

AFR

HIGH COURT OF ORISSA : CUTTACK.

W.P.C. (OAC) No. 206 of 2016

(In the matter of an application under
Articles 226 and 227 of the Constitution of India, 1950)

ABDUL WADOOD

SON OF

ABDUL ROUF

PHASE-I, DOOM DUMA

HOUSING BOARD COLONY

BHUBANESWAR

Petitioner

Mr.K.C. Das,
Advocate for
the petitioner

VERSUS

STATE OF ODISHA

REPRESENTED THROUGH

COMMISSIONER-CUM-

SECRETARY

DEPARTMENT OF SCHOOL AND

MASS EDUCATION

ODISHA – 751 001

& OTHERS

Opposite parties

Mr. Ramanath Acharya,
Standing Counsel
(School & Mass
Education)
for opposite party
Nos.1 to 3

Date of Hearing: 19.10.2022 :: Date of Judgment: 03.11.2022

CORAM:

MR. JUSTICE MURAHARI SRI RAMAN

JUDGMENT

P.T.O.

Murahari Sri Raman, J.—

1. The petitioner, joined as Teacher in Urdu in Syed Mumtaz Ali High School, Jadupur under Khandagiri P.S. in the district of Khurda, being aggrieved by approval of his post with effect from 26.04.2012 after the said School being taken over by the Government, approached the learned Odisha Administrative Tribunal by way of Original Application, which has been converted to Writ Petition on abolition of said Tribunal, craving for the following relief(s):

- “(i) *To direct the respondents to approve the post of applicant from 30.08.1991;*
- (ii) *To direct the respondents to grant/release the salary from 30.08.1991 from the date of approval of his post.”*

2. The fact adumbrated by the petitioner in the Original Application/Writ Petition reveals that the petitioner joined Syed Mumtaz Ali High School, Jadupur to function as Teacher in Urdu subject in pursuance of Resolution *vide* No.3 dated 30.08.1991 as communicated by Secretary of said School by Letter No.1292 (App), dated 30.08.1991 with a copy to Circle Inspector of Schools, Khurda Circle, Khurda.

- 2.1. As is revealed from the document enclosed to Annexure-3 to the writ petition, *i.e.*, Office Order dated 26.04.2012, it is apparent that the petitioner with qualification “ALIM-97” has been shown to have been joined as Urdu Teacher since 03.09.1991 in Syed Mumtaz Ali High School within the jurisdiction of Khurda Circle. The Director of Secondary Education, Odisha, Bhubaneswar *vide* Letter No.2983, dated 01.07.1994 conveyed to all the Inspectors

of School the decision of the Government of Odisha regarding taking over of all non-Government Fully Aided High Schools. With regard to suggestion *inter alia* list of approved staff position of the School to the Inspector of Schools, Khurda Circle, Khurda it has been stated at paragraph 6.5 of the writ petition as follows:

*“That, the Headmaster of Baliana High School submitted detailed charges of assets of the School along with list of approved staff position of the school to the Inspector of Schools, Khurda Circle, Khurda vide Letter No.36, dated 15.05.1995. In the said letter the name of the applicant appears at serial No.16. It is indicated in the remarks column of the said serial that his approval is awaited. ***”*

- 2.2. It has been asserted by the petitioner that Baliana High School was taken over by the Government with effect from 07.06.1994. As a consequential effect, funds were stopped and the petitioner being aggrieved by non-disbursement of salary approached this Court in W.P.(C) No.1710 of 2011, wherein prayer was made for approval of date of appointment as Urdu Teacher with effect from 05.08.1992. However, while the matter was pending, the Government *vide* Order dated 26.04.2012 decided to adjust the petitioner and seven other similarly situated persons in existing new Government High Schools as special case. Said Office Order is extracted hereunder:

*“Government of Odisha
School & Mass Education Department
No. 10995-IX-SME(P)-18/2012/SME, Date 26.04.2012
Office Order*

Sub Adjustment of Urdu / Persian Teachers working in 8 Now Govt. High Schools (Taken over).

