

IN THE HIGH COURT OF ORISSA AT CUTTACK

FAO No. 124 of 2011

An application under Section 24-C of Odisha Education Act.

AFR Keshab Chandra Behera Appellant

-Versus-

State of Odisha & another Respondents

Advocate(s) appeared in this case:-

For Appellant : M/s. S.K. Das & S.K. Mishra,
Advocate.

For Respondents: Mr. B.P. Tripathy,
Addl. Govt. Advocate.

M/s. K.K. Swain, R.N. Mohanty,
R.P. Das.
[R-4]

M/s. D.P. Dhal & C.R. Panda
[R-3]

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT

11th October, 2022

SASHIKANTA MISHRA, J.

The judgment passed by the Presiding Officer, State
Education Tribunal, Odisha in GIA Case No. 214 of 2007 on

17.01.2011 is under challenge in the present appeal.

2. The GIA Case was filed by one Purusottam Sethi, the present Respondent No.4. It is his case that he was appointed against the 2nd post of peon by the Governing Body of Trupti Women's College, Basudevvpur in the district of Bhadrak on 02.11.1988 pursuant to which he joined on 03.11.1988. Prior to his appointment, one Brundaban Palei was appointed against the 1st post of peon and subsequently, one Keshab Chandra Behera, the present appellant was appointed against the post of 4th Peon on 01.01.1989. Therefore, in all records of the College including the recommendation form, the petitioner was shown against the 2nd post of peon. When the College was notified to receive grant-in-aid w.e.f. 01.06.1994, the then Secretary of the Governing Body, manipulated the records to show favour to the said Keshab Chandra Behera by recommending his name against the 2nd post of peon and basing upon such recommendation, the Director of Higher Education, Odisha approved the appointment of Keshab Chandra Behera against the 2nd post of peon. It is alleged that at the time of his appointment, Keshab Chandra

Behera was a regular student of Upendranath Academy in the district of Balasore and he passed his HSC examination in the year 1989. His date of birth, being 11.10.1971, he was aged less than 18 years at the time of his so-called appointment, which is illegal.

3. A joint counter was filed by the Governing Body of the College and Keshab Chandra Behera. It was stated that the petitioner-Purusottam Sethi was issued with appointment order on 15.02.1989 pursuant to which he joined on 16.02.1989 and not on 03.11.1988 as claimed by him. On the contrary, Keshab Chandra Behera was given appointment on 31.12.1988 against the vacancy caused by the resignation of one Prafulla Kumar Agasti, who was appointed against the 2nd post of peon on 09.10.1988. As regards the allegation regarding his underage, it was clarified that the rules do not prescribe any minimum age limit and since he is senior to the petitioner, the Governing Body rightly recommended his name and the Director, Higher Education, Odisha, considering all aspects had approved his appointment.

4. A rejoinder was filed by the petitioner- Purusottam Sethi insisting that his appointment was against the 2nd post of peon and that of Keshab Chandra Behera against 4th post of peon and further that the Keshab Chandra Behera was underage at the time of his appointment.

5. Basing on the rival pleadings, learned Tribunal framed the following questions for consideration.

- (i) *Whether the petitioner was appointed against the 2nd post of Peon w.e.f. 2.11.1988 pursuant to which he joined on 3.11.1988,*
- (ii) *Whether the petitioner is entitled to grant in aid w.e.f. 1.6.1994 as per Grant in Aid Order 1995,*
- (iii) *Whether release of grant in aid in favour of O.P. No.4 as per Annexure-3 is liable to be set aside.”*

