

IN THE HIGH COURT OF TELANGANA AT HYDERABAD

W.P. No. 23323 of 2017

Between:

Khaja Nizamuddin

... Petitioner

And

The Union of India and others

... Respondents

JUDGMENT PRONOUNCED ON: 01.11.2022

THE HON'BLE MRS JUSTICE SUREPALLI NANDA

1. Whether Reporters of Local newspapers : yes
may be allowed to see the Judgment?
2. Whether the copies of judgment may be
marked to Law Reporters/Journals? : yes
3. Whether Their Lordships wish to
see the fair copy of the Judgment? : yes

SUREPALLI NANDA, J

THE HON'BLE MRS JUSTICE SUREPALLI NANDA**W.P. No. 23323 of 2017**

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< Gist:

> Head Note:

! Counsel for the Petitioner : Mr K.Rama Subba Rao

^ Counsel for the Respondent No.1: Asst. Solicitor General

^ Counsel for the Respondent No.2: Mrs. Megha Rani Agarwal

^ Counsel for the Respondent No.3 : Sri Muddu Vijay

? Cases Referred:

(1998) 8 SCC 194,

(2007) 1 SCC 575,

1991 Supp(1) SCC page 600

(1985) 3 SCC 545,

THE HON'BLE MRS JUSTICE SUREPALLI NANDA**W.P. No. 23323 of 2017****ORDER:**

Heard Sri K.Rama Subba Rao, learned counsel for the petitioner, learned Assistant Solicitor General of India appearing for the 1st respondent, Mrs. Megha Rani Agarwal, learned Counsel appearing for respondent No.2 and Sri Muddu Vijay, learned counsel appearing for Respondent No.3.

2. This writ petition is filed to declare the order bearing No.F.59-2/2010(CU), dated April, 2017 of the 2nd respondent and proceedings bearing No.MANUU/ER-II/PF.501/2017-18/193, dated 23.05.2017 of the 3rd respondent as illegal, arbitrary and consequently direct the 2nd respondent to accord its approval for creation of posts of Drivers as proposed by the 3rd respondent by its letter bearing No. MANUU/PVCO/11/1561, dated 27.11.2014 and redirect the 3rd respondent to reinstate the petitioner into service as driver with all consequential benefits.

3. The 2nd and 3rd respondent filed their counter affidavits.

4. The petitioner also filed reply affidavit reiterating the contentions raised in the writ affidavit.

5. Main contentions put-forth by the Counsel for the Petitioner are as follows:

a) That there is no notice issued to the petitioner before terminating the services of the petitioner as Driver vide the impugned orders of the 3rd Respondent dated 23.05.2017.

b) That the 2nd Respondent has got nothing to do with the sanction of the posts except to discharge its functions as provided under Section 12 of the University Grants Commission Act, 1956.

c) That Statute 13(iii) of the Statutes of the 3rd Respondent confers power on the Executive Council of the 3rd Respondent to create administrative, ministerial and other necessary force and to make appointment thereto in the manner prescribed by the Ordinances and accordingly the Executive Council in its 47th Meeting held on 12.02.2014 had created 5 posts of Drivers against the requirement of 8 and accordingly issued Notification for filling up of the same.

d) That the letters dated 27.11.2014, 16.01.2017 and 14.02.2017 of the 3rd respondent addressed to the 2nd respondent categorically explained the need for creation of posts of drivers in the 3rd respondent University, the 2nd respondent however, did not consider the same.

e) That the 2nd respondent failed to give credence that the highest authority of the 3rd respondent University i.e., Executive Council initiated the creation of the posts and the 2nd respondent simply rejected the proposal of the 3rd respondent merely saying that the proposal of the University for creation of 5 posts of drivers is not agreed by the UGC. Therefore, it is clear non-application of mind by the 2nd respondent.

f) That the 3rd respondent ought not have notified the posts without obtaining prior approval from the 2nd respondent UGC.

