

In Re: Abdul Rasul

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Court : Kolkata

Decided On : Sep-01-1913

Reported in : (1914)ILR41Cal518

Judge : Chaudhuri, J.

Appellant : In Re: Abdul Rasul

Judgement :

Chaudhuri, J.

1. Section 45 of the Specific Relief Act provides an exceptional remedy. It is in substitution of the Prerogative Writ of Mandamus, which our Court on its original side had jurisdiction to issue. Five conditions are laid down in the section, provisos (a) to (c), which the applicant invoking this jurisdiction has to satisfy. The conditions are cumulative. All of them have to be fulfilled. The remedy is of a summary nature and coercive in character. Being discretionary it must be exercised with caution, and the duty sought to be enforced must be clear and obligatory. The first condition is that the applicant has to show a threatened injury to his personal right, that such right does exist and a clear injury must also be shown. He must also show that he has no other specific and adequate legal remedy, and that the remedy applied for will be complete.

2. By Section 3 of Act VIII of 1904, power has been given to the University to appoint Professors and Lecturers. By Section 4, the body corporate of the

University is constituted, and the powers of that corporate body are vested in the Senate. By Section 25 of Act VIII of 1904 the Senate of the University, with the sanction of the Government, is empowered to make regulations consistent with the Act of incorporation, as amended by the said Act of 1904, and the last mentioned Act, to provide for all matters relating to the University, including the appointment and duties of the Registrar and of all officers and servants of the University, and of Professors and Lecturers appointed by the University. The applicant states that on the recommendation of the Syndicate of the said University, the Senate appointed him University lecturer in International law, for post graduate students, that such appointment was made some time in the month of July 1912 for a period of two years; that after his appointment he began to deliver lectures on International Law and continued to do so up to the end of the academic year ending May 1913, and his lectures were attended by over 80 students; that the petitioner was about to commence his lectures for the current academic year which would end in May 1914, when he was informed by the Registrar of the University that the Government of India had refused to sanction his appointment as University lecturer. He contends that he is still the University lecturer in International Law, and the Government of India has no authority to interfere with his appointment. He contends that the Regulations promulgated by the Government of India under the Act are ultra vires, in so far as they provide that no University lecturer shall be appointed without the sanction of Governor-General in Council (Section 12, Chapter XI of the Regulation). The contention is based upon the provision in Section 3 of Act VIII of 1904, the power to appoint lecturers being given to the Corporate Body of the University, as defined by that Act. It is also contended that although under the Act 'Government' means in relation to the Calcutta University, the Governor-General in Council, yet having regard to the fact that the Governor-General in Council not having by notification reserved to themselves any right over the University, they had ceased to have any power over the University of Calcutta. The relator further contends that the result is, that the action taken by the Governor-General in Council with regard to his appointment is a nullity in law. The application sets out certain correspondence between the relator and the University authorities, to which it is needless to refer in detail. In one of these letters, namely, the relator's letter of the 10th July 1913 he purported to appoint 11 A.M. Saturday

the 26th July as the time, and the Darbhanga Building as the place, for his first lecture this year. In reply to that letter the Registrar of the University said that inasmuch as the Governor-General in Council had under Section 12, Chapter XI of the University Regulations, declined to sanction the petitioner's appointment as University lecturer for the current academic year, the Hon'ble the Vice-Chancellor and the Syndicate could not allow the petitioner to deliver lecture's as proposed by him. The petitioner in his letter of the 1st August insisted, that in law, the sanction of the Government was not required for such appointment, and that assuming although not admitting, that any sanction was necessary, it was the sanction of His Excellency the Governor of Fort William in Bengal in Council, and not of the Governor-General in Council. The petitioner proceeded to ask the University, forthwith to make arrangements for lectures to be delivered by him, and if the University thought that the sanction of the Government was necessary, to seek such sanction from the Governor of Fort William in Bengal in Council. The Registrar wrote in reply saying that the Syndicate found themselves unable to accede to his request. The refusal of the Syndicate to comply with his requisitions is complained of as the injury to the personal right of the relator. As the relator had not set out the resolutions of the. Syndicate and the Senate, and his letter of appointment in his application, I required a further affidavit, which has now been filed.