After considering the materials on record, learned Tribunal held that there is no dispute that Keshab Chandra Behera was a minor on the date of appointment i.e. on 01.01.1989 and even on 31.12.1988 as per his own case. Referring to Para-16(2) of the Grant-in-Aid Order, 1994, Rule-9 of the Odisha Education (Management of Private College) Rules 1979 and Rule 7(C) of Odisha Recruitment Rules, 1974, it was held that the age and qualification for appointment of staff of recognized unaided colleges have been prescribed as

being the same as that of Government servants and as per Rule 52-A (iii) of Odisha Service Code, the minimum age limit for Class-IV staff is 18 years. Therefore, under no circumstances a Class-IV staff could have been appointed even in an unaided college, who is below 18 years of age. Holding thus, learned Tribunal held that the approval of appointment of Keshab Chandra Behera and the consequential release of grant-in-aid in his favour is illegal and is liable to be set aside. It was further held that as per the staff position, the petitioner (Purushottam Sethi) had joined on 16.03.1989, whereas Keshab Chandra Behera joined on 20.05.1989, which is inconsistent to his own stand that he had joined on 01.01.1989. This is also inconsistent with his own stand taken in the additional counter that he had joined on 31.12.1988 as also on 17.12.1990. The approval order shows that he had joined on 01.01.1989. Taking note of these inconsistencies, learned Tribunal held that the same suggest manipulation and undue favour being shown to Keshab Chandra Behera only to bring him within the grant-in-aid fold. It was further held that not only that the petitioner is senior to Keshab

Chandra Behera and is entitled to approval of his appointment and consequential release of grant-in-aid against the 2nd post of peon but also the appointment of Keshab Chandra Behera per se and approval of his appointment as well as release of grant-in-aid in his favour is illegal as he was minor at the time of appointment and such period of minority cannot be taken into consideration towards his qualifying service. On such findings, the petitioner's case was allowed and the authorities were directed to approve his appointment against the 2nd post of Peon and consequential release of grant-in-aid w.e.f. 01.06.1994 within a period of three months. The approval of the appointment and consequential release of grant-in-aid in favour of Keshab Chandra Behera was set aside and since the approval his of appointment was made illegally, the grant-in-aid released in his favour was directed to be recovered either from him or the authority concerned responsible for such manipulation.

6. Heard Mr. Sameer Kumar Das, learned counsel for the appellant, Mr. B.P.Tripathi, learned Addl. Government Advocate and Mr.K.K. Swain, learned counsel

for the private respondent No.4.

7. Mr. Das has assailed the impugned judgment on the ground that learned Tribunal decided the case on the premise of negative equality by holding that there is manipulation of College records to show undue favour to the appellant and hence, respondent No.4 is to be approved against the 3rd post of peon of the college and to get grant-in-aid from 01.06.1994. Learned Tribunal did not go into the facts with regard to validity of the appointment and claim of respondent No.4 for the 2nd post of peon of the College nor considered whether the Governing Body had ever appointed and adjusted him against the 2nd post. It is further contended by Mr. Das that respondent No.4 was not in service of the institution since 06.07.2010 which amounts to termination of service. By suppressing such facts, respondent No.4 misled the learned Tribunal to pass the impugned judgment in his favor which is nothing but an act of fraud. In this context it is submitted by Mr. Das that respondent No.4 had approached the learned Tribunal during pendency of the GIA case by filing Appeal Case No. 39 of 2010 challenging the decision of the Governing Body

preventing him to discharge his duty with effect from 06.07.2010 which amounts to termination of service. As on the date of passing of the impugned judgment in GIA Case No. 214 of 2007, the said appeal was pending but such fact was never disclosed before the Tribunal. Had he disclosed such fact, the appeal could have been heard along with the GIA case or the GIA case would have waited till finalization of the appeal because he had himself admitted that he was no longer an employee of the institution due to his termination from service with effect from 06.07.2010. Therefore, the impugned order inasmuch as it treats the respondent No.4 as an employee of the institution is a nullity. Similarly respondent No.4 had also filed another Education Appeal Case No. 13 of 2011 under section 10-A challenging the order of termination dated 03.03.2011. Both the appeals, i.e., Education Appeal Case No. 39 of 2010 and Education Appeal Case No. 13 of 2011 were disposed of by common judgment passed by the learned Tribunal on 16.03.2012. So, while the GIA case was disposed of during pendency of the appeal without disclosing the fact of filing of these appeals, the appeals were disposed of by taking note