g) The impugned order bearing No.F.59-2/2010(CU) of the 2nd respondent dated April, 2017 in rejecting the proposal of the 3rd respondent University for creating of 5 posts of Drivers on the pretext that it is not agreed by the UGC and further

treating the same as unapproved posts and also the expenditure incurred on the said posts as unapproved expenditure and further directing the 3rd Respondent to fix the responsibility and recover from the salary of the person responsible is highly illegal and is liable to be set aside.

h) That the consequential orders dated 23.05.2017 vide Proceedings bearing No. MANUU/ER-II/PF.501/2017-18/193, of the 3rd Respondent referring to the resolution of the Executive Council at its 61st Meeting held on 23.05.2017 in compliance to the directions of the 2nd Respondent vide its Letter bearing No.F.59-2/2010(CU) of the 2nd respondent dated April 2017 and further terminating the Petitioner with immediate effect without issuing notice to the Petitioner is illegal, arbitrary, and in clear violation of principles of natural justice and therefore that the writ petition should be allowed as prayed for.

6. Main contentions put-forth by the learned counsel for the 2nd respondent are as follows:

a) That five posts of drivers created by the Executive Council of the 3rd respondent University is without the

approval of the Finance Committee of the 3rd respondent University i.e., Maulana Azad National Urdu University.

b) That the creation of new posts require the approval of the UGC and further that MHRD vide its letter dt. 08.04.1998 (F/B) has clearly mentioned that no new posts/pay scales should be created or upgraded by the Universities themselves without the prior approval of MHRD/UGC.

c) That UGC vide its letter dt. 05.05.2008 addressed to all Central Universities, Deemed to be Universities and Delhi Colleges has informed that University must ensure that the University may not create any position or upgrade the existing positions to the higher level without the approval of UGC.

d) That UGC vide the impugned letter dated April 2018 very clearly mentioned that the 5 posts of the drivers created by the EC of the 3rd respondent University without the approval of MHRD/UGC will be treated as unapproved posts and the expenditure incurred on the above posts will be treated as unapproved expenditure and that therefore the Writ Petition needs to be dismissed in limini.

7. Main contentions put-forth by the learned counsel for the 3rd Respondent are as follows:

- a) That the Respondent No.3 vide its letter dt. 16.01.2017 addressed to the 2nd Respondent sought *ex post facto* approval of the decision of the Executive Council for creation of 5 posts of drivers. Subsequently, a reminder letter dated 14.02.2017 was also forwarded to the 2nd Respondent UGC.
- b) That the Executive Council of the 3rd respondent University in its 60th Meeting held on 18.03.2017 extended the probation of petitioner and 3 other drivers for a period of one year w.e.f. 09.03.2017 in order to maintain the *status-quo* and pending receipt of *Ex post facto* approval from the 2nd respondent UGC.
- c) That respondent No.2 vide its communication dated 04.05.2017 informed the 3rd respondent University that proposal of the University for creation of five posts of drivers was not agreed to and therefore, the five posts of the drivers created by the EC of the 3rd Respondent University without the approval of MHRD/UGC will be treated as unapproved posts and the expenditure incurred on the above posts will be

treated as unapproved expenditure and further the 2nd Respondent asked the 3rd respondent University to fix the responsibility and recovery may also be made from the salary of the person for taking illegal decision inspite of specific instructions issued by the 2nd Respondent in this regard and in response to the said communication of UGC dt. April 2017, the Executive Council of the 3rd respondent University vide their resolution dt. December 2014 resolved to terminate the services of the Petitioner herein along with 4 others who are continuing on probation with immediate effect.

d) That the Petitioner was only a probationer and had not been confirmed in the service and as such there is no legal or other infirmity in the decision of the University and therefore the writ petition needs to be dismissed.

RELEVANT LEGAL PROVISIONS :

8. Section 2(h) of the Maulana Azad National University Act, 1996 (No.2 of 1997) defines that employee means any person appointed by the University and includes teachers and other staff of the University.

9. As per Section 20(1) of the Maulana Azad National University Act, 1996 (No.2 of 1997) the Executive Council shall be the Principal Executive Body of the University.

