
(1999) 07 PAT CK 0023
In the Patna High Court
Case No : C.W.J.C. 8203 of 1993

Tulsi Das Goshwami

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 21-07-1999

Acts Referred:

Bihar Hindu Religious Trusts Act, 1950 — Section 26, 83, 83(2), 83(3)

Citation : (1999) 3 PLJR 446

Hon'ble Judges : A.K. Ganguly, J

Bench : Single Bench

Advocate : Y.V. Giri and M.N. Parbat, for the Appellant; S.N. Jha and S.C. Jha, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Ganguly, J.—In this writ petition the Petitioner has challenged the abolition of the post of Law Officer of the Bihar State Board of Religious Trust (hereinafter called the said Board) under the following circumstances.

2. The Petitioner was initially appointed a Legal Assistant in the service of the said Board in the year 1973. The Petitioner's case is that at the relevant point of time there were two posts in the legal department of the said Board, namely, the Law Agent and the Law Officer and the post of the Law Officer was created by a resolution of the Board of Directors in its meeting dated 29.11.1971. Further case of the Petitioner is that the appointment to the post of Law Officer was to be made by way of promotion from amongst the employees of the said Board who must have the minimum qualification of being a law graduate. The Petitioner's further case is that he was made Incharge of the Legal section-cum-Law Officer on 31.3.1990 and since then he worked on the said post till 1.5.1991 and the Petitioner's positive assertion is that there is no complaint against his performance and without any complaint the Petitioner was moved from the post in question on 2.5.1991 and the said post was filled by one Kedarpati Pandey, who was appointed as the Law Section Incharge of the said Board on ad hoc

basis and against such filling up of the said post the Petitioner made representation to the authorities of the Board but as no step was taken on the Petitioner's representation, he filed a writ petition before this Court which was numbered as C.W.J.C. No. 3763 of 1991. The said writ petition came up for hearing before a Division Bench of this Court and the learned Judges of the Division Bench disposed of the said writ petition. While disposing of the said writ petition the learned Judges of the Division Bench noted the case of the Petitioner but the Court came to the finding that the Petitioner was substantively holding the post of Law Agent and it was also made clear that he was only made Law Officer on an officiating capacity and no procedure for promotion to the post of Law Officer was followed while appointing the Petitioner as Law Officer on an officiating capacity. The learned Judges of the Division Bench were also pleased to hold that while on an officiating capacity the Petitioner has right to hold the said post and the order by which he was relieved from the officiating capacity was not by way of punishment as the officiating post did not confer on the Petitioner any right to continue on the post of the Law Officer. Therefore, the learned Judges of the Division Bench did not find any illegality in the said order nor the learned Judges found any illegality in the promotion of one Sri Kedarpati Pandey.

3. However the learned Judges of the Division Bench disposed of the said writ petition with the following direction:

Accordingly, we direct the Board to fill up the post of Law Officer within a period of four months from today in accordance with the decision of the Board, as contained in Annexure-1. It goes without saying that the case of the Petitioner and other eligible persons shall be considered while deciding the question of promotion.

4. Pursuant to the said judgment the Petitioner filed a representation for taking action in terms of the said judgment. The Petitioner's case is that the Respondent Board did not pay any need to the Petitioner's representation. The Petitioner's further case is that on 3.10.1992 the President of the said Board (Respondent No. 4) issued a letter to the Secretary of the Law Department, Government of Bihar, Patna and asked for certain guidelines for considering the case of promotion on the post of the Law Officer of the Board in question. It was also mentioned in the said letter that as there was a ban on the promotion of the employees of the Board, the case of promotion to the post of Law Officer could not be considered. Further case of the Petitioner is that when the time granted by the Division Bench of this Court in C.W.J.C. No. 3763 of 1991 for consideration of the Petitioner's case was about to expire, an application was filed by the said Board for extension of time for a period of two months. The Petitioner has further enclosed document to show that the Administrative Department in the Government of Bihar has directed consideration of the case of the Petitioner for promotion to the post of Law Officer but not in respect of other promotion. But the Petitioner's grievances are that even then the matter was not

considered by the Respondent Board. Ultimately the Petitioner filed a contempt application before this Court wide M.J.C. No. 1831 of 1992. The Petitioner's further case is that after the contempt petition was filed, a decision was taken to abolish the said post of Law Officer of the Board and a notification to that effect was published in the Bihar Gazette on 18th January, 1993. The Petitioner is aggrieved by this notification.

5. Learned Counsel for the Petitioner has challenged the said notification, inter alia, on the following grounds:

(i) The said notification cannot be issued without framing bye-laws u/s 83(2)(j) of the Bihar Hindu Religious Trust Act, 1950 (hereinafter called the said Act).

(ii) Even if such bye-laws have been framed, the same cannot be pressed into service unless they are approved and confirmed by the State Government.

(iii) Such abolition of post is malafide.

(iv) Such order for abolition of post has been made by the Administrator of the said Board whose appointment has been challenged in a different proceeding and a Division Bench of this Court has held that the appointment of the Administrator is bad and all orders passed by him are also bad.