As per the Articles 532 and 533 of the Orissa Education Code, there is provision to provide Urdu Teachers in Secondary Schools where sufficient Muslim students are desirous of reading the subject. There is no Urdu/Persian Teachers as per the yardstick for Secondary Schools as prescribed in erstwhile E&YS Department Letter No.28465 dtd.07.08.1981. However, the Managing Committee of some High Schools have appointed Urdu/Persian Teachers in their Schools keeping in view the requirement of such teachers for the Urdu language students who are continuing beyond approved post without GIA/Salary. These High Schools have been subsequently taken over by the Government. Govt. after careful consideration have been pleased to decide to adjust 8 Urdu/Persian Teachers working in existing eight new Govt. High Schools (taken over) (as per list Annexure-I) as one time dispensation against the existing vacant posts of Urdu/Persian/Classical teachers in Govt. High Schools as a special case.

2. *The order will take effect from the date of issue.*
3. *This has been concurred in by Finance Department vide their U.O.R. No. 185-SS-I, dated 21.10.2011.*

Principal Secretary to Government

Annexure-I

<i>Sl. No.</i>	<i>Name of the Circle</i>	<i>Name of the School</i>	<i>Name of the Teacher</i>	<i>Qualification with year</i>	<i>Date of Appointment/Joined</i>
***	***	***	***	***	***
4.	Khurda	Sd. Mumtaz Ali High School	Abdul Wadood	Alim-97	30.08.1991/ 03.09.1991"

- 2.3. In consonance with such office order, the District Education Officer, Khordha issued following Office Order:

*"District Education Office, Khordha
Office Order No.15423, Date 27.11.2012*

Pursuant to Govt. in S & ME Deptt. order No. 10995/SME dated-26.04.2012 communicated vide Director Secondary Education, Odisha, Bhubaneswar Memo No. 32892 dated 13.08.2012 the appointment of following Urdu teachers appointed by erstwhile Managing Committee of their High Schools, now taken over by Govt. are hereby approved & adjusted against existing vacancy of classical teacher of the High School as noted against each with effect from the date of issue of this order in the scale of pay of Rs.5200/- to 20,200/- GP 2,800/-. They will continue as Urdu teacher in the parent school and get their salary from the school against which they have been adjusted.

Sl. No.	Name of the parent school	Qualification	Name of the school were adjusted against classical teacher post	Remarks
***	***	***	***	***
3.	Abdul Wadood Sd. Mumtaz Ali H/S, Jadupur	Alim	Naranagarh Girls' H/S, Naranagarh	"

2.4. Thus, it is contended by the learned counsel for the petitioner that instead of according approval of the post of the petitioner with effect from 26.04.2012, the same should have been with effect from 30.08.1991, i.e., the date of appointment.

3. *Per contra*, Sri Ramanath Acharya, learned Standing Counsel (School & Mass Education Department) submitted that the petitioner is well aware of the fact that after taking over of the High Schools, the Government in Order dated 26.04.2012 clearly stipulated that as special case eight Urdu Teachers working in existing eight new Government High Schools (taken over) are adjusted against existing vacant posts of Urdu/Persian/Classical Teachers. Therefore, there is no infirmity in approving the post of

the petitioner with effect from the date of issue of Office Order dated 26.04.2012.

- 3.1. It has further been submitted by Sri Ramanath Acharya, Standing Counsel, that the Government has clarified the position that there was no sanctioned post and, therefore, by way of counter the Government made the stance clear that the Government of Odisha in School and Mass Education Department in Order dated 26.04.2012 (Annexure-3) approved the posts of eight Urdu teachers working in existing eight new Government High Schools (taken over) who were continuing beyond the approved post without Grant-in-Aid/Salary as one time dispensation against the existing vacant post of Urdu/Persian/Classical Teachers in Government High Schools. It is only after such approval being accorded, the petitioner was adjusted in existing vacancy of classical post in Naranagarh Girls' High School.
- 3.2. Mr. Ramanath Acharya, Standing Counsel for the School and Mass Education Department referred to Annexure-A/3 enclosed to the counter to argue that the petitioner, being appointed by Management Committee, can be said to not appointed by competent authority and he worked beyond the yardstick. Annexure-A/3 is extracted herein below for better comprehension of the yardstick:

*“Government of Odisha
Education & Youth Services Department
No.28465-XVII-ES-80/81-EYS dated 07.08.1981*

*From
Sri N.P. Parija, I.A.S.
Deputy Secretary to Govt.*

To

*The Director of Public Instruction(s),
Orissa*

Sub: Fixation of standard staff for the non-Govt. Secondary Schools.

