

**IN THE HIGH COURT AT CALCUTTA
(Constitutional Writ Jurisdiction)**

APPELLATE SIDE

Present:

The Hon'ble Justice Krishna Rao

WPA 5278 of 2019

Dr. Latifa Sk.

Versus

The State of West Bengal & Ors.

Mr. Sandip Kumar Bhattacharyya

Ms. Mamata Khatun

Mr. Satyam Mukherjee

Ms. Sayani Ahmed

.....For the Petitioner

Mr. Swapan Kumar Datta

Ms. Debjani Mitra

.....For the State

Mr. Raghunath Chakraborty

Ms. Amrita De

.....For the Resp./Aliah University

Heard on : 25.02.2022

Judgment on : 10.03.2022

Krishna Rao, J.: The instant writ application is directed against the Resolution adopted by the Executive Council of the University on 11.04.2015, Resolution dt. 27.02.2016, Memo dt. 08.10.2015 and Memo dt. 03.03.2016 issued by the Registrar (Musajjil), Aliah University. The

petitioner was initially appointed as Lecturer (Civil Engineering) on temporary basis for a period of 11 months in the Aliah University on 04.09.2009. The petitioner had joined in the said post on 21.12.2009. Subsequently a fresh recruitment process was initiated for appointment to the Post of Lecturer which was re-designated as Assistant Professor on permanent basis and accordingly, the petitioner was selected and appointed as Assistant Professor in the said University on 29.10.2010.

The appointment of the petitioner was confirmed by the University on 03.07.2012 with effect from 01.11.2010. The petitioner had applied for maternity leave and accordingly, the University had granted maternity leave to the petitioner with effect from 02.01.2013 to 30.06.2013.

Even on expiry of maternity leave on 30.06.2013, the petitioner had not reported for duty. On 15.12.2013, the petitioner had made representation requesting for grant of child care leave for 18 months with effect from 11.07.2013.

On receipt of the representation dt. 15.12.2013, the same was placed in the University Council Meeting held on 11.04.2015. The decision of the meeting was communicated to the petitioner on 08.10.2015 by informing that the absence of the petitioner has been treated as unauthenticated and service of the petitioner is terminated w.e.f. 01.07.2013.

On receipt of the communication dt. 08.10.2015, the petitioner had again sent a representation to the Registrar of the University requesting for consideration of the entire period of her absence from 01.07.2013 as leave without pay and requested to allow her to join immediately. Similarly, the petitioner had made representation to the Vice-Chancellor on 13.11.2015.

On 13.12.2015, the petitioner had again made a representation to the Registrar of the University informing that she will not claim any salary for 30 months or extra ordinary leave/ leave without pay starting from 01.07.2013 up to 30.12.2015.

On receipt of the representations of the petitioner, the University has again considered the case of the petitioner and vide communication dt. 22.12.2015 informed the petitioner that the request of the petitioner will be placed before the Council Meeting of the University. In the mean time the petitioner had again made several representations and accordingly on 27.02.2016 the request of the petitioner was placed in the Executive Council Meeting and it was resolved that the service of the petitioner cannot be reinstated.

The Counsel for the petitioner submitted that the unauthorized leave of the petitioner is not wilful but for the circumstances beyond her control and due to which the petitioner could not able to join duty after completion of leave period as the petitioner is not from Kolkata and parents as well as her in-laws also not residing in Kolkata. It is further submitted that the husband of the petitioner went to abroad and was pursuing higher studies. He submitted that the petitioner had given birth to the second child and no one was with the petitioner to take care of two minor children of the petitioner.

The Counsel for the petitioner relied upon Clause 23 of Schedule of the Aliah University Act, 2007 which reads as follows:-

“23. Removal of Teachers:

(1) Where there is an allegation of misconduct against a teacher, the Shaikh-ul-Jamia (Vice-Chancellor) may, after an enquiry, by order in writing, place the teacher under suspension and shall forthwith report to the Majlis-i-Muntazimah (Executive Council) the circumstances in which the order was made:

Provided that the Majlis-i-Muntazimah (Executive Council) may, if it is of the opinion, that the circumstances of the case do not warrant the suspension of the teacher, revoke that order.

(2) Notwithstanding anything contained in the terms of his contract of service or of his appointment, the Majlis-i-Muntazimah (Executive Council) shall be entitled to remove a teacher after an enquiry on the ground of misconduct.

(3) Save as aforesaid, the Majlis-i-Muntazimah (Executive Council) shall not be entitled to remove a teacher except for good cause and after giving three months' notice in writing or payment of three months' salary in lieu of notice.

(4) No teacher shall be removed under clause(2) or under clause(3) until he has been given a reasonable opportunity of showing cause against action proposed to be taken in regard to him.