of the result of the GIA case. On merits of the case it is argued by Mr. Das that respondent No.4 had never been appointed/adjusted against the 2nd post of peon nor had challenged the appointment and continuance of the present appellant against the second post of peon at any time from 1990 to 2007 i.e., for a period of 17 years. Only when he was terminated from service for unauthorized absence from duty he came up with this plea that his case was to be considered for approval in light of the judgment in the case of the ***Simanchal Panda vs. State of Orissa and Ors***, reported in 2002 SCC (L&S) 369. In any case, respondent No.4 cannot get the benefit of GIA order 1994 because he has already retired from service and in the case of ***State of Odisha and another vs. Anup Kumar Senapati and another*** (Civil Appeal No.7295 of 2019) and batch of cases, the Supreme Court held that if a person's appointment has not been approved under GIA Order 1994 on the date of the decision i.e., 16.09.2019, irrespective of his eligibility, he will get Block Grant. At best respondent No.4 may get Block Grant from 01.02.2009 if the Governing Body recommends his case but he cannot be paid grant-in-aid from

01.06.1994. Learned Tribunal committed manifest error in not considering these vital aspects of the matter.

8. Per contra, Mr. Swain has supported the impugned order by submitting that fraud was practiced not by the respondent No.4 but by the appellant himself in connivance of the members of the Governing Body which had wrongly recommended his case for approval against the 2nd post. Insofar as the appellant is concerned, his date of joining is shrouded with serious doubts. At one place, i.e., in its counter filed before the learned Tribunal, the date of joining of the appellant is said to be 01.01.1989 against the resignation vacancy of one Prafulla Kumar Agasti, while at another place, that is, in the additional counter filed by the present appellant before the learned Tribunal, the said date is said to be 16.12.1990. If the said Prafulla Kumar Agasti resigned prior to 31.12.1988 from the 2nd post of peon and the appellant was appointed against the said post on 31.12.1988 and joined on 01.01.1989 then, the question of resignation of Prafulla Kumar Agasti again on 26.10.1990 as per resolution dated 26.11.1995 (Annexure-A/4 to the

additional counter), does not arise at all. All this, according to Mr. Swain, strongly suggests manipulation of records and falsifies the claim of the appellant of having been appointed against the 2nd post of peon against the consequential vacancy of Prafulla Kumar Agasti. Again, in the staff position submitted by the College, enclosed as Annexure-2 to the GIA case before the learned Tribunal, the date of joining of the appellant has been shown as 20.05.1989. In the approval order passed by the Director, Higher Education, the date of joining of the present appellant has been shown as 01.01.1989. Thus, three different dates namely, 01.01.1989, 20.05.1989 and 16.12.1990 have been projected as the dates of joining of the appellant. Therefore, learned Tribunal rightly held that there was manipulation of records. Ultimately learned Tribunal accepted the date of joining of the appellant as 01.01.1989 as reflected in the approval order. However, by such date the appellant had not completed 18 years of age and therefore such appointment was ab initio void as per the relevant rules. Since the very appointment of the appellant was unlawful, invalid and ab initio void, he is not liable to get grant-in-aid from the State

Government. On the other hand, learned Tribunal rightly held that the respondent No.4 is senior to the present appellant having been appointed on 15.03.1989. Therefore, notwithstanding the claim of the respondent that he was actually appointed on 03.11.1988, even accepting the version of the Governing Body that he was appointed on 15.03.1989 then also, he is senior to the appellant and as such entitled to get grant-in-aid as per the GIA order 1994. It is the settled position of law that if one post is admissible for grant-in-aid then the senior person will be approved against that post. The contention that respondent No.4 had suppressed material facts before the learned Tribunal and had practiced fraud is sought to be repelled by Mr. Swain that law is well settled that termination is a lis between the terminated employee and employer and therefore the substitute appointee in the termination vacancy has no role to play and is hence, not a necessary party to that proceeding. The cause of action for filing the Education Appeal Case Nos. 39 of 2010 and 13 of 2011 by respondent No.4 arose after filing of the GIA case and in any case, relates to his termination from service, in which the

appellant has no role to play. Even otherwise, the termination having been found to be unlawful in the end by the learned Tribunal and the respondent No.4 being directed to be reinstated in service, the argument advanced by the appellant no longer has any force. As regards the applicability of the case of **Anup Kumar Senapati (supra)** it is contended by Mr. Swain that the judgment of the learned Tribunal was passed prior to judgment of the Apex Court and in any case as per the yardstick dated 08.07.1977 two posts of peon were admissible and since the petitioner is the senior, he is entitled to get grant-in-aid against the said post.