Sir,

I am directed to say that the question of fixation of standard staff for the non-Govt. Secondary Schools has been felt necessary by the Government due to introduction of the revised syllabus under 10 years Schools' pattern. After careful consideration of various aspects, Government have now been pleased to decide that the Standard Staff both teaching and non-teaching for different categories of non-Government Secondary Schools shall be follows:

(A) For the Schools having no additional sections.

Sl. No.	Category of staff	3 class	5 class	7 class
1	Headmaster/Headmistress	1	1	1
2	Trained Graduate	4	4	4
3	Trained Intermediate	-	1	3
4	Trained Matric	-	1	3
5	Classical Teacher	1	1	1
6	Hindi Teacher	1	1	1
7	PET	1	1	1
8	LDC	1	1	1
9	Peons			
	i) Office Peon	1	1	1
	ii) Science Attendant	1	1	1
	iii) Night Wather-cum-Sweeper	1	1	1

Note: (a) Out of the four trained graduate teachers 2 must be Arts graduate and 2 other must be Science Graduate.

- (b) *Out of the two Science Graduate one would be having Mathematics and other having life Science as a subject in degree stage*
- (B) *For additional sections.*
- (i) *For each of the additional section in classes VIII, IX, X one additional Trained Graduate teacher would be admissible.*
- (ii) *In addition to (i) supra for every 3 (three) additional sections of the above classes (VIII to X) taken together one additional trained graduate teacher or one classical teacher according to necessity would be admissible.*
- (iii) *For each additional section for class VII one additional Trained Intermediate teacher would be admissible.*
- (iv) *For each additional section for class IV, V and VI one additional trained Matric teacher would be admissible.*
- (C) *Additional post of Clerks and Peons.*
- (i) *Where the roll strength of the school is 1000 or more one of U.D.C. would be admissible in addition to the existing post of L.D.C.*
- (ii) *Where the roll strength of the schools exceeds 100 one post of Daftory is admissible*
- (iii) *For the schools running in shift system for shortage of accommodation one additional post of Peon is admissible.*

The above yardstick will come into force with effect from 1.7.81. The Government order bearing No. 2085E dt.28.1.75 and No. 23874 EYS dt.7.7.77 shall stand cancelled from 1.7.81.

*Yours faithfully,
Sd/ illegible
Deputy Secretary to Government”*

3.3. Hence, Sri Acharya reiterated that in absence of sanctioned post and existing post of Urdu Teacher (MAULVI) in Syed Mumtaz Ali High School, Jadupur the petitioner was adjusted in Naranagarh Girls' High School, Naranagarh and, therefore, the post of the petitioner could not be approved from the date of appointment, *i.e.*, 30.08.1991.

4. Before proceeding with the matter, this Court wishes to observe that the petitioner appears to have pleaded incorrect fact at paragraphs 6.6 and 6.7 of the writ petition. For better comprehension, the contents of said paragraphs are quoted hereunder:

*“6.6. That, the Government as sanctioned post of Urdu Teacher for Balibandha High School and it is for this reason Deputy Secretary, School and Mass Education Department in Letter No.4186 dated 12.02.2001 addressed to the Director Secondary Education, Odisha, Bhubaneswar to take immediate steps to provide the sanctioned post of an Urdu Teacher even though Government have sanctioned post of Urdu Teacher and the applicant is working as Urdu Teacher in Baliantha High School since 27.07.1990. ****

*6.7. That being aggrieved by such action the applicant approached the Hon'ble High Court in W.P.(C) No.1710/2011 with a prayer to approve the date of his appointment as a Urdu Teacher with effect from 05.08.1992. ***”*

4.1. It is not clarified by the counsel for the petitioner as to how aforesaid statement of fact by the petitioner in the writ petition with regard to “Baliantha High School”/“Balibandha High School” would enure to the benefit of the petitioner, who has claimed to have joined as Urdu Teacher in “Syed Mumtaz Ali High School”.

