

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMP NO.1174 OF 2015

(Application under Articles 226 and 227 of the Constitution of India)

Itishree Mohanty

... Petitioner

-versus-

**State of Odisha(Vigilance)
and others**

... Opposite Parties

Advocates appeared in the case through hybrid mode:

For Petitioner : Mr.L. Pangari,
Sr.Advocate

-versus-

For Opp.Parties: Mr.N. Moharana
Standing Counsel (Vigilance)

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT
06.12.2022.

Sashikanta Mishra,J. In the present application, the Petitioner questions the correctness of order dated 6th August,

2012 passed by learned Special Judge (Vig), Cuttack in T.R. No.40/2012 (VGR Case No.46/2009) whereby cognizance was taken of the offence under Section 13(2) read with Section 13(1)(d) of the P.C. Act, 1988 and Sections 420/468/477-A read with Section 120-B of I.P.C.

2. The facts of the case are as follows:-

The Petitioner joined as a Lecturer in Economics (4th Post) in Adikabi Saraladas College, Tirtol in the district of Jagatsinghpur on 1st September, 1993 after facing an interview. The Odisha Aided Educational Institutions (Appointment of Lecturers Validation) Act, 1988 was enacted to validate the appointment of Lecturers appointed between 1st January, 1985 to 31st December, 1992. Accordingly, the Government in Department of Higher Education asked the authorities of all aided Colleges to send list of Lecturers, who had the requisite qualification and eligibility for such validation. The names of 18 Lecturers including the Petitioner working in the College were forwarded to the

Government basing on which, the Government in Department of Higher Education issued order on 6th January, 2001 validating the services of 17 Lecturers. Subsequently during incumbency of the succeeding Principal, an objection was raised by him on 10th December, 2001 alleging that the services of 3 Lecturers including the Petitioner had been validated on manipulation of records to avail the benefit under the Act. It was alleged that the fact of appointment of 3 Lecturers on payment of honorarium from contingent fund of the College was taken as true without proper verification. On further verification conducted in the Department of Higher Education, the Notification dated 6th January, 2001 was modified issuing order of approval and sanction in respect of 14 Lecturers excluding 3 Lecturers including the Petitioner by order dated 13th March, 2002. An F.I.R. was lodged by the DSP (Vigilance), Jagatsinghpur on 11th November, 2009 leading to registration of Cuttack Vigilance Police Case No.45 dated 11th November, 2009. It was specifically alleged that the Petitioner had

joined on 1st September, 1993, but was shown in the list of 18 Lecturers to have joined on 10th September, 1992 by manipulating documents and creating false joining reports in connivance of the then Principal and Head Clerk of the College. In short, the manipulation was done with a view to bring the Petitioner and other such Lecturers within the cut-off date stipulated in the Validation Act. It is stated that the Petitioner has not been benefited by the initial notification of validation and has continued as management staff without getting any grant-in-aid. The F.I.R. allegations were investigated and charge sheet was submitted on 30th July, 2012 along with the order of sanction dated 25th July, 2012 issued by Sub-Collector-cum-President of the Governing Body of the College. Learned Special Judge (Vig), after considering the materials on record took cognizance of the offences and issued process holding that a prima facie case was made out against the accused persons relating to the offences.

The Petitioner challenged the order taking cognizance before this Court in CRLMC No.3794/2012 filed under Section 482 of Cr.P.C. The said petition was dismissed by order dated 20th January, 2014. The Petitioner thereafter approached the Supreme Court in SLP (CRLMP) No.14015/2015, which was also dismissed. The present application filed under Articles 226 and 227 of the Constitution of India is on a fresh ground, not taken in the earlier petition that there was no valid sanction for prosecution of the Petitioner for which the impugned order is illegal and void.

3. Heard Mr. L. Pangari, learned Senior counsel for the Petitioner, and Mr. N. Moharana, learned Standing Counsel for the Vigilance Department.

4. A preliminary objection is raised by Mr. Moharana regarding maintainability of the petition. It is submitted that the Petitioner having once approached this Court challenging the self-same order in an application under Section 482 of Cr.P.C. (CRLMC No.3794/2012) and the same having been dismissed

on merits as also confirmed by the Apex Court, it is no longer open to the Petitioner to approach this Court again by impugning the very same order.

5. Opposing such contention Mr. Pangari contends that dismissal of an earlier petition under Section 482 of Cr.P.C. does not bar filing of a subsequent petition under Section 482 of Cr.P.C. in case the facts so justify. In this regard, Mr. Pangari has referred to a decision of the Apex Court rendered on 29th June, 2021 in the case of **Vinod Kumar, I.A.S. v. Union of India and others**, reported in 2021 SCC Online 559, wherein a reference has been made to an earlier decision of the Apex Court rendered in the case of **Superintendent and Remembrancer of Legal Affairs v. Mohan Singh and others**; reported in (1975) 3 SCC 706. Relying on the aforesaid decision of the Apex Court Mr. Pangari submits that the present application has been filed on the ground of absence of valid sanction for prosecution of the Petitioner, a ground which was not taken in the earlier petition. He

further contends that unlike civil proceedings, the principle of resjudicata/constructive resjudicata are not applicable to criminal proceedings and therefore, there is no bar in law to prefer the present application under Article 227 of the Constitution of India notwithstanding dismissal of the earlier application under Section 482 of Cr.P.C.