6. Learned Counsel appearing for the Respondent Board has controverted all the aforesaid submissions. His case was that the Petitioner was appointed as a Law Agent and he was never appointed as a Law Officer on permanent basis. His submission is that the Division Bench of this Court merely directed a consideration of the Petitioner's case and pursuant to such direction, the Petitioner's case was considered and it was found that the Petitioner was working on the post of Law Agent and from the post of Law Agent promotion to the post of Law Officer would amount to a case of jumping the grade and such promotion is not in accordance with the rules. In support of this contention learned Counsel for the Respondent Board has referred to Annexure-C to the counter affidavit filed by the Board. Learned Counsel for the Board further submitted that the case of the Petitioner was considered for promotion and he was promoted to the post of Law Inspector. Learned Counsel further submitted that no case of malafide has been made out by the Petitioner and there is no malafide in abolition of the said post of Law Officer. With reference to the Division Bench judgment of this Court relating to powers of the Administrator to abolish the said post, the learned Counsel submitted that u/s 83(2)(j) of the said Act no bye-laws is required to be formulated for the said purpose and the Administrator is competent to abolish the said post in exercise of his powers u/s 26 of the said Act. Learned Counsel further pointed out that in the Division Bench Judgment in the case of Pitambar Thakur and Others Vs. The Bihar State Board and Others , the legality of the appointment of the Administrator of the said Board certainly came up for consideration but the said matter was challenged in a totally different context and has nothing to do with the facts of the instant case.

7. Judging the rival contentions of the parties, this Court is of the opinion that the decision for abolition of post can be challenged before a Court of Law on very limited grounds. It may be remembered here that in the instant case by abolition of post, the Petitioner has not lost his employment. The Petitioner's only grievance is that by abolition of the said post, the Petitioner's aspiration for promotion to the said post has come to an end. The main challenge to the said abolition of post is on the ground that without framing bye-laws u/s 83(2)(j) of the said Act and without getting such bye-laws approved by the State Government u/s 83(3) of the said Act, the abolition cannot be brought about.

8. This Court, with respect, cannot accept this contention advanced by the learned Counsel for the Petitioner. Section 83 of the said Act is an enabling provision empowering the Board to make bye-laws which will not be inconsistent with the Act and the Rules and which are meant for carrying into effect the object of the Act and Clause (i) of Section 83(2) of the said Act is as follows:

(i) the number, designation, grades, salaries, allowances and other conditions of service including the powers and duties of the officer and servant of the Board.

9. On an over all interpretation of Section 83(2)(j) of the said Act, this Court comes to the conclusion that the abolition of the post has nothing to do with the framing of such bye-laws. Reference in this connection may be made to the bye-laws prepared by the said Board in exercise of the power conferred u/s 83 of the said Act. Sub-clause (3) of Regulation 38 of the Religious Trusts Board's Bye-Laws (hereinafter called the said bye-laws), provides for the post of the Law Officer. Regulation 38 of the said bye-laws is also another enabling provision which permits the Board to appoint one person as the Law Officer in the pay scale of Rs. 1800-3300/ -. So far abolition of the said post is concerned, no further regulation is required to be made. In fact Section 26 of the said Act empowers the Board to determine from time to time the number, designation, grade and scale of pay and other condition of service of its Officers and servants. So in exercise of that power an order for abolition of post can be passed.

10. This Court is coming to this conclusion as it is well settled that the power to abolish a post is inherent in the authority which has created the post. The law on the subject has been very elaborately considered and succinctly put in a Full Bench judgment of Allahabad High Court in the case of State of Uttar Pradesh and Another Vs. Dr. Prem Behari Lal Saxena, . Speaking for the majority of the Full Bench, Hon''ble Mr. Justice R.S. Pathak, (as His Lordship then was) was pleased to observe as follows:

The power to create an office generally includes the power to modify or abolish it. The two powers have been described as essentially the same. These are principles well settled and are valid whether the question arises in India, the United kingdom or the United States or indeed wherever organized Government. recognizing the sovereignty of the State holds sway. The creation of a post and its abolition are essentially matters of administrative policy and expediency

related to the needs of governmental administration. They are matters which properly fall within the exclusive domain of State policy.

11. The learned Judge has further elaborated the principle by saying that the question of an individual aspiring for employment has nothing to do with either creation or abolition of such post. The exact observation made by the learned Judge is set out below:

The creation of a post is not to be decided by considerations personal to an individual aspiring to employment as a civil servant. So also, the question of abolishing a post falls to be decided by considerations of governmental need rather than the private interest of the incumbent in employment.