10. Section 25 and relevant clauses of the Maulana Azad National University Act, 1996 (No.2 of 1997) reads as under:

Subject to the provisions of the Act the Statutes may provide for all or any of the following matters namely:-

Clause(d) :

the appointment of teachers and other academic staff and other employees of the University, their emoluments and other conditions of service.

Clause (f) :

the condition of service of the employees including provision for pension, insurance and provident fund, the manner of termination of service and disciplinary action.

11. Section 5 (xx) of the Maulana Azad National University Act, 1996 (No.2 of 1997) reads as under:

“to lay down conditions of service of all categories of employees including their code of conduct;

12. Statute 13 and relevant clauses of the Statutes of the University reads as under:

Statute 13:

Powers and Functions of the Executive Council.

Statue 13(1)

the Executive Council shall have the power of management and administration of the revenue and

property of the University and the conduct of all administrative affairs of the University not otherwise provided for.

Statute 13 (2)

subject to the provisions of this Act, the Statutes and the Ordinances, the Executive Council shall, in addition to all other powers vested in it, have the following powers, namely:-

Statute 13 (2)(i)

to create teaching and academic posts, to determine the number and emoluments of such posts and to define the duties and conditions of service of Professors, Readers, Lecturers and other academic staff and Principals of Institutions maintained by the University.

Statute 13(2)(iii)

to create administrative, ministerial and other necessary posts and to make appointments thereto in the manner prescribed by the Ordinances.

13. Statute 26 and relevant clauses reads as under:

Statute 26:

Removal of the Employees of the University :

Statute 26(2)

Notwithstanding anything contained in the terms of the contract of appointment or of any other terms and conditions of service of the employees, the Executive Council in respect of teachers and other academic staff, and the appointing authority, in respect of other employees, shall have the power to remove a teacher or a member of the academic staff or as the case may be, other employee on ground of misconduct.

Statute 26 (3)

Save as aforesaid, the Executive Council or as the case may be, the appointing authority, shall not be entitled to remove any teacher, member of the academic staff or other employee except for a good cause and after giving three months notice or on payment of three months salary in lieu thereof.

Statute 26 (4)

No teacher, member of the academic staff or other employee shall be removed under clause (2) or clause (3) unless he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

DISCUSSION & CONCLUSION :

14. A bare perusal of Statutes 26(3) and 26(4) of the Maulana Azad National University Act, 1996 (No.2 of 1997) (extracted above) clearly indicates that no employee can be removed unless he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. Employee is defined under the Act under 2(h) and Employee means any person appointed by the University and includes teachers and other staff of the University. Admittedly, in the present case no notice has been issued to the Petitioner prior to terminating the services of the petitioner vide the impugned order dated 23.05.2017 of the 3rd respondent herein.

15. A bare perusal of the Employment Notification No.33/2014, dated 27.10.2014 issued by the 3rd Respondent notifying five posts of drivers and a bare

perusal of the order of appointment dt. 05.03.2015 issued to the Petitioner by the 3rd Respondent vide No.MANUU/ER.II/F.165/ 2014-15/1819 clearly indicates that there is no mention nor any reference that the said appointments sought to be made and the appointment order issued to the Petitioner herein is subject to EX-POST FACTO approval of the University Grants Commission. Admittedly the Petitioner herein worked from 05.03.2015 to 23.05.2017.

16. A bare perusal of the contents of the 3 letters addressed by the 3rd Respondent herein dt. 27.11.2014, 16.01.2017 and 14.02.2017 to the Secretary, University Grants Commission, New Delhi, the 2nd Respondent herein clearly indicate that the 3rd Respondent categorically explained the need for creation of posts of drivers in the 3rd Respondent University and requested the 3rd Respondent to kindly accord ex-post facto approval.

17. Insofar as the power of the 3rd Respondent is concerned in appointing the Petitioner the same can be

traced to Section 5 Clause (xx), Sec.20(1), Sec. 25(d), Section 25 (f) of the Maulana Azad National University Act, 1966 (No.2 of 1997) (extracted above) and also to Statutes 13(iii) of the Statutes of the 3rd Respondent university which confers power on the Executive Council of the 3rd Respondent (extracted above) to create administrative, ministerial and other necessary force and to make appointment thereto in the manner prescribed by the Ordinances and accordingly the Executive Council in its 47th Meeting held on 12.02.2014 had created 5 posts of Drivers against the requirement of 8 and accordingly issued Notification for filling up of the same.