6. In view of the authoritative pronouncement of the Apex Court in this regard in the case of **Mohan Singh** (supra), this Court finds considerable force in the contention raised by Mr. Pangari that the present application is maintainable. As regards dismissal of the SLP it is contended that the dismissal being not a judgment on merits, but in limine, also cannot stand as a bar to the subsequent applications. Mr. Pangari has relied upon the decision of the Apex Court in the case of **Kunhayammed and others v. State of Kerala and another**, reported in (2000)6 SCC 359, wherein it was held that the dismissal of a Special Leave Petition by the Supreme Court by a non-

speaking order would not operate as a bar to raise the issues in a subsequent proceeding. Similar view was taken by the Apex court in the case of ***State of Orissa and another v. Dhirendra Sundar Das and others***; reported in AIR 2019 SC 2331 that dismissal of SLP in limine simply implies that the case before the Apex Court was not worthy of examination for a reason, which may be other than merits of the case. It is further held that such in limine dismissal at the threshold without giving any detailed reasons, does not constitute any declaration of law or a binding precedent under Article 141 of the Constitution.

In view of such clear pronouncement of law as referred above, this Court has no hesitation in holding that the present application is maintainable notwithstanding dismissal of the SLP filed against the earlier order passed by this Court in the petition under Section 482 of Cr.P.C.

7. Before commencement of hearing, the parties were impressed upon that the points already

canvassed in the earlier application filed under Section 482 Cr.P.C. would not be considered and only the additional point urged in the application would be considered.

8. In this regard, the moot point that arises for consideration is, whether there was valid sanction for prosecution of the Petitioner. It is submitted by Mr. Pangari that the order of sanction was issued by the Sub-Collector-cum-President of the Governing Body, who had no authority to issue such order. It is submitted that the Government in Department of Higher Education had issued a notification on 10th June, 2004 dissolving the Governing Body of all non-Government Aided Colleges with immediate effect and by directing the Addl. District Magistrates at District Headquarters and Sub-Collectors at other places to take over as President of the Governing Bodies. The said notification came up for challenge before this Court in a number of writ petitions. In the case of ***Bhararatiya Chaturdham Ved Bhawan Nyas and***

another v. State of Orissa and others (WPC No.9541/2004), by judgment dated 26th July, 2010, this Court after analyzing the provisions of the Odisha Education Act particularly, the proviso to sub-section 6 of Section 7 of the said Act, held that the notification dated 10th April, 2004 is without any jurisdiction under the Act or Rules and hence, cannot be sustained and accordingly quashed the same. This Court further held that as per the proviso to sub-section 6 of Section 7 of the Act, the Governing Body which was existing as on 10th June, 2004 shall be held to be continuing as a valid Governing Body of the College till a new Governing Body is constituted as per law. The operative portion of the order passed by this Court is quoted herein below:-

“In view of the above discussion, as this Court finds that the notification dated 10.6.2004 impugned in this writ petition, issued by the Government is without any jurisdiction under the Act or Rules of the year 1991, the said notification cannot be sustained and the same is accordingly quashed. As per the proviso to sub-section (6) of Section 7 of the Act, the Government Body, which was existing as on 10.6.2004

shall be held to be continuing as a valid Governing Body of the College and shall continue as such till a new Governing Body is reconstituted as per the provisions of the proviso to sub-section (s) of Section 7 of the Act in accordance with Orissa Education (Establishment, Recognition and Management of Private Junior Colleges/Higher Secondary Schools) Rules, 1991 as amended.”

9. Subsequently, this Court in several Writ Petitions held that any action taken by the ADM/Sub-Collector as President of the Governing Body would be without jurisdiction. A division Bench of this Court in the case of ***Governing Body, Biju Pattnaik Degree College of Science and Education and another v. State of Odisha and others*** (W.A. No.182/2019) by order dated 30th April, 2019 held that the Sub-Collector (of the concerned institution), who can be the President of the Governing Body of an Aided College lacks jurisdiction to act either as a Governing Body of an Aided College or as a disciplinary authority to inflict penalty under Rule 20 of the Rules. In the case of ***Governing Body of Bahanaga College v. State of Odisha and others***; reported in 2014 Lab. I.C. 2872,

this Court held that once the authority is not competent, any order passed by it is a nullity in the eye of law. Relying on the cited decisions Mr. Pangari would contend that the Notification dated 10th June, 2004 having been quashed by order dated 26th July, 2010, the Sub-Collector had no authority to grant sanction on 27th July, 2012 as by then he was neither the appointing authority of the Petitioner nor had authority to remove her from service.