3. Now, it appears that the Resolution of the Syndicate was in the following form: 'That the Syndicate recommend to the Senate that with the sanction of the Governor-General in Council the undermentioned gentlemen (Mr. Rasul being one of them) be appointed University lecturers in History for a period of two years with effect from July 1912, to lecture in the special branch of the subject mentioned against his name' see Minutes, Calcutta University, Part IV, 1912, 29th June 1912, page 1262. It appears that the above recommendation of the Syndicate came up before the Senate on the 13th of July 1912 when the following Resolution was passed: 'That the Governor-General in Council be moved to sanction the appointment of the following gentlemen (the petitioner being one of them) as University lecturers in the subjects noted against the name of each, for a term of two years with effect from the session 1912-13' (See Minutes of the Senate, dated 13th June 1912, page 1318, Calcutta University Minute, Part IV, 1912). In putting

the motion to the meeting the Vice-Chancellor observed that the University was 'to be congratulated on the satisfactory arrangements it had been able to make for the furtherance of postgraduate study in the different subjects.... The staff in History was particularly strong and the work of lecturing in the special branches of the subject had been entrusted to competent men, who had received their training in one or other of the older Universities of England.' I have quoted the above as some reliance is placed upon this speech, by the relator. It further appears that certain other names came up before the Senate on the 27th July 1912, when the Hon'ble the Vice-Chancellor addressing the Senate, announced that they had, secured the services of Messrs. Rasul and others who had taken the Degree of History, either at Oxford or Cambridge, to deliver special courses on selected topics. It is clear therefore, that the Syndicate recommended the appointment subject to the sanction of the Governor-General in Council and the Senate thereupon resolved to move the Government to sanction the appointment of the petitioner amongst others as University lecturer. The resolution of the Senate is not one of appointment, not even of a provisional appointment pending the sanction of the Governor-General in Council. The Vice-Chancellor no doubt said that at the meeting of the Senate on the 13th July that the work of lecturing had been entrusted to competent men. What he meant was that the services of competent men had been arranged for, or secured. But whatever he may have meant the Senate is only bound by its resolution.

4. Paragraphs 4 and 5 of the relator's affidavit do not accurately set out the resolutions of the Syndicate and Senate.

5. The relator states in paragraph 8 of his affidavit of the 18th August that to the best of his recollection he received in or about the month of July 1912 a communication in writing from the Registrar of the University that he had been appointed University lecturer in History, for a period of two years from July 1912, requesting him to appoint the time and place for the delivery of his lectures, and thereupon he wrote back to the Registrar making such appointment, and delivered his lectures during the academic year 1912-13.

6. He believes he has lost the letter. His attorney' wrote for a copy from the University but they have not on record, in their office, copy of any such letter addressed to Mr. Rasul. They say 'the practice is that when a number of lecturers are appointed at the same time, only one draft copy of the letters of appointments, which are all exactly similarly worded, is kept in the office, the wording being based on the respective resolutions of Syndicate and Senate' Mr. Rasul's attorney wrote for a copy of the draft, and received the following reply from the Registrar dated the 13th August 1913.

7. I find on further enquiry that the draft, copy. referred to in my letter of yesterday concerns only certain lecturers who were appointed on a fixed monthly salary. No letter of appointment has been sent to the other gentlemen who, with Mr. Rasul, were provisionally appointed on other terms pending the sanction of His Excellency the Governor-General.

8. Mr. Rasul therefore could not have received any letter of appointment and, according to the Registrar of the University, his appointment was provisional, pending the sanction of His Excellency.

9. Mr. Rasul's impression seems to be due to some circular letter or communication, asking him to appoint the time and place for his lectures.

10. There being no letter of appointment from the University I cannot hold he was appointed and judging from the resolutions I have quoted, the Senate did not even formally appoint him pending the sanction of the Governor-General.

11. He has placed himself in an unfortunate position by not requiring a letter of appointment and I quite sympathize with him. I appreciate the spirit in which he took up the work and the sacrifice it involved, but I cannot hold that any legal right has been established, or exists by his having lectured last year.

12. The Syndicate and Senate are only bound by their resolutions, and I do not think that they ever intended to appoint him without the sanction of the Governor-General.

13. Mr. Rasul apparently did not know the text of the resolutions, but he was dealing with a corporation whose rights are defined by statute. He ought to have informed himself of them and thus his present trouble might have been avoided. If he came to know, and he must be deemed to have had notice, that his appointment was dependent upon the sanction of the Governor-General, he could not be heard to say, upon refusal of such sanction, that he still held the appointment.

