GAHC010157962020

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/4769/2020

SACHINDRA NATH MISRA
S/O LATE PRABHAT CHANDRA MISRA, RESIDENT OF KUNDIL NAGAR, HOUSE NO. 37, BELTOLA, BASISTHA CHARIALI, GUWAHATI 781029

VERSUS

THE KRISHNA KANTA HANDIQUI STATE OPEN UNIVERSITY AND 2 ORS.
REPRESENTED BY ITS REGISTRAR, HOUSEFED COMPLEX, DISPUR, LAST GATE, GUWAHATI 781006

2:THE VICE CHANCELLOR
KRISHNA KANTA HANDIQUE STATE OPEN UNIVERSITY
HOUSEFED COMPLEX
DISPUR
LAST GATE
GUWAHATI 781006

3:THE REGISTRAR
KRISHNA KANTA HANDIQUE STATE OPEN UNIVERSITY
HOUSEFED COMPLEX
DISPUR
LAST GATE
GUWAHATI 78100

Advocate for the Petitioner : MR. K N CHOUDHURY

Advocate for the Respondent : SC, KKHSOU

BEFORE
HONOURABLE MR. JUSTICE SANJAY KUMAR MEDHI

Date of hearing : **24.02.2022**
Date of Judgment : **28.02.2022**

JUDGMENT & ORDER

The writ jurisdiction of this Court has been sought to be invoked by the petitioner by questioning the legality and validity of an order dated 26.06.2020 issued by the Krishna Kanta Handiqui State Open University (hereinafter called, KKHSOU). By the impugned order, the earlier order dated 24.12.2019 of extension of service of the petitioner as Secretary to the Vice-Chancellor till completion of 65 years of age has been cancelled. It is the case of the petitioner that such action is in gross violation of the principles of natural justice and is otherwise bad in law and therefore liable for interference by this Court.

2. Before going to the issue which has arisen for determination in this Case, it would be convenient to state the facts of the case in brief.

3. The petitioner was earlier serving as the Private Secretary to the Vice-Chancellor, Gauhati University. Pursuant to a recruitment process for the post of Secretary to the Vice-Chancellor, KKHSOU, the petitioner, who claims to have fulfilled all the requisite qualifications and eligibility had successfully participated in the said selection process. Accordingly, an order dated 01.06.2015 was issued by which the petitioner was appointed as Secretary to the Vice-Chancellor, KKHSOU for a tenure of 5(five) years. Admittedly, the petitioner had joined the post on 07.07.2015. The appointment order contains a Clause that the same would be renewed after 5(five) years for any further period, as may be decided.

4. It is not in dispute between the parties that the Board of Management of KKHSOU in its 51st meeting held on 27.09.2019 had adopted a resolution to fix the tenure of the existing employees till the attainment of 60 years. The said resolution however empowered the Vice-Chancellor to extend / re-employ any existing employee up to the age of 65 years subject to satisfactory performance and need of the service as per the existing terms and conditions

stated in the Ordinance. It is the case of the petitioner that on 03.10.2019 he had made a representation for extending his service in terms of the aforesaid resolution.

5. It is the case of the petitioner that the representation was acted upon and considering the Clause in the appointment letter that the term may renewed after 5(five) years and also the satisfactory performance, a decision was taken to extend his service. The consequential order of extension of service was passed on 24.12.2019 whereby the services of the petitioner stood extended up to 28.02.2022 i.e. the end of the month when he completes 65 years of age.

6. It is the case of the petitioner that out of the blue, the impugned order dated 26.06.2020 was passed whereby the earlier order of extension of service of the petitioner has been cancelled. The petitioner had submitted a representation against the aforesaid order and to allow him to continue in service in accordance with the order dated 24.12.2019 which was not paid any heed to. The petitioner has categorically pleaded that no notice or opportunity was afforded to the petitioner before issuing the impugned order dated 26.06.2020. Amongst various legal grounds assailing the impugned order including the principal ground of gross violation of principles of natural justice, the petitioner has pleaded grave inconvenience and hardship for sudden discontinuation of his service as the petitioner had taken various loans on the strength of being in service till the 28.02.2022. The petitioner has however admitted that he had to obtain a release order so as to enable himself to get the pensionary benefit from his earlier employer namely, the Gauhati University.