18. The Apex Court in its judgment reported in (1998) 8 SCC 194 in Basudeo Tiwary v. Sido Kanhu University and Others at paras 7, 9, 12 observed as follows :

Para 7 : Shri Akhilesh Kumar Pandey, learned counsel for the respondent submitted that the appointment made by the University was not at all proper inasmuch as the appellant should have been appointed to a post in the service of the University purely on temporary basis not exceeding a period of 6 months. Since the appellant had been appointed for a period longer than that it was not open to the University to do so without the express sanction of the Government. In this situation it was certainly open to the Vice Chancellor to

treat the appointment made as contrary to the provisions of the Act or statutes or rules or regulations or in any other manner irregular. If that was so, it was certainly not necessary for the University to have afforded an opportunity of being heard to the appellant. He relied upon Section 35(3) of the Act which was introduced into the enactment by an amendment made by [Bihar Act 17](#) of 1993 which came into effect from 22.8.93.

Para 9 : The law is settled that non-arbitrariness is an essential facet of [Article 14](#) pervading the entire realm of State action governed by [Article 14](#). It has come to be established, as a further corollary, that the audi alteram partem facet of natural justice is the antithesis of arbitrariness. In the sphere of public employment, it is well settled that any action taken by the employer against an employee must be fair, just and reasonable which are components of fair treatment. The conferment of absolute power to terminate the services of an employee is antithesis to fair, just and reasonable treatment. This aspect was exhaustively considered by a Constitution Bench of this Court in Delhi Transport Corporation vs. D.T.C. Mazdoor Congress reported in 1991 SUPP (1) SCC 600.

Para 12 : The said provision provides that an appointment could be terminated at any time without notice if the same had been made contrary to the provisions of the Act, statutes, rules or regulations or in any irregular or unauthorised manner. The condition precedent for exercise of this power is that an appointment had been made contrary to Act, Rules, Statutes and Regulations or otherwise. In order to arrive at a conclusion that an appointment is contrary to the provisions of the Act, statutes, rules or regulations etc. a finding has to be recorded and unless such a finding is recorded, the termination cannot be made but to arrive at such a conclusion necessarily an enquiry will have to be made as to whether such appointment was contrary to the provisions of the Act etc. If in a given case such exercise is absent, the condition precedent stands unfulfilled. To arrive at such a finding necessarily enquiry will have to be held and in holding such an enquiry the person whose appointment is under

enquiry will have to be issued a notice. If notice is not given to him then it is like playing Hamlet without the Prince of Denmark, that is, if the employee concerned whose rights are affected, is not given notice of such a proceeding and a conclusion is drawn in his absence, such a conclusion would not be just, fair or reasonable as noticed by this Court in D.T.C. Mazdoor Sabha's case. In such an event, we have to hold that in the provision there is an implied requirement of hearing for the purpose of arriving at a conclusion that an appointment had been made contrary to the Act, statute, rule or regulation etc. and it is only on such a conclusion being drawn, the services of the person could be terminated without further notice. That is how [Section 35\(3\)](#) in this case will have to be read.

19. In State of Madhya Pradesh & Others v. Lalit Kumar Verma (2007) 1 SCC 575 – the Apex Court observed as follows :

“12. The question which, thus, arises for consideration, would be : is there any distinction between ‘irregular appointment’ and ‘illegal appointment’? The distinction between the two terms is apparent. In the event the appointment is made in total disregard of the constitutional scheme as also the recruitment rules framed by the employer, which is ‘State’ within the meaning of Article 12 of the Constitution of India, the recruitment would be an illegal one; whereas there may be cases where, although, substantial compliance with the constitutional scheme as also the rules have been made, the appointment may be irregular in the sense that some provisions of some rules might not have been strictly adhered to.”