14. When the duty is Conditional on the approval of another person or body being obtained, there is no right to the writ until such approval has been given. *R. v. St. Luke's Chelsea* (1862) 31 L.J.Q.B. 50, 53 Cockburn C.J.I. There is no evidence of any personal right having been created such as enables me to interfere under the provisions of Section 45. The true principle underlying the jurisdiction in these cases is that the proceeding can confer no title not already existing, though it may affect the consummation of the relator's title, if he have one; but it gives him none: Lord Kenyon, C.J., in *King v. Clarke* (1801) 2. East 74, 83. See *Ex parte Napier* (1852) 18 Q.B. 692, 695 where Lord Campbell, C.J. said--'The existence of a legal right is the foundation of every writ of mandamus.' It is only issued to place a person in possession of office but confers no right. It merely places him in possession to enable him to assert his right, which in some cases he could not otherwise do. In all cases where the validity of an appointment is the main point in dispute the writ is not granted until the controversy has been tried at law, and an adjudication had in favour of the relator. In other words, the writ does not lie to try the title (*Spelling on Injunction*, p. 1365, 2nd edition). Here apparently there is no title. There is no letter of appointment. If such title is based upon the resolutions, the utmost that can be said is, that he held the office only provisionally, and the condition having failed, he is not now legally in a position to assert that he holds the office as of right. It is said that the University is estopped from denying his title having availed itself of his services. If there is such an estoppel, the right ought to be declared in a suit instituted for that purpose. It is contended that the sanction of the Governor-General in Council under Section 12 Chapter XI of the University Regulations is ultra vires. It may be so, but if that is the issue it cannot be tried in these proceedings. The Government is not a party to these proceedings and cannot be made a party under the express provisions of the section. I do not think

any authority can be found for trying an issue' of this character in these proceedings. It would be to decide a question of jurisdiction which arises as between the University and the Governor-General in Council. It may be tried in a properly constituted suit, but not in summary proceedings of this nature. The Court has always refused to allow an application for a mandamus to be made the occasion or excuse for obtaining the opinion of the Court on some doubtful question of law. One portion of the application is that' the Senate be required if sanction is necessary, to apply for such sanction to His Excellency the Governor of Fort William in Bengal, which means that in these proceedings it has got to be determined as to whether the Regulation I have referred to is ultra vires or not, and in addition thereto to hold that the sanction intended was to be obtained from the Governor of Bengal in Council. If Section 12 is ultra vires in respect of the Governor-General in Council, it would also be ultra vires with regard to the Governor of Bengal in Council, and I do not think the applicant can ask me to replace, if his contention is correct, the Governor-General in Council by the Governor of Bengal in Council. That clearly I cannot do. I was at one time inclined to think that the right of a lecturer to lecture who is not remunerated for his services is not a personal right, to which an injury can be said to be caused by the refusal of the senate to give him facilities for delivering lectures. A clear distinction has been made in England between endowed lectureships and lectureships not carrying fees or emoluments. Tapping in his work on Mandamus, p. 176, says there must also be annexed to or issued out of the office fixed fees or emoluments or a salary, the office must be an office of consequence or value, for which there does not exist any specific legal remedy. The value, however, is not scrupulously weighed. Stated in this broad form, the proposition does not seem to be quite correct. The Writ has been issued in respect of offices carrying no emolument as pointed out by Short on Mandamus, p. 274. Ordinarily there are certain fees attached to the office of a University Lecturer, but the applicant from a sense of public duty accepted the office without fees. The office is undoubtedly an office of consequence, though it may not be of any pecuniary value. The injury to the office is said to be that no arrangements are being made for lectures to be delivered. I am not quite clear in my mind that such refusal is an injury to the personal right of the lecturer. In *In re Rustam Jamshed Irani* (1901) 3 Bom. L.R. 653 it was