7. It appears from the Court records that at the stage of Motion, an argument was made on behalf of KKHSOU that since the extension was granted without fulfilling the pre-requisite, taking of adverse action was not required to be done by following the principles of natural justice and in this regard a case of the Hon'ble Supreme Court reported in ***(2018) 15 SCC 463 [Union of India and Another Vs. Raghuwar Pal Sing]*** was pressed into service. In the case before the Hon'ble Supreme Court, there was a requirement of prior approval of the competent authority which was not done. This Court however noted that in the instant case, the extension of service of the petitioner was done on a recommendation by the Registrar and an endorsement by the Finance Officer and therefore this Court observed that it was

doubtful whether the case of ***Raghuwar Pal Singh (Supra)*** would be applicable. Subsequently, vide order dated 14.12.2020 Notice of Motion was issued and the assurance made on behalf of the KKHSOU was recorded that the post which the petitioner was holding would not be advertised.

8. I have heard Shri K.N. Choudhury, learned Senior Counsel for the petitioner assisted by Shri R.M. Deka, learned counsel. I have also heard Shri A.M. Bora, learned Senior Counsel assisted by Shri J. Patowary, learned counsel for the respondents. The records pertaining to the case have been handed over by Shri Patowary, the learned counsel, which have been carefully examined.

9. Before going to the submissions made on behalf of the parties, this Court has noticed that the KKHSOU is a creature of the statute namely, the Krishna Kanta Handiqui State Open University Act, 2005 (Assam Act No.XXXVII, 2005) and is a Open University of the State of Assam and therefore, there is no manner of doubt that the University is an instrumentality of the State and amenable to the writ jurisdiction of the Court.

10. Shri Choudhury, the learned Senior Counsel for the petitioner has submitted that admittedly the decision of the Board of Management of the University taken in its 51st meeting dated 27.09.2019, more specifically the resolution no. BM/51/9(C)/2019 is not the subject matter of challenge. As indicated above, by the said resolution, the tenure of the existing employees was fixed till attainment of 60 years. However, the Vice-Chancellor was empowered to extend / re-employ any existing employee up to age of 65 years subject to satisfactory performances and need of service as per the existing terms and conditions stated in the Ordinance. Pursuant to the said resolution, another resolution was adopted being No. BM/51/9(H)/2019 whereby the petitioner was allowed to continue till the completion of his term with the further stipulation that the Vice-Chancellor be authorized to take necessary action in respect of the extension of service up to the age of 65 years on completion of the 1st term. The learned Senior Counsel has submitted that on communicating the aforesaid resolution in the form of an Office Order dated 30.09.2019, the petitioner had submitted the representation dated 03.10.2019 for extension of service and the said representation was duly acted upon leading to passing of the communication dated 24.12.2019 whereby the

services of the petitioner was extended till attainment of 65 years of age. The said order dated 24.12.2019 specifically mentioned that the same was issued with the approval of the Vice-Chancellor in the following terms-

"this is issued with the approval of the Vice-Chancellor"

11. It is the argument of the petitioner that when the extension was done by following the due process of law, the impugned order dated 26.06.2020 could not have been issued. The Senior Counsel argued that even in case, the order of extension dated 24.12.2019 was sought to be cancelled, the same can be done only by following the due process of law which would necessarily include adherence to the principles of natural justice. It is submitted that as a writ Court, it is the decision making process which is required to be examined and in the instant case the process is vitiated by legal malice.

12. *Per contra*, Shri A.M. Bora, learned Senior Counsel for the University has submitted that the respondents have filed two affidavits-in-opposition, one for opposing the interim order and the other to controvert the pleadings of the writ petition. It is contended that the very appointment of the petitioner being for a particular tenure and contractual in nature, his claim to be treated at par with a regular employee is not liable for consideration. It is further submitted that extension of the services of the petitioner was not done strictly in terms of the resolution, which stipulates satisfactory performance and need of service and those factors were not taken into consideration. The further submission is that the power was only given to the Vice-Chancellor and the extension was done without a proper consideration by the said authority. It is also submitted that the services of the petitioner would have otherwise come to an end in the month of July, 2020 when the extension order was to take affect and the impugned order was passed on 26.06.2020 which is prior to the said date and therefore, it is argued that the order in favor of the petitioner dated 24.12.2019 was never acted upon. Lastly, it is submitted that though, the extension was communicated on 24.12.2019, till the date, the same was to take effect, there was no assessment of the services of the petitioner.

13. Shri Bora, the Senior Counsel has also relied upon Section 21 of the General Clauses Act to bring home the contention that the power to make includes the power to rescind. It is further submitted that the impugned action is not an act of termination of service but a mere

release order.