- 4.2. Aforesaid basic statement of fact, which is vital for adjudication *vis-à-vis* prayers made being contrary to what is reflected at Annexure-1 to the Office Order dated 26.04.2012, this Court is not persuaded to grant any relief as prayed for by the petitioner for ante-dating the approval of the post with effect from 30.08.1991.
5. Having given anxious consideration to the rival contentions, this Court takes cognizance of the fact that even though there was no sanctioned post of Urdu/Persian Teachers as per the yardstick prescribed by the Government *vide* Letter No.28465, dated 07.08.1981, Managing Committee of Syed Mumtaz Ali High School, Jadupur appointed the petitioner as Urdu Teacher on 30.08.1991 and sought for post facto approval of the Government. Nonetheless, considering such sort of appointments made by the Managing Committee of different High Schools, which were subsequently taken over by the Government, as one time measure a policy decision has been taken to adjust such teachers who are continuing beyond approved post without Grant-in-Aid/Salary for Urdu language students. It is in its wisdom, the Government have notified that the Office Order dated 26.04.2012 would take effect from the date of issue after having concurrence of Finance Department.
- 5.1. In the case of *Hemanta Kumar Mohanta and Others Vrs. Coal India Ltd., O.J.C. No.2487 of 1993, etc., etc., vide Judgment dated 06.09.2017*, in the context of exercise of powers under Article 226 of the Constitution for issue of direction to the State Government to take over schools run by private management, this Court observed as follows:

- “7. *** The main stand taken by the petitioner that since the other schools have been taken over by the State Govt. hence the school in question is also directed to be taken over by the State Govt. and by stating these facts, the case of the discrimination has been made.

The admitted fact in this case is that the school in question is being run by the managing committee on its own without any aid from the State Govt. or by the Mahanadi Coalfield Ltd. The managing committee on its own bylaws appoints the teachers and impart teaching to the students studying therein. The petitioners initially, have filed these writ petitions for issuance of direction upon the opposite parties, the functionaries of the Mahanadi Coalfield Ltd. to treat the teachers working in these schools at par with the employees of the Mahanadi Coalfield Ltd. but the petitioners, on its own, in course of argument, have not pressed that prayer and confined their writ petitions with the alternative prayer, i.e. for a direction upon the State Govt. to take over the schools.

This court has examined the factual aspect in order to come to the conclusion as to whether the decision of the Government in taking over the schools conferred any right upon the petitioners.

This court has also examined the resolution dated 11th March, 1992 issued by the Government of Odisha, Department of Education and the resolution dtd.22.4.1997 issued by the Department of School and Mass Education, Government of Odisha and found that the Government has taken decision under these resolutions in view of the new education policy. It stressed on the universalization of primary education, as such has declared all the primary school teachers of schools managed by the panchayat samiti as well as the urban local bodies and the schools directly administered by the District Inspector of Schools as well as Asst. Teachers and Headmasters of UGME schools as Government servants w.e.f. 05.09.1989, taking into consideration that decision, the primary school run by Satyasai Seva Sang, Bhubaneswar imparting the same primary education to the students as per the syllabus of the education department has been taken over by the State

Government, likewise the schools established by the Orissa Weavers Co-operative Spinning Mills Ltd. at Tora, Bargarh in the district of Sambalpur has also been taken over by the State Govt. under its control subject to certain condition.

It is not in dispute that the Govt. has taken a policy decision under His Excellency, the Governor of the State in this regard. It is not in dispute that the Govt. is independent to take its policy decision since it is in their domain to take the decision depending upon the financial implication and it is also settled that the court of law cannot direct the State Govt. to take a policy decision to take over the school or come out with a particular policy decision otherwise it will be said that the court has transgressed its jurisdiction since the court is meant to enforce the law and not to make the law.