9. From the rival contentions noted above, it is evident that the following points are required to be determined in the present appeal:

1. Whether the appellant is entitled to receive grant-in-aid as per GIA order 1994.
2. Whether respondent No. 4 practiced fraud by way of suppression of relevant facts.

3. Does the impugned judgment warrant any interference by this Court?

10. Of the three points noted above, the one at Serial No.2 deserves consideration at the outset because it is well settled that fraud and justice never dwell together. If it is established that respondent No.4 has indeed practiced fraud the whole perspective would change and the consideration for this Court would be entirely different.

It has been argued that respondent No.4 filed the GIA case in 2007. During pendency of the said case, challenging the order of the Governing Body refusing him to discharge his duties, he approached the Tribunal in Education Appeal Case No. 39 of 2010. Further, he was terminated from service on 03.03.2011 which he also challenged before the learned Tribunal in Education Appeal Case No. 13 of 2011. Both the appeals were disposed of by the learned Tribunal on 16.03.2012 i.e., after passing of the impugned order which was on 17.01.2011. So as on 17.01.2011 both the appeals were pending. Admittedly, the appellant was not a party to the said appeals. It is also

common ground that the fact of pendency of the appeals was not brought to the notice of the Tribunal. The question is, does it amount to suppression of relevant facts. Viewed differently, whether non-mentioning of the fact of pendency of the appeals in the GIA case by respondent No.4 amounts to suppression of relevant facts? The answer to this question obviously would depend upon whether the pendency of the appeals had any material bearing on the outcome of the GIA case. The GIA case, as already stated was filed by respondent No.4 with the following prayer:

“Under the above circumstances, it is humbly prayed that the aforesaid grant-in-aid may be admitted and records be called for and upon hearing the parties, the impugned order dated 06.04.1996 passed by the Director, Higher Education, Orissa, under Annexure-3 may be quashed/set aside and necessary direction be made to the O.Ps. more particularly to the O.P. Nos. 1 and 2 to approve the appointment of the applicant against the post of second Peon and to release grant-in-aid in his favour w.e.f. 01.06.1994 and the arrear dues may be calculated and be paid to him within a time to be stipulated by this Hon’ble Tribunal”

Evidently, the lis involved in the GIA case is a claim for grant of grant-in-aid which involves inter se dispute between respondent No.4 on one hand and the appellant and Governing Body of the institution on the other. Though it is claimed that respondent No.4 was no

longer an employee of the institution having been terminated from his service in the year 2010, it is not the case of the appellant that as on the date of filing of the GIA case respondent No.4 was not an employee of the institution. The appeals were filed during pendency of the GIA case. In the first appeal namely, Education Appeal Case No. 39 of 2010 the refusal of the Governing Body to the respondent No. 4 to discharge his duties was under challenge. In the second appeal namely, Education Appeal Case No. 13 of 2011, the order of the Governing Body terminating the respondent No.4 from service dated 03.03.2011 was under challenge. Obviously, the lis involved in the GIA case and the lis involved in the two appeals are entirely different. In the appeals the relief is sought for against the Governing Body and the appellant has no role whatsoever to play in the matter. To such extent therefore, non-impletion of the appellant in the appeals is of no consequence. If the fact of pendency of the appeals would have been brought to the notice of the tribunal, it is contended, the learned Tribunal would have awaited finalization of the said appeals without disposing of the GIA