(5) The removal of a teacher shall require a two thirds majority of the members of the Majlis-i-Muntazimah (Executive Council) present and voting.

(6) The removal of a teacher shall effect from the date on which the order of removal is made:

Proved that where a teacher is under suspension at the time of his removal, the removal shall take effect on the date on which he was placed under suspension.

(7) Notwithstanding anything contained in these Statues, the employees of the University, being a teacher shall be entitled to resign:

(i) in case of the permanent teacher only after giving three months' notice in writing to the appointing authority or paying to the University three month's salary in lieu thereof.

(ii) in any other case, only after giving one month's notice in writing to the appointing authority or paying to the University one month's salary in lieu thereof."

The Counsel for the petitioner submitted that as per Clause 23 of schedule of the Aliah University Act, 2007 where there is an allegation of

misconduct against a teacher, an enquiry is to be conducted and without any enquiry no punishment can be awarded. The Counsel for the petitioner further submitted that in the said schedule, there is no provision of termination. There is only a provision of removal and the removal is to be effected from the date of order only but in the case of the petitioner, the respondents have terminated the service of the petitioner from the back date i.e. 01.07.2013 though the decision was taken on 11.04.2015. The Counsel for the petitioner further submitted that without giving any opportunity of hearing to the petitioner, the respondent authorities have terminated the service of the petitioner which violates the provisions of principle of natural justice and violation of Clause 23 of Schedule of University Act, 2007.

The Counsel for the petitioner relied upon Section 44 of the Aliah University Act, which reads as follows:-

“44. (1) The first Statues are those set out in the Schedule appended to this Act.

(2) The Majlis-i-Muntazimah (Executive Council) may, from time to time, make new or additional Statues referred to in sub-section (1):

Provided that the Majlis-i-Muntazimah (Executive Council) shall not make, amend, or repeal any Statue affecting the status, powers or constitution of any authority of the University until such authority has been given an opportunity of expressing an opinion in writing on the proposed changes, and opinion so expressed shall be considered by the Majlis-i-Muntazimah (Executive Council).

(3) The Majlis-i-Muntazimah (Executive Council) may of its own motion, and shall, when required by the Darbar-i-Aliah (Court), make a draft of any statue and submit the same to the Darbar-i-Aliah (Court). The draft so submitted shall be considered by the Darbar-i-Aliah (Court) at a meeting or meetings to be held within a period of six weeks from the date of such submission (hereinafter referred to as the said period), and the draft so submitted shall, unless rejected or amended by the Darbar-i-Aliah (Court) before the expiry of the said period by a majority of the total number of its members existing at that time, be deemed to have been passed by the Darbar-i-Aliah

(Court). If the Darbar-i-Aliah (Court) so rejects or amends the draft of any statue, it shall be sent back to the Majlis-i-Muntazimah (Executive Council) with views of the Darbar-i-Aliah (Court) for reconsideration. Thereupon, the Majlis-i-Muntazimah (Executive Council) shall reconsider the draft and resubmit it to the Darbar-i-Aliah (Court) with such changes, as it may deem necessary. On such resubmission of the draft, it shall again be considered by the Darbar-i-Aliah (Court) at a meeting or meetings to be held within a period of six weeks from the date of such submission (hereinafter referred to as the latter period) and the draft so resubmitted shall, unless rejected by the Darbar-i-Aliah (Court) before the expiry of the latter period by a majority of the total number of its members existing at the time, be deemed to have been passed by the Darbar-i-Aliah (Court) without any amendment as it may deem fit to make therein the latter period and by the same majority as aforesaid.

(4) A Statue, passed in the manner provided in sub-section (3), shall be presented to the Amir-i-Jamia (Chancellor).”

The Counsel for the petitioner submitted that as per Section 44 no enactment of new statue has been cited by the University in its Memo No. AU/REG/0694/15 dt. 08.10.2015 by not removing the service of the petitioner but terminated her service by giving retrospective effect.

The Counsel for the petitioner further submitted that on 29.02.2016, the University had published an advertisement for the post of Associate Professor with the education qualification of PhD degree with 1st Class at Bachelors or Master’s Degree level in the appropriate Branch of Engineering and Technology and experience of 8 years in teaching, research and/or at the level of Assistant Professor or equivalent Grade including the period spent on obtaining the research degree. It is further submitted that the petitioner had the requisite qualification being an Assistant Professor in Aliah University from 2010 to 2013, lecturer from 21.12.2009 for about 10 months, Assistant Professor, CSIR, New Delhi for 2 years and Aerospace Engineering (IIT Kharagpur) for 8 years but the respondents have not

considered the qualification of the petitioner for appointment as Associate Professor.

The Counsel for the petitioner further submitted that the termination of the petitioner is not within the four corners of the statue of the Aliah University Act, 2007 and continues denial to the petitioner to allow to join her service is in violation of natural justice.

