. In the agenda of that meeting circulated on 11th November, 2003, one of the subjects placed before the State Bar Council was concerning the appointment of the petitioner to the post of Secretary. From the counter affidavit filed by the State Bar Council, which we have no justifiable reason to disbelieve, it transpires that on 16th November, 2003 the subject concerning the appointment of the petitioner was deferred to the next meeting i.e. 7th December, 2003. The meeting of on 7th December, 2003 was also adjourned. The next meeting was fixed for 4th January, 2004. On 4th January, 2004 the subject concerning appointment of the petitioner as Secretary, State Bar Council was considered and disapproved. Resolution No. 1/2004 passed by the Bar Council on 4 January, 2004 which has been reproduced by the State Bar Council in its counter affidavit, reads thus:

"Took up item No. 1 of the agenda. The Council disapproves the appointment of the Secretary and Accountant of Bihar State Bar Council namely Shri Ashok Kumar Singh and Shri Sushil Kumar Singh respectively with immediate effect. Shri Ashok Kumar Assistant and a law graduate of the Bihar State Bar Council is authorized to work as officiating Secretary in his own pay scale and Shri Lala Krishna Murari Prasad, retired Accountant of Bihar State Bar Council is appointed on contract basis for a period of three months as Accountant of Bihar State Bar Council. He will get his pay per month as he has drawn in the month in which he retired. All accounts of the Bar Council and others shall be operated now by the Chairman alongwith officiating Secretary, Shri Ashok Kumar."

12. Pursuant to the aforesaid resolution, the officiating Secretary sent a letter to the petitioner on 5th January, 2004 which reads thus :

"To,

Shri Ashok Kumar Singh, S/o Shri Deomuni Singh, C/o Baban Singh (Advocate), Maulabagh, Mahabir Asthan, Ara (Bhojpur), Bihar

Sir,

I have to inform you that the General Body of Bihar State Bar Council in its meeting dated 4.1.2004 has disapproved your appointment on the post of Secretary. Therefore, you are removed from the post of Secretary with immediate effect. You are directed to hand over the charge of the post of Secretary to Shri Ashok Kumar.

Yours faithfully,

Sd/- Off. Secretary Bihar State Bar Council"

13. It may be noticed here that by another letter dated 5th January, 2004, the petitioner was communicated about correction in the appointment letter dated 29th October, 2003.

14. The question that falls for consideration is whether the Single Judge was justified in quashing the communication dated 5th January, 2004 sent to the

petitioner by the State Bar Council bringing to an end of his services as its Secretary,

15. We have already indicated the statutory provisions relating to the appointment of the Staff in the State Bar Council including the appointment of Secretary. That the Executive Committee is empowered to appoint staff of the Bar Council including Secretary is again not a matter of debate. The question is: is it open to the State Bar Council to undo the appointment so made by the Executive Committee, although the Executive Committee is empowered to make such appointment. Rules 2 and 13 (Chapter IX) of the Rules, 1962 have some significance. All Committees which are referred to in rule 1 including the Executive Committee (the power of disciplinary committee being different as would be seen in Rule 13(A) of Chapter IX) are mandated to exercise their powers, duties and functions subject to the general control and supervision by the State Bar Council. The expression "subject to" is an expression to introduce a ''condition'' or to provide" for a ''proviso''. Yet another expression, "general control and supervision" refers to some administrative control by the apex body, namely, General Body of the State Bar Council over the Committees. In other words, Rule 2 works as a proviso to Rule 1. The rule makers while framing rules in Chapter IX were conscious of the fact that for carrying out the objectives of the Act, 1961, a larger body may not be required to do all acts and that smaller bodies may exercise powers, functions and duties of the State Bar Council. However, such exercise of power or discharge of duties assigned to them have been made subject to general control and supervision of the apex body i.e. State Bar Council. It is for this reason that rule 13 of Chapter IX provides that the proceeding of the committee shall be placed before the Bar Council with an exception which is made in Rule 13(A) that Rules 1 to 13 of Chapter IX are not applicable to the disciplinary committee. The placing of the subject before the General Body of the State Bar Council on 16th November, 2003 has to be seen in that perspective as the decision taken by the executive committee in appointing the petitioner as Secretary has to be placed and was, in fact, placed before the General Body of the State Bar Council on 16th November, 2003. Merely because on 16th November, 2003, no firm decision was taken on the subject and it was deferred to 7th December, 2003 and on 7th December, 2003 when the meeting did not take place, it was deferred to 4th January, 2004, it cannot be said that the State Bar Council re-opened the issue concerning appointment of the petitioner which had attained finality. When the subject concerning the appointment of the petitioner was discussed on 4th January, 2004 and decision was taken, it was a continuation of the subject which was placed for consideration before the General Body of the State Bar Council on 16th November, 2003. The question is not whether the appointment of the petitioner suffered from any irregularity or any illegality, but the question is whether the Bar Council committed any illegality in upturning the decision of the Executive Committee in appointing the petitioner as Secretary. Dr. S. N. Jha, Senior counsel for the petitioner strenuously urged that the Executive Committee in appointing

