

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.4254 of 1999

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Devesh Nandan, Son of Sri Brahmachari Umakant Sharma @ Uma Kant Sharam,
resident of 5A, Noorani Bagh Colony, Tripolia, Patna-7, District-Patna.

.... **Petitioner/s**

Versus

1. The State of Bihar.
2. The Commissioner-cum-Secretary, Higher Education, Human Resources Department, Govt. of Bihar, Patna.
3. The Director, Higher Education, Human Resources Department, Govt. of Bihar, Patna.
4. The Chairman-cum-Secretary, Bihar Sanskrit Academy, Road No.22, Shri Krishna Nagar, Patna.

.... **Respondent/s**

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Appearance :

For the Petitioner/s : Mr. Amarendra Narayan, Advocate
Mr. Sitesh Chandra Mitra, Advocate
For the Respondent/State : Mr. Sudhir Kumar, Advocate (AC to AAG-2)

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

ORAL JUDGMENT

Date: 20-04-2015

Heard learned counsel for the petitioner and learned
counsel appearing on behalf of the State. No one appears
on behalf of the Bihar Sanskrit Academy, respondent no.
4.

2. By office order issued vide Memo No. 266 dated
11.08.1998, under the signature of Chairman-cum-
Director, Bihar Sanskrit Academy, Patna (**hereinafter**
referred to as the 'Academy'), the appointment of the
petitioner as Library Assistant has been terminated with
effect from initial date of his appointment, 29.12.1988, on

the ground that his very initial appointment having made against an unsanctioned post was illegal.

3. At the very outset, before referring to the facts of the case, I must mention that there is no dispute about the fact that the post, against which the petitioner was appointed on 29.12.1988 in the Academy, was not sanctioned. He received salary for nearly two years from the amount sanctioned for the post of Assistant Director as the said post was vacant. It is the petitioner's plea that he was rightly appointed as Library Assistant though the post was not sanctioned, invoking Rule 85 of the Bihar Financial Rules. The other contention is that in no circumstance, the order of termination can be given retrospective effect and the order impugned is bad at least to this extent.

4. From the facts narrated by the petitioner himself in the writ application, the Academy evolved a unique method of selection and appointment. The petitioner with qualification of Master of Arts (M.A.) was searching for a job and a notice was found published on the notice board of the Academy, pursuant to which the petitioner applied for the post of Library Assistant in the scale of Rs. 680-

965/-. He, thereafter, appeared for an interview on 15.12.1988 and was selected for appointment and the appointment letter was issued on 29.12.1988 under the signature of Chairman-cum-Secretary of the Academy on *ad hoc* and temporary basis till further order.

5. There was no post of Library Assistant sanctioned in the department. The petitioner is said to have continued thereafter and he was paid his salary and allowances up to November, 1990. However, the pay and allowances which were paid to the petitioner were drawn against the vacant sanctioned post of Assistant Director.

6. It appears from Annexure-5 series of the writ application that the Academy had been writing to the Director, Higher Education for creating a post of Library Assistant. In all such communications, it was mentioned that the petitioner was not getting salary because the post was not sanctioned. It was mentioned that the petitioner had been continuously working against unsanctioned post and was not getting his salary. It appears that way back on 12.10.1992; the Chairman-cum-Director of the Academy had issued a notice to the petitioner that his appointment having been made against post which was not

sanctioned, why his service should not be terminated with immediate effect. The petitioner had submitted his reply on 16.10.1992. For some reason or the other, the petitioner continued there till issuance of the impugned order dated 11.08.1998.

7. Learned counsel for the petitioner has submitted that though the notice dated 12.10.1992 was issued to him seeking his response as to why his service should not be terminated as his appointment was made against unsanctioned post, he was allowed to continue even thereafter and the Academy itself kept on corresponding with the Human Resources Development Department, Government of Bihar for creation and sanction of the post against which the petitioner was working. He has referred to several communications in this regard as contained in Annexure-5 to the writ application. Learned counsel for the petitioner has submitted that till date, the post of Assistant Director has been filled up and the petitioner would have been conveniently paid his salary, during which he was working as Library Assistant, in the same manner as he was paid his salary up to November, 1990.

8. Rule 85 of the Bihar Financial Rules reads as

follows:-

“85. The head of an office is not at liberty to re-adjust the pay of Government servants by giving one Government servant more and another less than the sanctioned pay of his post, nor may he distribute the pay of an absentee otherwise than as provided in the rules governing the service to which the Government servant belongs. But in the case of non-gazetted establishment divided into separate units or cadres carrying different scales of pay there is no objection to excess appointments made in a lower unit of cadre, against an equal or greater number of vacancies left unfilled in the higher.

9. I am not able to accept the submission made on behalf of the petitioner that he could have been appointed as Library Assistant since the post of Assistant Director in the Academy was vacant. Rule 85 of the Bihar Financial Rules will have no application in the facts and circumstances of the present case. In the present case, I find that it will create an anomalous situation if an appointment was allowed to be made on lower post of Library Assistant on the ground that the post of Assistant



Director is temporarily vacant. If such submission is to be accepted, the appointment of person on a lower grade will automatically come to an end, the moment appointment to the vacant posts in higher grade is made. This being an undisputed fact that the petitioner was appointed against post which was not sanctioned, I am of the view that his initial engagement itself was wholly illegal and unjustifiable.

10. There cannot be any dispute over the proposition that an order of termination from service cannot have retrospective effect. But whether this principle has application in the present case, where the petitioner was admittedly appointed against unsanctioned post; is an issue which needs to be addressed. The petitioner did not get any salary after November, 1990. He knew it well that he was not getting his salary because he was working against a post, which was not sanctioned and no fund was being released for the payment of his salary. In the year 1992, the petitioner was given a notice, as to why his service could not be terminated, as his very initial appointment was made against a post which was not sanctioned. It is difficult to comprehend the circumstance



under which the respondents were taking work from him, if at all, and the petitioner was working there without raising any grievance against non-payment of his salary for years together. The respondent-Bihar Sanskrit Academy certainly comes within the meaning of Article 12 of the Constitution of India. Fairness in action is the least which is accepted from such body. This is astonishing to note that the petitioner did not approach any authority for payment of salary right from 1990 nor did he approach this Court for seeking any direction to this effect. Learned counsel for the petitioner, however, in this regard, has laid emphasis upon various communications made by the authorities of the State Government over creation of post against which the petitioner was working and, according to him, since the Academy itself was taking steps for creation of post and payment of salary, he did not take recourse to any legal remedy.

11. Such submission, for the purpose of grant of relief for payment of salary to the petitioner, right from year 1990 till the issuance of the impugned order dated 11.08.1998, does not convince me as claim for payment of salary partakes the nature of money claim and no direction

can be issued for such claim in a writ proceeding instituted in the year 1999.

12. At the same time, I do not find any logic for giving effect to the order terminating the services of the petitioner from retrospective date of his very initial appointment itself, particularly when the petitioner had worked and was paid salary from the date of appointment till November, 1990. The order dated 11.08.1998, is quashed, as it could not have been made effective from a retrospective date.

13. This application is disposed of, accordingly.

(Chakradhari Sharan Singh, J)

Praveen-II/-

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