20. The Apex Court in its judgment reported in Olga Tellis & Others v. Bombay Municipal Corporation

reported in (1985) 3 SCC 545 at para 32 observed as under :

"32..... The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law. If the right to livelihood is not regarded as a part of the right to life. That, which alone makes its possible to live, leave aside what makes life liveable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life..."

21. A bare perusal of the material on record clearly indicates that the Petitioner faced the selection process and appeared before the Selection Committee Meeting held on 25.02.2015 and further based on the recommendations of the Selection Committee, the Executive Council of the 3rd Respondent University at its 51st meeting held on 28.02.2015 has accorded

approval for the appointment of the Petitioner as driver under unreserved category and the same even had the approval of the Vice-Chancellor on 05.03.2015 and accordingly an order of appointment dt. 05.03.2015 was issued by the 3rd Respondent to the Petitioner vide Proc.No.MANUU/ER.II/F.165/2014-15/1819. This Court opines that there is no dispute in so far as the power of the 3rd Respondent is concerned in appointing the Petitioner though the said appointment did not have the approval of the 2nd Respondent, the appointment of the Petitioner cannot be termed an illegal appointment in view of the simple fact that the Petitioner underwent the process of selection as per the recruitment rules framed by the 3rd Respondent University. Admittedly in this case notice has not been given to the petitioner before holding that the petitioner's post of driver would be treated as unapproved post and further ordering termination of his service. Hence the impugned order terminating the services of the petitioner cannot be sustained. Therefore, this Court is of the firm view that the 3rd

respondent ought not have terminated the services of the Petitioner without issuing notice to the Petitioner though the Petitioner is a probationer contrary to 26(3) and 26(4) of the Maulana Azad National University Act, 1966 (No.2 of 1997) (extracted above) and contrary to the law laid down by the Apex Court in the judgment reported in (1998) 8 SCC 194 in Basudeo Tiwary v. Sido Kanhu University and Others since the Petitioner is entitled to fair, just and reasonable treatment and though the Petitioner is a probationer yet he is still entitled to be afforded the minimum protection which is contemplated under Article 311(2) of the Constitution of India. The protection is very limited to inform the Petitioner about the proposed action and to give him a reasonable opportunity of being heard.

22. Taking into consideration the aforesaid circumstances and the law laid down by the Apex Court in the judgments referred to and discussed above in Basudeo Tiwary v. Sido Kanhu University and Others, reported in (1998) 8 SCC 194, State of Madhya Pradesh & Others v. Lalit Kumar Verma reported in (2007) 1 SCC

575, Delhi Transport Corporation v D.T.C. Mazdoor Congress reported in 1991 Supp(1) SCC page 600 and Olga Tellis & Others v. Bombay Municipal Corporation reported in (1985) 3 SCC 545, this Court opines that defect and procedural irregularity attributable to the methodology followed in making the petitioner's appointment needs to be condoned and the petitioner cannot be penalized for the same since making the petitioner to suffer adversely for the default or lapse on the part of the 3rd respondent would be unjust, unreasonable and arbitrary, and hence, the writ petition is liable to be allowed.

23. Accordingly, the writ petition is allowed setting aside the order No.F.59-2/2010(CU) of the 2nd respondent dated April 2017 and the consequential proceedings bearing No. MANUU/ER-II/PF.501/2017-18/193 of the 3rd Respondent dated 23.05.2017 and the 2nd and 3rd respondents are directed to reconsider the subject issue of according its approval for creation of posts of Drivers as proposed by the 3rd respondent by its letter bearing No.MANUU/PVCO/11/1561, dated

27.11.2014 within a period of three weeks from the date of receipt of the copy of the order duly taking into consideration the principle laid down by the Apex Court and also the observations of the Apex Court in the judgments referred to and extracted above and pass appropriate orders in accordance with law and communicate the said decision to the Petitioner. There shall be no order as to costs.

Miscellaneous petitions, if any, shall stand dismissed.

SUREPALLI NANDA, J

Date: 01.11.2022

Note: L.R copy to be marked

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