the petitioner as the Secretary of the Bihar Bar Council acted as a delegatee of the State Bar Council and once the delegatee (Executive Committee) exercised its power assigned to it, the State Bar Council could not have upturned the decision of the Executive Committee as its authority got exhausted by the exercise of power by the Committee. We are afraid, the argument of Dr. S.N Jha overlooks Rules 2 and 13 of Chapter IX which makes the decision taken by the Executive Committee subject to general control and supervision of the State Bar Council. It is not a simple case where the power given to the delegatee got exhausted. It is a case where the very exercise of power by the delegatee was subject to the control and supervision of the delegator (State Bar Council) and in its exercise of control and supervision the State Bar Council disapproved the appointment of the petitioner as Secretary of the State Bar Council.

16. We may at this stage refer to the decisions cited by Dr. S.N Jha, senior counsel for the petitioner. In Bombay Municipal Corporation Vs. Dhondu Narayan Chowdhary, , the question for consideration before the Supreme Court was whether the delegation by the Commissioner, Municipal Corporation of his functions u/s 105B to 105E to certain officers of the Corporation was valid and proper. The Supreme Court referred to Section 68 of the Bombay Municipal Corporation Act, 1888, which provided that the Municipal officers may be empowered to exercise certain powers of the Commissioner and also sections 105B, 105C, 105D and 105E. Sections 68, 105B, 105C, 105D and 105E of the Bombay Municipal Corporation considered by the Supreme Court in paragraph 2 of the report read thus:

"(2) The Bombay Municipal Corporation Act is an Act of 1888 and it has been amended frequently. Section 68 is one of the original Sections and it provides as follows:

"68. Municipal officers may be empowered to exercise certain of the powers, etc. of the Commissioner.

(1) Any of the powers, duties or functions conferred or imposed upon or vested in the Commissioner by any of the sections, sub-sections or clauses mentioned in sub-section (2) may be exercised, performed or discharged, under the Commissioner''s control and subject to his revision and to such conditions and limitations, if any, as he shall think fit to prescribe, by any municipal officer whom the Commissioner generally or specially either by name or by virtue of office, empowers in writing in this behalf: and in each of the said sections, sub-sections and clauses the word "Commissioner" shall, to the extent to which any municipal officer is so empowered, be deemed to include such officer.

(2) The sections, sub-sections and clauses of this Act referred to in subsection (1) are the following namely:-

Section 105B. Section 105C. Section 105D. Section 105E.

A reference to Ss. 105B, 105C, 105D and 105E was inserted by the Maharashtra

Act XIV of 1961. These sections are in Chapter 6A which was also newly added by the same Act. It is not necessary to refer to these sections, except a portion from S. 105B which brings into prominence the action taken by the Corporation against the respondents:

"105B. Power to evict person from Corporation premises.

(1) Where the Commissioner is satisfied-

(a) that the person authorized to occupy any Corporation premises has, whether before or after the commencement of the Bombay Municipal Corporation (Amendment) Act, 1960,-

* * * *

(i)

(ii) sub-let, contrary to the terms or conditions of his occupation, the whole or any part of such premises;

* * * *"

* * * *

the Commissioner may nothwithstanding anything contained in any law for the time being in force, by notice * * * * order that the person as well as any other person who may be in occupation of the whole or any part of the premises, shall vacate them within one month of the date of the service of the notice."

It will be noticed that S. 68 was originally intended to cover very different matters because Chapter 6A could not have been in contemplation. When Chapter 6A was added and a reference to Ss. 105B to 105E was included in S. 68, the wording of that section became applicable to the powers exercisable under Ss. 105B to 105E, even though that wording, taking literally, is somewhat inapt to cover delegation of judicial power."