The Counsel for the petitioner relied upon the judgment reported in 2012 (3) SCC 178 (Krushnakant B. Parmar –Vs- Union of India & Anr.).

“17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence cannot be held to be wilful. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a government servant.”

The Counsel for the petitioner relied upon the judgment reported in 1997 (1) SCC 99 (Bengal Waterproof Limited –Vs- Bombay Waterproof Manufacturing Company & Anr.)

Per contra, the Counsel for the respondents submitted that the petitioner went on maternity leave with effect from 02.01.2013 to 30.06.2013 and the petitioner was suppose to join her duty on 01.07.2013 i.e the day after the maternity leave was over or in the alternative, she had to apply for leave before completion of her maternity leave or to send any communication to that effect.

The Counsel for the respondents further submitted that the petitioner served in the University on permanent basis only for a period of 2 years 8

months including the period of her maternity leave which was less than the period of 3 years. The Counsel for the respondents further submitted that the petitioner had applied for maternity leave with effect from 02.01.2013 till 30.06.2013 but taking the advantage of the maternity leave had left for USA without any intimation/permission of the University. The Counsel for the respondents further submitted that the petitioner was in USA and had given birth of two children at USA but the same was not communicated by the petitioner to the authority. The Counsel for the respondents submitted that the petitioner has made her first representation on 15.12.2013 in which reads as follows:-

“Recently, I have been blessed with my first daughter for whom I have been availing the maternity leave from 02-01-2013 to 30-06-2013 (Memo: AU/REG/0946/12). But due to some unavoidable circumstances. I could not resume my duties immediately after the end of the aforementioned maternity leave.

I am not from Kolkata and my parents (and-in-laws) do not reside at Kolkata. Moreover, my husband went abroad (perusing a post doctoral research program through availing Extra Ordinary Leave from IIT kharagpur). It is also not possible for my parents/parent’s in-laws to stay with me to take of my daughter. It will be a heart breaking situation for me to keep my daughter in a day-care before at least one year.

With respect to my present situation, I would like to apply for child-care leave or leave of any kind (e.g., leave without pay) for 18 months beginning from July 1st, 2013 without which it is impossible to revive my career.

Therefore, I request you to kindly consider my situation sympathetically and grant me the aforementioned leave at the earliest.”

The Counsel for the respondents referring the representation submitted that the petitioner has suppressed the fact in the representation dt. 15.12.2013 that the petitioner had been to USA with her husband and

she had given birth of two child at USA in contrary the petitioner has submitted in her representation that she is not from Calcutta and her parent's in-laws do not reside at Kolkata and her husband went to abroad to pursue higher study and as such it was not possible for the petitioner to leave the children at day care at least for one year.

The Counsel for the respondents further submitted that from the said representation it reveals that the petitioner has suppressed the material fact which is grave misconduct. The Counsel for the respondent further submitted that after receipt of the representation, the University has considered the same in its meeting held on 11.04.2015 and found that the petitioner has suppressed the material fact by not mentioning about leaving India and going abroad and had not intimated to the University prior to living abroad and she was unauthorized absent from duty w.e.f. 01.07.2013 and accordingly, in the meeting, the service of the petitioner was terminated with effect from 01.07.2013.

The Counsel for the respondents further submitted that after the order of termination dt. 08.10.2015, the petitioner had again made a representation to the University and accordingly the University had again considered the representation of the petitioner in the Executive Meeting held on 27.02.2016 and it was decided that the service of the petitioner cannot be reinstated.

The Counsel for the respondents relied upon the judgment passed in the case of Union of India & Ors. -Vs- Tarsem Singh reported in 2008 (8) SCC 648 and the judgment passed in the case of Amrit Lal Berry -Vs- Collector of Central Excise, New Delhi & Ors. reported in 1975 (40) SCC

714. The Counsel for the respondents further submitted that the petitioner has not challenged the order of termination and as such the claim of the petitioner is barred by waiver, estoppel and acquiescence and submitted that repeated or delayed representation does not cure delay. Mere filing of repeated or delayed representation, the petitioner cannot get over the obstacles which delayed in appreciating the Court creates case equitable right of others have arisen.

The Counsel for the respondents further relied upon the judgment passed in the case of Atanu Chakraborty -Vs- High Court of Calcutta & Ors. reported in 2020 (2) CAL LT 434 (HC) and submitted that importance of approaching the Court without unreasonable delay for initiating a writ proceeding has been emphasized repeatedly in a large number of cases by the Hon'ble Supreme Court of India over all these years. It is further submitted that some cases, some marginal delay in approaching the Court has been condoned on a satisfactory explanation given by the petitioner but in the instant case there is no satisfactory and convincing explanation is available.