case. This is being said in view of the fact that in the common judgment passed in the appeals, the judgment passed in the GIA case has been taken note of. This is undoubtedly a reasonable submission but in the facts and circumstances of the case, this Court is unable to persuade itself to accept that not mentioning of the fact of pendency of the appeals filed by respondent No.4 was a deliberate act of suppression. Be that as it may, this argument loses much of its steam in view of the fact that the order of termination has since been held to be illegal and set aside by the learned Tribunal with direction to the authorities to reinstate the petitioner in service. It goes without saying that if an order of termination is held to be illegal, in the instant case for want of compliance of Section 10-A of the Odisha Education Act, it is as if the said order never existed and for such reason the learned Tribunal directed reinstatement of the respondent No.4 in service. Therefore, the argument made on behalf of the appellant in this regard is only academic having no material bearing on the present case. This Court, in view of the foregoing discussion holds that respondent

No.4 cannot be held to have suppressed any material fact so as to be treated as having practiced fraud.

11. Coming to the point at Serial No.1, a reading of the impugned judgment shows that the learned Tribunal held that respondent No.4 being admittedly senior to the appellant is entitled to get grant-in-aid as per the GIA order 1994. The case of the appellant however is on the premise that he was appointed against the consequential vacancy caused by the resignation of Prafulla Kumar Agasti, who was holding the 2nd post of peon. It would be proper to examine the merits of the claim put forth by the appellant by examining the relevant facts.

12. It is borne out from the record that pursuant to the resolution dated 31.12.1988 of the Governing Body the appellant was appointed as a peon on 01.01.1989. The College was notified to receive grant-in-aid from the State Government with effect from 01.06.1994 as per the GIA order 1994. The Governing Body recommended the name of the appellant against the 2nd post of peon. Basing on such recommendation of the Governing Body, the Director of

Higher Education in his order dated 06.04.1996 approved the appointment of the appellant against the 2nd post of peon. Significantly in the said order, the date of joining of the appellant has been mentioned as 01.01.1989. Respondent No.4, on the other hand claims to have been appointed against the 2nd post of peon by the Governing Body after undergoing a due process of selection on 02.11.1988 in which he joined on 03.11.1988. Learned counsels for both parties have argued at length with regard to the actual date of joining of the appellant.

13. As already stated hereinbefore, there appears to be considerable confusion and discrepancy with regard to the date of joining of the appellant inasmuch as three dates namely, 01.01.1989, 20.05.1989 and 16.12.1990 are being put forth in this regard at different places. Learned Tribunal has placed reliance on the date mentioned in the approval order of the Director i.e., 01.01.1989. In the circumstances, this Court also would like to place reliance on the date mentioned in the order of approval passed by the Director that is, 01.01.1989 because the appellant was given the

benefit of grant-in-aid on such basis. If such be the case, the question is, whether the appellant was appointed against the 2nd post of peon and if so, since when.

From the School Leaving Certificate issued by Upendra Nath Academy in favour of the appellant it appears that his date of birth as recorded in the Admission Register is 11.10.1971. It has been strenuously argued by learned counsel for the respondent No.4 that the appellant was a minor as on the date of his appointment i.e., 01.01.1989 inasmuch as he was aged below 18 years. Reliance has been placed on the provisions of Odisha Education (Management of Private Colleges) Rules, 1979 (in short “1979 Rules”), Odisha Education (Recruitment and Conditions of Service of Teachers and Members of Staff of Aided Educational Institutions) Rules, 1974 (in short “1974 Rules”) and Rule 52-A of the Odisha Service Code in this regard. As per rule 9(1) of the 1979 Rules, the Governing Body shall appoint teaching and non-teaching staff in accordance with the provisions contained in the 1974 Rules. Rule 7(c) of the 1974 Rules provides that the age and qualifications for appointment as teachers and other posts would be the same

as for similar or corresponding posts in the educational institutions established and maintained by the Government. Rule-52-A (iii) of the Odisha Service Code lays down the minimum age limit for entry into Government service as 18 years in case of non-gazetted Class-III Ministerial Servants and Class-IV Government servants. Learned Tribunal has also relied upon the aforementioned rules in the impugned judgment.