17. In view of the statutory provisions of the Bombay Municipal Corporation, the Supreme Court considered the matter in paragraph 3 of the report, which is as follows:-

(3) No question has been raised that any of the amendments is ultra vires so the words of S. 68 must be reasonably construed. It goes without saying that judicial power cannot ordinarily be delegated unless the law expressly or by clear implication permits it. In the present case the amendment of S. 68 by inclusion of delegation of the functions of the Commissioner under Ss 105B to 105E does indicate the intention that the judicial or quasi-judicial powers contained in Chapter VIA were expressly intended to be delegated. To the delegation as such there can be no objection. What is objected to is the provision, both in the section as well as in the order of delegation, that the exercise of the function is to be under "the Commissioner''s control" and "subject to his revision". These words are really appropriate to a delegation of administrative functions where

the control may be deeper than in judicial matters. In respect of judicial or quasi-judicial functions these words cannot of course bear the meaning which they bear in the delegation of administrative functions. When the Commissioner stated that his functions were delegated subject to his control and revision it did not mean that he reserved to himself the right to intervene to impose his own decision upon his delegate. What those words meant was that the Commissioner could control the exercise administratively as to the kinds of cases in which the delegate could take action or the period or time during which the power might be exercised and so on and so forth. In other words, the administrative side of the delegate''s duties was to be the subject of control and revision but not the essential power to decide whether to take action or not in a particular case. This is also the intention of S. 68 as interpreted in the context of the several delegated powers. This is apparent from the fact that the order of the delegate amounts to an order by the Commissioner and is appealable as such. If it were not so the appeal to the Bombay City Civil Court would be incompetent and the order could not be assailed. The order of the delegate was the order of the Commissioner and the control envisaged both in S. 68 and the order of delegation was not control over the decision as such but over the administrative aspects of cases and their disposal. No allegation has been made that the Commissioner intervened in the decision of the case or improperly influenced it. In these circumstances, the order impugned in the appeal cannot be sustained."

18. It would be, thus, seen that the issue before the Supreme Court related to the exercise of the quasi judicial power and in this background, it was held that once the quasi judicial power of the Commissoner delegated to the Municipal Officer was exercised by the delegatee, the exercise of that power by the delegatee would amount to an order of Commissioner and the Commissioner could not exercise further quasi judicial power. Such order was appealable to the Bombay City Civil Court. We are afraid, the decision of the Supreme Court in the case of Bombay Municipal Corporation has no application to the present fact-situation.

19. In OCL India Ltd. Vs. State of Orissa and Others, , the question that arose for consideration before the Supreme Court was whether after the Assistant Commissioner, as a delegatee of the power of the Commissioner, Sales Tax u/s 23(4)(a) of the Orissa Sales Tax Act, 1947 read with Rule 80 of the Orissa Sales Tax Rules, 1947 has exercised revisional jurisdiction in respect of an order of the Sales Tax Officer, the Commissioner can exercise the power under the said provision to revise the same order over again. Dealing with the said question the Supreme Court held thus:-

"Thus, it is clear that the power conferred on the Assistant Commissioner was under clause (a) of subsection (4) of Section 23 of the Act read with Rule 80 of the Rules. The Commissioner has revisional power to call for the records and revise the orders not only of the Sales Tax Officer but also of the Assistant Commissioner, Additional Commissioner and Special Additional Commissioner;

the power that was delegated to the Assistant Commissioner was confined to the orders passed by the Sales Tax Officers. In the result the Commissioner retained his power to revise the orders passed by the Assistant Commissioner, Additional Commissioner and Special Additional Commissioner. However, in regard to the orders passed by the Sales Tax Officer, after the delegation, the Assistant Commissioner was competent to revise and, in fact, he did exercise the power to revise the order of the Sales Tax Officer, after issuing a show-cause notice dated 13.12.1995. If that be so, the power of the Commissioner (the delegator) under the aforequoted provisions has been exhausted by the Assistant Commissioner and the Commissioner cannot, in law, exercise the delegated power over again."

20. In the case of OCL India Limited, the issue again related to exercise of quasi judicial power by the delegatee in the light of the provisions contained in Section 23(4)(a) of the Orissa Sales Tax Act, 1947 and Rule 80 of the Orissa Sales Tax Rules, 1947. It was held that the revisional power of the Commissioner having been exercised by the Assistant Commissioner the said power got exhausted and the Commissioner cannot exercise the delegated power again. This decision too, in our opinion, has no application to the present fact-situation. The Executive Committee in appointing the petitioner as secretary has not exercised quasi judicial power; it simply exercised administrative power for which an authority has been given to it but that authority is subject to general control and supervision of the State Bar Council, and, therefore, it cannot be said that upon exercise of authority by the Executive Committee even the general power of supervision and control retained by the Bar Council got exhausted.

21. The Single Judge, as a matter of fact, did not advert to the relevant provisions of Rule 1962 and, thus, affecting the consideration of the matter. We hold, as we must, in the backdrop of the aforesaid provisions contained in Rules 1962, that no illegality was committed by the State Bar Council in disapproving the appointment of the petitioner which power they did possess and thereby upsetting the decision of the Executive Committee.