The Counsel for the respondents further relied upon the judgment passed in the case of Ramana Dayaram Shetty -Vs- The International Airport Authority of India & Ors. reported in AIR 1979 SC 1628 and submitted that there is equity for the vigilant and not for the dormant. The Respondents further submitted that petitioner kept on sending repeated representations based on the assumption and presumption but failed to join the University after the lapse of her period of leave and the petitioner was sleeping over her right knowing that 3rd party right has been created.

Considered the submissions made by the respective parties, documents available on record and the judgment relied by the parties.

The petitioner was granted maternity leave w.e.f. 02.01.2013 to 30.06.2013. On completion of the Maternity Leave, the petitioner did not join the service with effect from 01.07.2013. After the lapse of about 7 months the petitioner has submitted an application i.e. on 15.12.2013 requesting the authorities to grant Child Care Leave to the petitioner for 18 months with effect from 01.07.2013 (without pay).

After the request made by the petitioner, the petitioner has neither joined her duty nor had made any further request to the authorities to allow her to join duty. On receipt of the representation dt. 15.12.2013, the respondent authorities have placed the same in the Council Meeting held on 01.04.2015 and in the meeting the request of the petitioner was not accepted.

As per Rule 3 (4) of Schedule of Aliah University Act, 2007 the Musajjil (Registrar) shall have the power to take disciplinary action against such of the employees of the University, excluding teacher and academic staff, as may be specified in the orders of the Majlis-i-Muntazimah (Executive Council) and to suspend them pending enquiry, to administer warnings to them or to impose on them the penalty or censure or withholding of increment.

In the instant case, admittedly the competent authority has not invoked the power of disciplinary authority meaning thereby no disciplinary proceeding was initiated against the petitioner for her continuous absence from service.

Rule 23 of the Schedule of the Act provides for the removal of teacher and in the said provision it is mentioned that where is an allegation of misconduct against a teacher, Shayak-ul-Zamia (Vice Chancellor) may after an enquiry, by an order in writing, placed the teacher in suspension and she forthwith report Majlis-i-Muntazimah (Executive Council) the circumstances in the order was made. In the said provision it is categorically mentioned that the Executive Council shall not be entitled to remove a teacher except for good cause and after giving three months notice in writing or payment of three months' salary in lieu of notice and it is further mentioned that no teacher shall be removed under Clause 2 or in Clause 3 until he has been given a reasonable opportunity of showing cause against the action proposed to be taken. It is further mentioned that the removal of the teacher shall effect from the date on which the order of removal is made.

In the instant case admittedly the petitioner was working as permanent Assistant Professor and after the completion of the leave period, the petitioner failed to join her service. The respondents have neither issued any notice to the petitioner to showing cause as to why the service of the petitioner shall not be terminated/remove and after the period of about 2 years from the date of receipt of the application of the petitioner, the respondent have placed the grievance of the petitioner in their meeting held on 11.04.2015. The University have decided in the said meeting for termination of the service of the petitioner with effect from 01.07.2013 only on the reason that no kind of leave could be sanctioned and the absence of the petitioner is being treated as unauthenticated. The said Act of the authorities is in violation of the provision of schedule 23 of the Aliah

University Act, 2007, as before the order of termination neither any show cause notice was issued to the petitioner nor any opportunity of hearing was given to the petitioner. The judgment relied by the petitioner reported in 2012 (3) SCC 178 is squarely applicable in the case of the petitioner as the authorities have not adjudicated whether the unauthorized absence of the petitioner was willful or there is a different eventualities due to which the petitioner was absent from duty including the compelling circumstances beyond her control. The authorities failed to consider the representations submitted by the petitioner wherein the petitioner has categorically mentioned that she had given birth and neither the parents nor parent-in-laws are residing in Kolkata and as such nobody was there to look after the minor child of the petitioner. The order of termination was not on the ground that the petitioner left abroad without any intimation and suppressed the fact.

Considering the above facts and circumstances this Court of the view that the Act of the respondent authorities by terminating the service of the petitioner is in violation of the provision of Rule 23 of Schedule of the Act of 2007 as the respondents have neither given any opportunity of hearing nor have conducted any enquiry against the petitioner as provided under law.

In view of the above the order of termination passed by the respondents is liable to be set aside and accordingly set aside.

The respondent authorities are directed to reinstate the service of the petitioner within 4 weeks from the date of receipt of the copy of this order without any back wages. However, the authorities are at liberty to initiate

appropriate enquiry against the petitioner has provided under law, if the authorities intending to do so.

WPA No. 5278 of 2019 is thus **disposed of**.

Parties shall be entitled to act on the basis of a server copy of the Judgment and Order placed on the official website of the Court.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Krishna Rao, J.)