14. By referring to the records of the case, it is the submission of the learned Senior Counsel for the respondents that the Vice-Chancellor was the only authorized person empowered to make an extension of the services of an employee. However, except the endorsement "Approved" there was nothing to demonstrate that there was any application of mind by the said authority and therefore, the initial order of extension was not in accordance with law.

15. In support of his submission, Shri Bora, the learned Senior Counsel for the respondents has placed reliance upon the case of ***Oriental Insurance Company Limited Vs. T. Mohammed Raisuli Hassan*** reported in ***(1993) 1 SCC 553***. In the said case, the Hon'ble Supreme Court has held that in view of the terms of appointment contemplating one month notice or one month salary before termination, adherence of either of the two conditions would render such termination to be valid. It is contended that the stipulation of service in the instant case is almost similar.

16. Rejoining his submissions, Shri Choudhury, the learned Senior Counsel for the petitioner submits that the Vice-Chancellor, who is the highest authority empowered to exercise the powers is not required to be elaborate in giving the approval. As regards the submission that the extension order was not based on the relevant factors, it is submitted that notes in the concerned file would reveal the actual position. As regards the submission that the order of extension was yet to take effect, the Senior Counsel for the petitioner submits that the said submission was factually fallacious inasmuch as, once a decision contained in the file to extend the service of the petitioner was communicated by the order dated 24.12.2019, the same already came into effect. Shri Choudhury further submits that the power of the Vice-Chancellor to rescind an earlier order passed by him is not disputed and further there is no requirement to rely upon the General Clauses Act. However, what is required to be examined is whether such power has been exercised in accordance with the prescription of law.

17. Distinguishing the case ***Oriental Insurance Company (Supra)***, Shri Choudhury, the learned Senior Counsel for the petitioner submits that the same is not applicable in the

instant case as paragraph-2 of the said decision itself stipulates that there was a condition attached to the order of appointment regarding termination which is not the situation in the instant case. In any case, it is submitted that the principles of natural justice cannot be done away with.

18. With regard to the adequacy of words or expressions while approving the extension, the Senior Counsel has relied upon the case of ***Edwingson Bareh Vs. State of Assam and Others*** reported in ***AIR 1966 SC 1220***. The said case related to exercising the power of discretion by the Governor under the Sixth Schedule of the Constitution of India. In the said case, the Memorandum which was placed before the Governor was endorsed as "seen, thanks". The majority opinion of the Constitution Bench of the Hon'ble Supreme Court has held that the same would be enough to express the approval with application of mind. For ready reference, the relevant paragraphs of the said judgment are quoted hereinbelow-

> *"32. According to the respondents, what actually happened in the preset case was that after the report of the Commission was received, the Council of Ministers considered the report at its meeting on the 28th April, 1964, and decided to accept the recommendations of the Commission. An explanatory memorandum was then drawn up, and the whole file was placed before the Governor. After the Governor read the file, on the 21st September, 1964, he wrote on it "Seen, thanks". The affidavit filed by the respondents show that after the matter was considered by the Council of Ministers, the proceedings were placed before the Governor, and he read the proceedings and expressed his concurrence with the words 'Seen, thanks". The question is whether the procedure thus followed in the present case complied with the relevant conditions prescribed by Para. (14) or not.*
>
> *33. For the purpose of dealing with this aspect of the matter in the present appeal, we are prepared to assume that when Para. 14 (2) refers to the Governor, it refers to him as Governor who must act on his own and not be assisted by the advice tendered to him by the Council of Ministers. Even on that assumption, we are unable to see how the procedure followed in the present case can in substance, be said to contravene the substantial requirements of Para. 14(2). What Para. 14(2) requires is that before the*