considered by Russell J, that the personal right in the section, referred to rights in rem, such as every human being in a civilized society possesses independently of any act of his own (p. 655). This dictum does not seem to be supported by authority. The rule, on the other hand, appears to be that he alone is a competent relator who has some interest other than such as may belong to the community at large in the question to be tried: *Rex v. Brown* (1790) 3 T. 11. 574, note (6). The Appeal Court did not sanction the definition given by the learned Judge in the Original Court: see *Rustom J. Irani v. Kennedy* (1901) I.L.R. 26 Bom.396, 403. In this case it also seems to me that, if, a mandatory order was made in favour of the applicant it could be easily nullified by the University authorities, if they chose. The Regulation relating to the arrangements for lectures runs as follows: 'Such lectures shall be delivered and classes held in the college to which the lecturer belongs, or any such other place as the Syndicate in consultation with the lecturer may determine.' The applicant does not belong to any College and therefore in his case the place is to be determined by the Syndicate in consultation with him,. There is nothing said about appointing the time for lectures. If an order was made upon the Syndicate to appoint a place for the lectures, they might easily nullify it. by appointing a place but not appointing any time for the lecture, The section provides that the remedy shall be complete and effectual; such clearly would not be the case, if the University did not fix the hours of the lectures. I think, however, that these are matters of internal arrangement with which the Courts are unwilling to interfere, unless under express obligation. I cannot accede to the prayer of the application, as it seems to me that the applicant has not shown that he has a complete specific legal right, which I hold must pre-exist. It seems to me that the question of ultra vires cannot be litigated upon in these proceedings. It is also a clear principle that no order affecting the status or rights of the parties concerned ought to be determined in proceedings of this nature or of any proceedings whatsoever unless they are parties therein.

15. The petitioner further contends that his application may be treated as one by a person interested to enforce a statutory duty imposed upon the University 'to make provision for the instruction of students' under Section 3 of Act VIII of 1904. Before dealing with the question of statutory duty, if any, involved in this case I have to see what the personal right is. Section 45 requires some right in the person

applying, it must be some interest in him other than such as may belong to the community at large. If however, it be said that his personal right is by virtue of his appointment, I have already dealt with the matter and held that it has not been established. Section 3 of Act VIII of 1904 merely says the University 'shall be and shall be deemed to have been incorporated for the purpose (among others) of making provision for the instruction of students, with power to appoint University professors and lecturers.' It is merely an empowering section. It clothes the University with certain powers. They are words merely making that legal and possible which there would otherwise be no right or authority to do. There is no immediate duty imposed by Section 25(e) has also been referred to. It runs thus:

The senate with the sanction of the Government may from time to time make regulations consistent with the Act of Incorporation as amended by the Act of 1904 and with the Act of 1904 to provide for all matters relating to the University in particular such regulations may provide for among others: (e) the appointment and duties of the Registrar and of officers and servants of the University and of professors and lecturers appointed by the University.

16. This section gives power to the University to make regulations subject to the sanction of the Government. Such regulations have been made and my attention has been called to Section I of Chap. XI of the Regulations.

17. (1) The University shall provide for post-graduate teaching, study and research in the Faculties of Arts and Science.

18. Chapters IX and X deal with University Professors and Readers respectively. In the former case when the funds of the University permit, the Senate with the previous consent of the Governor-General, shall found such Professorships; in the latter case, a certain sum wherever practicable, shall be set apart annually for the purpose of providing special courses of lectures on particular subjects. The lecturers delivering such courses of lectures, shall be called University Readers. The appointment of a Reader shall be made by the Senate on the recommendation of the Syndicate. It is pointed out that there are distinctions made between the appointment of University Professors, University Readers and University Lecturers. In the case of the first two, the appointment is made

contingent upon the provision for funds. In the case of University lecturers there is no such provision. It is to be noticed, however, that in each case the Regulations provide that no one shall be appointed without the sanction of the Governor-General in Council. I am not prepared to hold that although it may be said that Section I of Chapter XI imposes an obligation on the University to provide for post-graduate teaching by appointing University lecturers, that it is to be construed that the duty is not only imperative, but immediate. I do not think that the Statute imposes any obligation that such lecturers are to be forthwith appointed. Section 4 of the same chapter runs thus: 'The Senate shall have power upon the recommendation of the Syndicate to appoint lecturers who shall be called University Lecturers.' It is merely an empowering Section. The words 'shall have power' do not signify any obligation but are potential. There is no compulsion upon them to appoint. There is no obligation upon them to exercise that power. Section 1 is controlled and modified by Section 4. The sections are to be read together. It is said, however, that even if it be held that Mr. Rasul was appointed provisionally yet the University having availed itself of his services, it is an executed contract and it must be taken that the contract is still subsisting as the appointment was for a period of two years. *York and North Midland Railway Company v. The Queen* (1853) 1 El. & B. 858, 860 has been cited in support of the proposition that even if the appointment of the University lecturers is merely discretionary, it may become obligatory under certain circumstances. It is said that it was decided in that case that 'a work which in its inception is permissive only, becomes obligatory by part performance.' The question in that case arose as regards the liability of a Railway Company to complete a Railway line which it was empowered to construct by a Railway Act. I find that Jervis C.J. expressly stated in this case that it was unnecessary for the Court to determine the abstract proposition that a work which before it is begun is permissive, is, after it is begun obligatory (p. 878). They did not desire to be understood as assenting to the proposition of Justice Erle in the same case on page 207, vis., 'that many cases may occur where the exercise of some of the compulsory powers may create a duty to be enforced by mandamus Justice Erle held that if there are no words in the Act that could be justly construed to create a duty, the Court is not authorised to decide that such a duty was created. Jervis C.J. emphasized the same principle and said Courts of Justice