10. Mr. Moharana has vehemently opposed the contentions advanced by Mr. Pangari as noted above. According to him, law recognizes the distinction between absence of sanction and invalidity of sanction. Absence of sanction may be a ground for the higher Court to interfere, but in case of invalid sanction the same is a matter to be decided only during trial. Mr. Moharana has relied upon several decisions of the Apex Court in this regard namely, ***Dinesh Kumar v. Chairman Airport Authority of India***; reported in AIR 2012 (SC) 858; ***CBI vs. Ashok Kumar Aggrawal***;

reported in (2014) 14 SCC 295; **Prakash Singh Badal and another vs. State of Punjab and others**; reported in (2007) 36 SCC 233 and several other decisions. This Court has consciously not referred to each of the decisions cited by Mr. Maharana because the common principle that emerges from a reading of all such decisions is found summarized in the following paragraph in **Dinesh Kumar's** case (supra);

“In para-11 while drawing a distinction between the absence of sanction and invalidity of the sanction, this Court in Prakash Singh Badal expressed in no uncertain terms that the absence of sanction could be raised at the inception and threshold by an aggrieved person. However, where sanction order exists, but its legality and validity is put in question, such issue has to be raised in the course of trial. Of course, in Prakash Singh Badal, this Court referred to invalidity of sanction on account of non-application of mind. In our view, invalidity of sanction where sanction order exists, can be raised on diverse grounds like non-availability of material before the sanctioning authority or bias of the sanctioning authority or the order of sanction having been passed by an authority not authorized or competent to grant such sanction. The above grounds are only illustrative and not exhaustive. All such grounds of invalidity or illegality of sanction would fall in the same category

like the ground of invalidity of sanction or account of non-application of mind a category carved out by this Court in Prakash Singh Badal, the challenge to which can always be raised in the course of trial.”

There can obviously be no doubt as regards the above proposition of law.

11. Now the question is, whether the present case represents a case of no sanction or invalid sanction. According to Mr. Moharana, the Petitioner's grievance is invalidity of the sanction and not absence of sanction. Sri Pangari, on the other hand, would persuade this Court to hold that the so called sanction has to be treated as no sanction in the eye of law.

12. A careful reading of the ratio laid down in **Dinesh Kumar's** (supra) case, would make it clear that where a question of validity of sanction is raised the same is left to be thrashed out during trial on the basis of evidence adduced by the parties. The validity of sanction can also be challenged on the ground that the sanctioning authority was not authorized or competent

to grant such sanction. This would obviously require evidence to prove. To amplify, whether the authority lacked competence to grant sanction would depend on specific materials, documents etc. and their interpretation, which obviously would require evidence to be adduced. The present case, however, stands on a different footing inasmuch as there can be no manner of doubt that the original order of the Government empowering the Sub-Collector to act as the President of the Governing body having been quashed prior to issuance of the order of sanction, he must obviously be held to be lacking jurisdiction for issuing the same. To reiterate, the Notification dated 10th June, 2004 was quashed by this Court by order dated 26th July, 2010 whereas, the order of sanction was issued on 27th July, 2012. This Court further held that the Governing Body as existing on 10th June, 2004 would continue till reconstitution of the Governing Body in accordance with law. Such being the admitted position, the Sub-Collector obviously lacks jurisdiction to grant sanction for prosecution.

Reference to the order of sanction, copy of which is enclosed as Annexure-9 would reveal that he has done so in the capacity of the President of the Governing Body. It has also been held in the sanction order that the Sub-Collector-cum-President, Governing Body has power to remove the Petitioner from service. This is again contrary to the judgment passed by this Court in the cases referred above that the Sub-Collector lacks jurisdiction to act either as a Governing Body of an Aided College or as a disciplinary authority to inflict penalty under Rule 20 of the Odisha Education (Recruitment and Conditions of Services of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 (**Governing Body of Biju Patnaik Degree College** (supra)).

13. These are facts which do not require any evidence to be established but are matters already settled by the pronouncement of this Court in the writ petitions and writ appeal referred above. Had there been any doubt regarding the competence of the

sanctioning authority the same could have been ascertained during trial on the basis of evidence adduced by the parties, but in view of the clear factual and legal position referred above, nothing further requires to be determined in trial. In the event the matter goes to trial, the same result would ensue. Therefore, this Court has no hesitation to hold that the so called order of sanction issued under Annexure-9 is no sanction in the eye of law.

14. Such being the position narrated above, there is no way in which the order of cognizance could be justified. It goes without saying that unless there is sanction to prosecute as required under Section 19 of the Act, the proceeding would stand vitiated. In the case of ***Manoranjan Prasad Choudhury v. State of Bihar***; reported in 2002 (10) SCC 688, it was held that since there is no sanction of the competent authority the proceeding is vitiated.

15. From a conspectus of the discussion and analysis made herein before, this Court finds that the

order of sanction under Annexure-9 being no sanction in the eye of law is a nullity. Consequently, the proceeding against the Petitioner stands vitiated. The impugned order in so far as cognizance was taken without valid sanction against the Petitioner cannot therefore, be sustained in the eye of law.

16. In the result, the CRLMP is allowed. The impugned order of cognizance is hereby set aside. Resultantly, the proceeding in T.R. No.40/2012 corresponding to Vigilance G.R. Case No.46/2009 in respect of the Petitioner is hereby quashed.

.....
(**Sashikanta Mishra**)
Judge

Ashok Kumar Behera