(Emphasis added)

12. To the same effect is the observation of the Hon'ble Supreme Court in the case of K. Rajendran and Others Vs. State of Tamil Nadu and Others, . Speaking for the Court, Justice E.S. Venkataramiah (as His Lordship then was) held that the power to abolish a civil post is inherent in the right to create it. The Government has always the power, subject, of course, to the constitutional provisions, to reorganise a department to provide efficiency and to bring about economy. It can abolish an office or post in good faith. The action to abolish a post should not be just a pretence taken to get rid of an inconvenient incumbent. The aforesaid observation has been made by His Lordship in paragraph 12 of the judgment in K. Rajendran (supra). Again in paragraph 32 of the said judgment, the learned Judge has quoted from another judgment of the Supreme Court in the case of State of Haryana Vs. Shri Des Raj Sangar and Another, . The relevant observation at paragraph 32 of the said report where excerpts from the case of Des Raj (supra) are quoted, are set out below:

Whether a post should be retained or abolished is essentially a matter for the Government to decide. As long as such decision of the Government is taken in good faith, the same cannot be set aside by the court. It is not open to the court to go behind the wisdom of the decision and substitute its own opinion for that of the Government on the point as to whether a post should or should not be abolished. The decision to abolish the post should, however, as already mentioned, be taken in good faith and be not used as a cloak or pretence to terminate the services of a person holding that post. in case it is found on consideration of the facts of a case that the abolition of the post was only a device to terminate the services of an employee, the abolition of the post would suffer from a serious infirmity and would be liable to be set aside.

(Emphasis added)

13. Here it is no body's case that the abolition of post was brought about to terminate the services of the Petitioner. In fact even after abolition of the post the Petitioner is still working as the Law Inspector of the said Board. Therefore, the impugned order of abolition was not an action taken with an idea to get rid of

the Petitioner.

14. In any event bad faith or malafide has not been pleaded anywhere in the writ petition. Although some vague allegations in paragraphs 23 and 24 of the writ petition have been levelled but those allegations do not amount to an allegation of bad faith. Apart from that those allegations have been controverted effectively in paragraph 18 of the counter affidavit filed by the Respondent Board. The only allegation of so called bad faith, as made out by the Petitioner, is that after the Petitioner filed a contempt proceeding the order of abolition of post was passed but in paragraph 18 of the counter affidavit it has been categorically stated that copy of M.J.C. i.e. contempt petition was served on the learned Counsel for the Respondent Board on 12.4.1993 and the present notification for abolition of the post was made on 7.1.1993 and the same was published in the Bihar Gazette on 18.1.1993. These facts are not effectively disputed by the writ Petitioner. Therefore, this Court does not find any bad faith on the part of the Board authorities in abolishing the said post of Law Officer which the Petitioner was not even holding at the relevant point of time.

15. It is well known that where malafide or bad faith is alleged, in that case the authority against whom such malafide or bad faith is alleged must be impleaded in his personal capacity. Here this has not been done. There is no allegation of malafide or bad faith against any individual.

16. As this Court has already held relying on the decision of the Supreme Court, that the power to abolish is inherent in the authority which has the power to create, it appears from Regulation 38 of the said Bye-laws that the Board has power to create such post of Law Officer and as such it has the power to abolish the said post under the provisions of the said Regulation which empowers the Board to create it. Therefore, the argument of the learned Counsel for the Petitioner that unless a new regulation u/s 83(2)(j) of the said Act is enacted the post cannot be abolished is not acceptable to this Court in view of the settled legal position discussed above.

17. Next comes the question of the authority of Respondent No. 3 to pass the impugned order. The impugned order was passed on 7.1.1993 and it appears from Annexure-E to the counter affidavit that Respondent No. 3 was appointed as an Administrator of the said Board by a notification dated 10.9.1992. It is, however, true that the said notification appointing the Respondent No. 3 as an Administrator of the said Board came up for challenge before this Court in a different context and a Division Bench of this Court quashed the said notification including the scheme prepared by the said Respondent. The said judgment was delivered on 24.5.1995. Much before the said judgment the impugned order of abolition of post was passed by the said Respondent. Therefore, the said order for abolition of the said post passed by the said Respondent is saved by the principle of de facto doctrine. In other words, just because the appointment of Respondent No. 3 was declared invalid by a Division Bench of this Court in the month of May, 1995, it cannot be said that on that ground an order of abolition

of the post in January 1993 becomes automatically invalid. In fact the said question of abolition of post was not at all an issue in the Division bench judgment in the case of Pitambar Thakur (supra).

18. Learned Counsel for the Petitioner has, however, relied on a decision of the Supreme Court in the case of State of Haryana and others Vs. Piara Singh and others etc. etc., . In that judgment also the Hon''ble Judge came to the conclusion that the creation and abolition of post is a matter of executive priority. Therefore, the said judgment is of no assistance to the contention of the learned Counsel for the Petitioner.

19. Having regard to the well settled principle that the Court can interfere with an order of abolition of post only when the Court is satisfied that such abolition is malafide and in bad faith and in order to get rid of the inconvenient incumbent, this Court finds that in the instant case none of the aforesaid grounds are present. No case of malafide or bad faith has been made out by the Petitioner and the Petitioner continues in service despite the abolition of the said post.

20. Therefore, judging from all angles this Court does not find any merit in this writ petition warranting interference with the impugned order. This writ petition is thus dismissed. There will be no order as to cost.