22. In what we have discussed above, by no stretch of imagination, can it be said that the communication dated 5th January, 2004 bringing an end to the services of the petitioner as Secretary, State Bar Council was stigmatic or needed any enquiry to be held.

23. Dr. S.N.Jha, senior counsel for the petitioner, however, relied upon Rules 6, 7, 8 and 9 (Chapter XI) of the Rules, 1962, which read thus:-

"6. The services of any employee may be terminated on one month''s notice or in lieu thereof one month''s salary if his work is found to be unsatisfactory while he is still on probation.

7. On completion of the term of probation, the records of the work of the employee concerned shall be considered and he will be confirmed in the post he is holding if his work is found to be satisfactory. In the event of the work of the employee concerned being found unsatisfactory, his services shall be terminated

by either one month''s notice or in lieu thereof one month''s salary.

8. The service of any employee who has been employed temporarily either to a permanent post or to a temporary post shall be terminated either:-

(a) on the expiry of the period for which he had been so employed, or

(b) at any earlier time on one month''s notice or in lieu thereof payment of one month''s salary.

7. The employee who has been confirmed in a permanent post shall not be terminated except under the following circumstances -

(i) by resignation of the employee concerned on the expiry of a period of one month or on refund of one month''s salary by the officer or servant concerned in lieu thereof if he is not permitted to do;

(ii) by abolition of the post;

(iii) on being removed as a result of recommendation made by a committee of the Bar Council and accepted by the Bar Council that the officer or the servant concerned, as the case may be, has been

(a) either guilty of insubordination, or misdemeanour, or gross negligence, or misconduct, or inefficiency, or

(b) found physically or mentally incapacitated to perform his duties

In all such cases the employee shall be called upon to explain in writing the charges levelled against him and shall be heard in respect thereof by the Committee and the Committee may examine witnesses, if any, and consider all other relevant records, documents and matter pertinent to the charges. The Bar Council may suspend the employee against whom charge has been levelled under sub-clause (a) to sub rule (iii) to Rule 9 of this Chapter till such time as the proceeding against him is concluded."

24. The Senior counsel would submit that in whatever manner the appointment of the petitioner was on permanent basis and, therefore, at least one month''s notice or in lieu thereof one month''s salary was required to be given. According to the senior counsel if a provision is made for a particular act to be done in a particular manner, it should be done in that manner alone or not at all.

25. There cannot be any dispute about the well accepted position in law that if a provision is made for an act to be done in a particular manner, it should be done in that manner alone or not at all. But in the present case the question before us is whether the termination of the petitioner from the post of Secretary, State Bar Council was to be preceded by one month''s notice or one month''s salary in lieu thereof. We do not think so as the very appointment given by the executive committee to the petitioner has been disapproved by the general body of the Bar Counsel. The petitioner''s appointment, as a matter of fact, never took final shape. Once the State Bar Council disapproved his appointment, which it was

competent to do, and he was informed about that, his employment came to an end. In the present case, none of the afore-referred rules have any application and, therefore, in the peculiar facts and circumstances it cannot be said that one month''s notice or salary in lieu thereof was necessary for valid termination of the petitioner''s services.

26. Even if we assume that one month''s notice and salary in lieu thereof was prerequisite for valid termination of the petitioner''s service and that was not done, obviously, the result would be that the petitioner''s termination would be rendered bad in law. What should then be the consequential order. The fact of the matter is that the petitioner before he joined the post of Secretary of the State Bar Council was already enrolled as an Advocate by the State Bar Council. After his termination, he has got his roll revived on 26th May, 2005 and started practicing law. In this backdrop and in view of the fact that his appointment has not been approved by the apex body (general body of the State Bar Council), reinstatement of the petitioner as Secretary of the Bar Council of Bihar would not be proper, rather interest of justice would be sub-served if he is paid his salary and wages upto the period 26th May, 2005 when he resumed practice. We are informed by Mr. Tara Kant Jha, senior counsel for the State Bar Council that, in fact, the petitioner has been paid his salary and allowances upto 26th May, 2005. He assures us that the amount so paid shall not be recovered from the petitioner. Consequently, Letters Patent Appeal is allowed and the judgment and order dated 27th March, 2006 passed by the Single Judge is quashed and set aside. However, as assured by the senior counsel for the State Bar Council that the amount paid to the petitioner towards his salary and allowances up to 26th May, 2005 shall not be recovered from the petitioner. We order accordingly. The appellant is the State Bar Council and the respondent is now practicing Advocate and, therefore, we observe that the parties shall bear their expensae litis,