ought not to depart from the plain meaning of the words used in Acts of Parliament; when, they do so, they make, but do not construe the laws; that Courts are not to construe Acts by their own notions of what ought to have been enacted upon the subject.

19. There is nothing to show that Mr. Rasul accepted his appointment for the period of two years. There is no writing to that effect. He undoubtedly intended to continue. It is after all, if anything, a contract of service; but where are the terms to be found? The Resolution of the Syndicate merely speaks of a provisional appointment. The University could not be bound by any representation made by any individual officer without the authority or sanction of the University, or by any act of his not within the scope of his authority. No such communication has been shown to have been made by any authorized person. No doubt the doctrines of estoppel and part performance apply to Corporations. The principles applied in such cases are said to be independent of contract. But no sort of estoppel, part performance or notification can bind a Corporation to a transaction which the legislature has in substance forbidden it to undertake; such restriction is to be found in Chapter XI, Section 12, and the main question is whether the restriction is ultra vires or not. The constitution of the University is embodied in special Statutes. All persons dealing with the University or its agents are deemed to have notice of the limits publicly set to their authority, and it is the accepted law that such a Corporation is not bound by anything done by such agents in its name when the transaction is on the face of it in excess of the powers defined: Mr. Rasul must be deemed to have known the conditions imposed upon the Senate by its Regulations as to its power of appointment, and to have accepted the office with knowledge of such limitation, and I am not disposed to say that he is entitled in this application to rely upon any estoppel on the part of the University such as validates his appointment. It is argued that the appointment must be held to be valid inasmuch as the application for sanction of the Government is ultra vires so that the Resolution of the University stands good, if the sanction of the Governor-General is not necessary according to the law. The Resolution of the Senate in this case is merely that the Governor-General be moved to sanction the appointment, not even that the lecturers are appointed subject to the sanction of the Governor-General. Even if it be conceded for purposes of this application that

the sanction of the Governor-General is not necessary, it does not better the position of the petitioner. *Ex parte Browning. In re Marks (1874) L.R. 9 Ch. Ap. 583* has been relied upon in support of the proposition that if the condition about the sanction of the Governor General is ultra vires, it is of no effect and the appointment stands. That was a case arising upon a bankruptcy, and a certain resolution of the creditors authorising trustees amongst other things to agree, to a composition, was held to be ultra vires and void, inasmuch as the creditors had no power at the meeting held, to pass any Resolution respecting the administration of the estate by the trustees, it being opposed to Section 20 of the Bankruptcy Act of 1869. But the contention that because that clause was void, all the clauses of the Resolution were void, was held not to be sound, inasmuch as the other Resolutions had been registered under Section 127. That was a special case depending upon the construction of special sections of the Bankruptcy Act, and cannot be accepted as laying down any proposition for universal application. This case has been cited in *Maxwell on Statutes* p. 649, 5th Ed. in connection with the validity of instruments part being invalid. The question of ultra vires raised in this case is, I understand, to be that under the Act the Senate has the power to appoint, and therefore no condition can be imposed by the Government upon the Senate's power of appointment. The Act makes, however, an imperative condition that the Regulations are to be framed by the University with the sanction of the Government. Section 26 of the Act of 1904 empowers the Government to add to or alter the draft Regulations submitted by the Senate after consulting that body and make such additions and alterations as appear to the Government to be necessary. It further provides that in default of the Senate submitting the draft Regulations within a limited period the Government may make Regulations. The contention is that the Regulations before they are framed may require the sanction of the Government, but the Government is not by Statute vested with any power to impose conditions or limitations on the powers given to the Senate. This is a difficult and doubtful point. In my view, it cannot be decided as a side issue in proceedings of a summary character.