After perusing the relevant provisions of the Rules, this Court is in complete agreement with the learned Tribunal that the appellant was a minor as on 01.01.1989 and hence, not eligible for appointment. Once the appointment itself is held to be void, no vested right can be claimed by the appointee. Obviously with a view to nullify the above facts, a stand was taken by the appellant before the learned Tribunal subsequently by filing an additional counter that he was engaged by the Governing Body looking at his poor financial condition as he was literate and a local inhabitant. Surprisingly, this is contrary to the stand taken in the original counter which again was filed jointly by the Governing Body and the appellant wherein it was stated

under oath that the petitioner was appointed by order dated 31.12.1988 and joined in his duty on 01.01.1989. At the same time it is mentioned that the respondent No.4 was appointed on 15.03.1989 and joined the duties on 16.03.1989 and therefore the appellant is senior to respondent No.4. Even if this much is accepted without entering into the factual controversy any further, it becomes evident that the appellant having been born on 11.10.1971 could have been eligible for appointment only after 10.10.1989 and not before. So his appointment, if at all, prior to such date can have no legal sanction. If the date of appointment of respondent No.4 is accepted as 15.03.1989 as per the counter filed by the Governing Body and the appellant, he obviously becomes senior in service to the appellant in view of the fact that the appointment of the latter at any rate prior to 10.10.1989 cannot have any legal recognition. In short, when the very appointment of a person is invalid he cannot be held entitled to grant-in-aid.

14. It is thus seen that the appellant had no legal right to be allowed grant-in-aid under the GIA Order 1994.

On the contrary, respondent No.4 is found to be entitled to receive grant-in-aid against the 2nd post of peon under the GIA Order, 1994. Consequently, there is no infirmity much less illegality in the impugned judgment passed by the Tribunal.

15. A feeble argument was advanced on behalf of the appellant that in view of the retirement of respondent No.4 in the meantime, he cannot be given the benefit of grant-in-aid. Further, in view of the ratio of the case of **Anup Kumar Senapati (supra)**, the case of the respondent No.4 cannot be considered in relation to the GIA Order 1994. This is argued by taking a cue from the judgment in **Anup Kumar Senapati** that since GIA 1994 has already been repealed, no further claims under the said order can be entertained. Learned counsel appearing for the appellant appears to have missed the point that this is not a case of claiming GIA under the 1994 Order per se, but of non-grant of GIA to the respondent No.4 at the relevant time. In fact, the appointment of the appellant was approved against the 2nd post by order dated 06.04.1996 but such order was

challenged by respondent No.4 in this Court in OJC No. 3868 of 1996, which was disposed of on 04.09.2007 directing him to approach the Learned Tribunal whereupon he filed the GIA Case in question in 2007. The Learned Tribunal passed the impugned judgment on 17.01.2011. The appellant challenged the said judgment in the present appeal filed in 2011. It must be kept in mind that the judgment in **Anup Kumar Senapati's** case was delivered on 16.09.2019. Therefore, the inter-se dispute was decided much before the said judgment was delivered. The ratio of **Anup Kumar Senapati** bars the raising and/or entertaining claims under the 1994 Order after its repeal but the case at hand stands on a different footing. The dispute arose right from the time when the appointment of the appellant was approved and admittedly, when the GIA 1994 Order was still in force. The dispute was finally decided by the Learned Tribunal in 2011. There is thus a factual distinction between the cases referred to in the ratio of **Anup Kumar Senapati** and the case at hand. For the same reason, the respondent No. 4, irrespective of the fact of his retirement from service in the meantime, is held entitled

to the claimed benefit as he had validly raised the same during his period of employment and not thereafter. This court therefore holds that the appellant is not entitled to receive grant-in-aid as per GIA order 1994.

16. For the foregoing reasons therefore, this Court is of the considered view that the impugned judgment suffers from no infirmity or illegality to warrant any interference whatsoever. Resultantly, the appeal being devoid of merit is therefore, dismissed. There shall be no order as to costs.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 11th October, 2022/ A.K. Rana, P.A.