matter goes to the Legislature of the State, the Governor must apply his mind to it and make his recommendations on it. It would be unreasonable to suggest that in considering the report, the Governor is precluded from receiving the assistance of the Council of Ministers before he makes up his mind as to what recommendations should be sent before the Legislature of the State. If the Governor thinks that the questions raided by the report should first be considered by the Council of Ministers and then submitted to him, we do not see how it can be said that Para 14(2) has not been complied with. On the other hand, if the Governor, in the context, is expected to act as a Constitutional Governor, it would be appropriate that the matter should first be examined by the Council of Ministers and then submitted to him for his own recommendations. However one looks at it, the facts disclosed in the counter-affidavit filed on behalf of the State of Assam unmistakably show that the matter has been considered both by the Governor and the Council of Ministers and they are all agreed that the recommendations of the Commission should be accepted. The criticism that the Governor has not made any recommendations as such, but has merely contended himself with making a short note "Seen, thanks", has, in our opinion, no substance. We have looked at the counter affidavit filed on behalf of the State of Assam and have examined the other documentary evidence to which our attention as drawn. In the present case, the record clearly shows that the Commission recommended that a new Autonomous District should be created, the Governor agreed with the said recommendation, and so did the Council of Ministers. Therefore, we see no reason to interfere with the majority decision of the High Court that the power conferred on the Governor by Para.1(3) of the Sixth Schedule has been validly and properly exercised by him. "

19. The issue which would arise for determination, as indicated above, is whether the impugned order dated 26.06.2020 is sustainable in law. At the same time, a defence has been raised on the part of the University questioning its own action in passing the earlier order of extension dated 24.12.2019. Whether such a defence is permitted to be taken is itself doubtful. However, giving the benefit to the University, to examine the said point, the records of the case were carefully examined.

20. The records reveal that after receipt of the application of the petitioner for extension of service, the same was duly considered at first by the Registrar and after due consideration, the matter was recommended to the Vice-Chancellor vide Note dated 16.12.2019 with an endorsement that the performance of the petitioner was found to be satisfactory. The Vice-Chancellor thereafter reverted back the matter to the Registrar for discussion vide Note dated 18.12.2019. Accordingly, the Registrar had placed the matter before the Finance Officer, who vide Note dated 20.12.2019 and on the next date i.e., 21.12.2019, the Finance Officer recommended the extension of the service of the petitioner. Thereafter, on 23.12.2019, the Registrar had put up the entire matter along with the views of the F.O. for approval before the Vice-Chancellor. The Vice-Chancellor, who is the competent authority had endorsed the recommendation as "Approved" vide note dated 23.12.2019.

In view of the aforesaid materials which are clearly found in the records, there is no manner of doubt that the initial extension of service of the petitioner was done by following the due process of law. This Court is unable to accept the contention made on behalf of the University that there was no application of mind of the Vice-Chancellor while extending the services of the petitioner. This Court is of the opinion that the matter regarding extension was taken up in the manner prescribed whereby final approval was given by the competent authority after taking all the relevant factors, including the recommendation of the Registrar and the F.O. into consideration. This Court is further of the view that an approval is not required to be expressed in so many words since the same is preceded by necessary discussion which is revealed from the records. This Court is also fortified in coming to the aforesaid conclusion by the judgment of the Hon'ble Supreme Court relied upon on behalf of the petitioner in the case of ***Edwingson Bareh (Supra)*** wherein the endorsement "seen, thanks" was held to be a proper approval.

21. The contention made on behalf of the respondents that the conditions precedent for acting upon the resolution for extension of service of the petitioner was not present is belied by the specific observation made by the Registrar in the Note dated 16.12.2019 that the performance of the petitioner was found to be satisfactory.

22. The next question is regarding the legality and validity of the order dated 26.06.2020

by which the order dated 24.12.2019 of extension of services of the petitioner has been cancelled and the petitioner has been informed that his tenure of appointment will come to an end on 06.07.2020.

23. Admittedly, the impugned order dated 26.06.2020 was issued without any notice or opportunity. Regarding the point of violation of principles of natural justice, an argument was attempted to be made on behalf of the University that the order dated 24.12.2019 was yet to take effect before which date, the order dated 26.06.2020 was passed and therefore, no right had accrued upon the petitioner. The said argument is apparently fallacious inasmuch as, once the decision contained in the file was transformed in the form of an order and duly communicated to the incumbent, a vested right accrues upon the said incumbent. In this connection, one may gainfully refer to the case of the Hon'ble Supreme Court in ***Bachhittar Singh Vs. State of Punjab and Another*** reported in ***AIR 1963 SC 395*** wherein, it has been laid down that a decision by the competent authority would not take effect unless duly communicated to the concerned person. For ready reference, the relevant paragraph is quoted hereinbelow-

> *"10. The questions, therefore, is whether he did in fact make such an order. Merely writing something on the file does not amount to an order. Before something amounts to an order of the State Government two things are necessary. The order has to be expressed in the name of the Governor as required by c1.(1) of Art. 166 and then it has to be communicated. As already indicated, no formal order modifying the decision of the Revenue Secretary was ever made. Until such an order is drawn up the State Government cannot in our opinion be regarded as bound by what was stated in the file. As long as the matter rested with him the Revenue Minister could well score out his remarks or minutes on the file and write fresh once."*