8. *The facts of the case in hand is that admittedly, the school in question where the petitioners are imparting teaching is purely under the control of the managing committee of the private bodies having no control of the Mahanadi Coalfield Ltd. only to the extent that the school in question has been established with the premises of the Mahanadi Coalfield Ltd., but it does not mean that all the schools established by the private managing committee will be directed to be taken over by the State Government by passing direction in this regard by the High Court sitting under Article 226 of the Constitution of India since it pertains to the policy decision and the State Govt. is coming forward with the specific stand that the schools cannot be taken over by it due to financial implications, hence directing a writ of mandamus upon the State Govt. would not be proper for this court, otherwise it will amount to interfering with the jurisdiction of the State Government.*
9. *According to the conscious view of this court, Article 226 of the Constitution of India is not meant to formulate the law, rather it is only to see as to whether the legal vested right of the citizen has been infringed or not, in case of infringement of fundamental right, the interference is to be shown by the writ court sitting under Article 226 of the Constitution of India otherwise not.*

The petitioners fail to make out a case of infringement of their fundamental rights, rather they are only on the principle of discrimination with respect to the policy, decision of the State Government which has been taken by it with respect to other schools but even assuming that some of the schools have been taken over, that does not mean that the High Court, in exercise of power conferred under Article 226 of the Constitution will direct the State authorities to take over the management of the schools, that too when the State Govt. has specifically stated in several paragraphs of the counter affidavit stating therein that taking over of an aided educational institution necessarily involves additional expenditure by government over and above the grant in aid which is payable to such institution and in view of serious financial crises faced by the State Government and its financial resources being far short of the committed liabilities, it is not possible to immediately take over the educational institution and further the employees of private educational institutions are not entitled to claim that Government should take over their institution.

It has further been stated that the State Government is not able to take over any new school, besides the case of one school cannot be considered in isolation and has to be considered along with several other schools which may have similar claims.”

- 5.2. Even in case where this Court has shown indulgence on humanitarian ground, the Hon'ble Supreme Court in the case of *Director, Elementary Education Vrs. Dibakar Pradhan, Civil Appeal No.2104 of 2004, vide Order dated 16.02.2010* laid down as follows:

*“*** We have perused the said order. In our opinion, the direction in the aforesaid appeal was given solely on humanitarian grounds and not on any principle of law and hence it is not a precedent. Apart from this, there is no statute which directs the State Government to take over all the Primary Schools/Hindi Primary Schools situated in different collieries of*

the Mahanadi Coalfields Ltd. In our view, the Courts are meant only to enforce the law, if it exists, but they cannot create a law and start enforcing it. To make a law is the domain of the Legislature and not of the Courts. It is in the discretion of the State Government to take over a School or not, and it cannot be compelled to do so. After all, taking over a School has financial and other implications.”

- 5.3. From the above decisions it is clear that taking over of schools is a policy decision involving financial burden on the State Exchequer. In the same breath it can be stated that creation of post to adjust teacher like the present petitioner would involve financial implication. Therefore, it is the wisdom of the Government to fix a date from which the approval is to be accorded. Therefore, seeking a writ in the nature of *mandamus* to ante-date the approval of the post of the petitioner would tantamount to intermeddling with the policy decision of the State, which power this Court is not vested with. Nevertheless, in the instant circumstances taking into account that the petitioner has discharged his duty as Urdu Teacher (MAULVI), a considerate view has been taken by the Government and he is adjusted along with seven other Urdu Teachers in different Government High Schools after being taken over. Under the aforesaid premises, no fault can be attributed to the Government in according approval to eight Urdu Teachers working in existing eight new Government High Schools (taken over) with effect from 26.04.2012 as one time dispensation against the existing vacant posts of Urdu/Persian/Classical Teachers in Government High Schools as special case.
- 5.4. It may be apt to add that the Government as a matter of policy had taken over the schools along with approved teaching and non-

teaching staff as on 07.06.1994, but not the staff whose services were yet to be approved or not approved. On his own showing it is admitted in the writ petition *vide* paragraph 6.5 that the remarks column of the staff position data as furnished to the Inspector of Schools, Khurda Circle, Khurda reflected “approval is awaited”. Therefore, the claim of the petitioner for a direction to approve the position of the petitioner with effect from 30.08.1991, *i.e.*, the date of appointment by way of Resolution passed by the Managing Committee of Syed Mumtaz Ali High School, Jadupur, cannot be granted.