24. There is no manner of doubt that the impugned order dated 26.06.2020 has adverse civil consequence upon the petitioner inasmuch as, the order extending his service has been cancelled. While such power of cancellation is not doubted by this Court, what is staring on the face is that such cancellation was not preceded by any notice or opportunity. An examination of the records would also reveal that after the order of extension of service, various service related matters of the petitioner were duly considered and approved by the

competent authority. In fact, just before the impugned order was issued, the Vice-Chancellor, vide Note dated 21.05.2020 had approved the request for Earned Leave of the petitioner. The records also reveal that the initiation for issuing the impugned order dated 26.06.2020 was done by a note by the Registrar on 20.06.2020 to the Vice-Chancellor which finds place at page 35 of the records. What is surprising is that in page 32 of the records, though the first Note is of 21.05.2020, the second Note is dated 12.08.2020 wherein the petitioner has already been addressed as the "Former Secretary" to the Vice-Chancellor. The said fact raises serious doubts on the *bona fide* of the respondent authorities.

25. This Court exercising powers under Article 226 of the Constitution of India has jurisdiction to examine the decision making process without even going into the merits of such decision. The Hon'ble Supreme Court in the landmark case of ***Tata Cellular Vs. Union of India*** reported in ***(1994) 6 SCC 651*** has laid down as follows:

> *"74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application of judicial review is made, but the decision making process itself.*
>
> *75. In Chief Constable of the North Wales Police v. Evans, (1982) 3 All ER 141 at 154 Lord Brightman said :*
> *"Judicial review, as the words imply, is not an appeal from a decision, but review of the manner in which the decision was made.*
> *Judicial Review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the Court is observed, the Court will, in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."*
>
> *In the same case Lord Hailsham Commented on the purpose of the remedy by way of judicial review under RSC Ord 53 in the following terms :*
> *This remedy, vastly increased in the extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the*

abuse of power by a wide range of authorities judicial, quasi-judicial, and, as would originally have been thought when I first practised at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law to substitute the Courts as the bodies making the decisions. It is intended to see that the relevant authorities are their powers in a proper manner. (p. 1160)

R v. Panel on Take-overs and mergers, ex p Datafin plc. Sir John Donladson MR commented :
'an application for judicial review is not an appeal'.
In Lonrho plc v. Secretary of State for Trade and Industry. Lord Keith said :
'Judicial review is a protection and not a weapon'. It is thus different from an appeal. When hearing an appeal the Court concerned with the merits of the decision under appeal. In Re Amin Lord Fraser observed that :
"Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made ..... Judicial review is entirely different from an ordinary appeal. It is made effective by the Court quashing an administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer."

26. This Court is of the opinion that the issue regarding application of mind can be answered if on examination of the records, it is found that contemporaneous materials in the file can lead to a conclusion that the relevant factors were taken into consideration. In the instant case, while the order of extension dated 24.12.2019 was preceded by due discussion wherein all the relevant factors were taken into consideration, including satisfactory performance of the petitioner, the impugned order has been initiated by a Note dated 20.06.2020 of the Registrar wherein the subject is the legality and validity of the extension order dated 24.12.2019 issued by the same authority. This court is of the view that the concerned resolution leading to such extension order was a general one of fixing the upper

age limit of the employees at 60 years of age with an exception regarding extension which was the prerogative of the Vice-chancellor. Therefore, there was no compulsion to exercise such discretion to extend the services of the petitioner. However, since the discretion was exercised, that too, by following the prescription of law, the same can be rescinded or cancelled only by adhering to the due process of law which would necessarily require affording of an opportunity and notice. Admittedly, the same has not been seen to be done in the instant case.

27. In view of the above discussion, this Court is of the unhesitant opinion that the impugned order dated 26.06.2020 is unsustainable in law. Accordingly, the same is set aside and quashed. Since the petitioner was forcefully debarred from rendering his services, it is directed that upon setting aside the impugned order dated 26.06.2020, the petitioner would be entitled to all consequential benefits for the extended period of service which is up to 28.02.2022.

28. Accordingly, the writ petition stands allowed.

29. No order, as to cost.

30. The records of the case are returned back to Shri J. Patowary, learned counsel for the respondents.

JUDGE

Comparing Assistant