6. At this juncture, it is pertinent to take note of the Resolution dated 16.12.1994 whereby the Government has decided to take over the management of all non-Government Fully Aided High Schools. Said Resolution runs as follows:

★ “No. 38522/SME-VIII-SM(M)-3/94
Government of Orissa
School And Mass Education Department
Resolution
Bhubaneswar Dated 16-12-1994

Sub: Taking over the management of all non-Government fully aided High Schools by Government—

Service conditions of the employees.—

Government had decided in principle on 7-6-1994 to take over the non-Government aided High Schools in receipt of full salary cost. The Managing Committee of these institutions were informed to comply with the terms and conditions of take over as laid down in this Department Letter No. 20645 dated 24-6-1994. The non-Government aided High Schools (as per the list enclosed) in receipt of full salary cost, have resolved to hand over the management

*along with approved teaching and run-teaching staff including assets as on 7-6-1994 and have furnished written consent of each of such staff. **Accordingly it has been decided to take over the management of these schools along with approved teaching and non-teaching staff and assets with effect from 7-6-1994.** Government would not be liable to clear any liability whatsoever relating to the period prior to and/or as, on and after 7-6-1994 incurred by the Managing Committee.*

2. *The taken over employees would be treated as Government servants with effect from 7-6-1994 only and their service conditions would be as follows :*

- 2.1. *Seniority:*

The seniority of the taken over employees in respective cadres under the State Government will be determined taking into account 7-6-1994 as the date of entry Into Government service and the inter se seniority of the taken over employees prior to 7-6-1994 will be determined in accordance with the guidelines prescribed in this Department letter No. 27236 dated 26-8-1994 subject to decision of competent Court of law where pending on the date of take-over.

- 2.2. *Fixation of pay and date of increment:*

As the teachers are entitled to salary in the scales of pay applicable to their counterparts in the State Government, their pay shall be protected on their coming over to Government service without any change in the date of increment.

- 2.3. *Pensionary benefits:*

Pensionary and other retirement benefits admissible to State Government servants shall be admissible to such employees for the period of their service under Government with effect from 7-6-1994. The remaining aided service shall be governed by the Orissa Aided Educational Institutions 'Employees' Retirement Benefit Rules, 1981.

- 2.4. *Provident Fund:*

Such employees shall subscribe to the State Government Provident Fund and shall be governed by the General Provident Fund (Orissa) Rules.

2.5. Leave:

Leave benefit as admissible to Government servants shall be admissible to such employees on the basis of service rendered by them with effect from 7-6-1994.

2.6. House Rent Allowance:

House Rent Allowance as admissible to Government servants shall be admissible to such employees with effect from 7-6-1994 but instead of the entitlement being paid to them shall be invested in shape of National Saving Certificate in the name of concerned individual teachers quarterly till the end of the financial year 1995-96.

2.7. Age of superannuation:

The employees other than Class-IV employees will retire on completion of 58 years of age. The age of superannuation for Class-IV employees shall be 60 years. The teaching and non-teaching staff other than Class-IV employees who are continuing in service beyond the age of 58 years shall be relieved forthwith. Their continuance beyond 53 years after 7-5-1994 shall not count towards pension and pensionary benefits, but they shall be entitled to salary for the period they have worked beyond 58 years.

3. All service rules applicable to Government servants shall be applicable to the taken over employees.

ORDER:

Ordered that the Resolution be published in the next issue of Orissa Gazette and copies thereof be extended to all concerned with 500 spare copies to this Department for reference.

*By order of the Governor
D.N. PADHI*

*Commissioner-cum-Secretary
to Government.”*

- 6.1. Careful reading of Resolution makes it clear that the terms of taking over *inter alia* contained decision to take over the management of these schools along with approved teaching and non-teaching staff and assets with effect from 07.06.1994. Since the post of the petitioner was not approved as on 07.06.1994, the contention of the counsel for the petitioner basing on the prayer made in the petition that the post of the petitioner is required to be approved with effect from 30.08.1991 is liable to be rejected.
7. On the reasoning assigned in foregoing paragraphs, the writ petition/original application, being sans merit, is dismissed. However, there is no order as to costs.

(M.S. RAMAN)
JUDGE