

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.C (OAC) No. 2103 of 2016

An application under Sections 19 of the Administrative Tribunal Act, 1985.

Niranjan Panigrahi

Petitioner

-Versus-

State of Odisha and others

Opp. Parties

Advocate(s) appeared in this case :-

For Petitioner : M/s. Sashi Bhusan Jena &
 S. Behera, Advocates

For Opp. Parties : Mr. N.K.. Praharaj,
 Additional Government Advocate

CORAM:

JUSTICE SASHIKANTA MISHRA

J U D G M E N T

6th December, 2022

SASHIKANTA MISHRA, J.

The petitioner being a Diploma Holder in Electrical Engineering was appointed as the Additional Sub-Assistant Engineer by order dated 07.03.1981 of the Collector pursuant to a selection process and was posted at Integrated Tribal Development Agency (ITDA), Jeypore. Such selection and appointment was stated to have been made in pursuance of the instructions of the Government in the erstwhile CD and SW Department in letter no. 5396

/CD dated 24.05.1978. The petitioner joined on 23.03.1981 and his Service Bank was opened. By letter dated 20.12.1984, the erstwhile Harijan and Tribal Welfare Department of Government requested all the project administrators of ITDA to furnish require, information as it has been decided to regularize the services of 15 Junior Engineers working in different ITDAs by adjusting them in the cadre of Junior Engineer in any Engineering Department of the State. In the meantime, the petitioner was transferred to ITDA, Rayagarh as Junior Engineer as per order of the Government where he served as such from 01.11.1988 to 20.07.1992. He was thereafter transferred to ITDA, Phulbani as per Government order where he worked as such from 20.07.1992 to 18.10.1996. He was also transferred thereafter to ITDA, Niligiri and ITDA, Baliguda. Since persons similarly placed as the petitioner in other departments were considered for promotion to the post of Assistant Engineer and his case was not considered, he submitted a representation on 21.02.2001 to the Director and Additional Secretary, S.T. & S.C. Development

Department of the Government. The said representation was not considered and in the meantime, the petitioner was allowed TBA scale of pay as per order dated 10.08.2007 of the Government. The petitioner was granted the benefits of revised scale of pay as per ORSP Rules, 1985 and 1996, TBA scale of pay and provident fund from time to time. The Junior Engineers working in the Water Resources Department were upgraded to Assistant Engineer as per Government order dated 11.09.2013, but the petitioner's case was not considered on the ground that he was directly appointed as Junior Engineer in an agency under ST & SC Development Department, which is a society registered under the Societies Registration Act, 1860 and the said department does not have a separate engineering cadre. The above was communicated by letter dated 05.12.2013 of the Government. While working at ITDA, Phulbani, the petitioner retired from Government service on attaining the age of 58 years w.e.f. 30.04.2014. Provisional pension was sanctioned by opposite party no.5 by order dated 01.05.2014. By a subsequent letter dated 09.06.2014, the Government informed the opposite party

no.5 that the petitioner is not a regular Government servant being directly recruited by the ITDA and hence he is not entitled to get pensionary benefits under OCS (Pension), Rules, 1992. Consequently, the opposite party no.5 informed the petitioner of the Government decision. It is claimed by the petitioner that two other persons, namely, Prakash Mishra and Purna Chandra Sahu who were also appointed by ITDA (ITDP) were given pensionary benefits, but the petitioner was deprived. Challenging such decision of the Government, the petitioner approached the erstwhile Administrative Tribunal in O.A. No.2103(C) of 2016 claiming the following relief:-

“Under the circumstances it is humbly prayed therefore, that the Hon’ble Tribunal may graciously be pleased to quashed the order date 15.07.2016 issued by Respondent No.5 under Annexure-12 as it has been passed by an incompetent authority.

And further be pleased to direct the Respondents to sanctioned and disburse pension DCRG and other retirement benefits to the applicant forthwith with interest at the prevailing bank rate by treating him as an employee of the Govt.”

2. The said O.A. has since been transferred to this Court and registered as the instant writ petition.

3. A counter affidavit has been filed on behalf of the opposite parties. It is stated that the petitioner was a directly recruited staff of ITDA, Jeypore. The Government in ST & SC Development Department have decided in principle that employees directly recruited by the ITDAs are not treated as regular Government servants since the ITDAs are established and registered under Societies Registration Act, 1860. As such, the petitioner is not entitled to get pensionary benefit as a regular Government employee. As regards the representation submitted by the petitioner for promotion, it is stated that the same was not considered due to non-availability of suitable and eligible candidates. It is also stated that the opposite party no.5 wrongly sanctioned provisional pension in favour of the petitioner though he is not eligible for the same. As regards the employees who were granted pension despite working in the ITDAs, it is stated that Purna Chandra Sahu was appointed by the Tahasildar and Prakash Mishra was appointed by the Collector.

4. The petitioner filed a rejoinder. It is stated therein that ITDA is controlled by the Government of Odisha in ST

and SC Development Department and therefore, the petitioner is entitled to pensionary benefits even if it is registered under the Societies Registration Act. The agency functions under the administrative control of the said department, which also provides Financial Assistance in the form of grant-in-aid with a view to streamlining the matter relating to recruitment and conditions of service in respect of persons working in ITDA. It is further stated that persons appointed along with the petitioner in other department have been given promotion to the next higher post but his case was ignored. As regards non-consideration of his representation dated 21.02.2001, it stated that nothing was communicated to him at any point of time. He also stated that his counter parts serving in other departments were upgraded to the post of Assistant Engineer ignoring his case which amounts to discrimination. It is further stated that even though the ITDA is an agency registered under the Societies Registration Act, it is under the administrative control of the Government. Persons working in similar agencies like the CDA and OREDA have been getting pensionary

benefits as per judgments passed by this Court in different cases. It is also stated that the petitioner having received all benefits like revision of pay, increments in DA etc. like regular employees, is entitled to pensionary benefits also.

5. Heard Mr. Satyjit Behera, learned counsel for the petitioner and Mr. N.K. Praharaj, learned Additional Government Advocate for the State.

6. Mr. Behera would argue that the petitioner having been appointed by the Collector after undergoing a process of selection cannot be treated differently than regular Government employees more so as he has received all service benefits during his service career as are extended to regular Government servants. Mr. Behera further submits that ITDA is an agency under the control of the Government and therefore its employees like the petitioner cannot be deprived of the benefits as are available to other Government employees. It is also argued that the initial appointment was based on order of the Government issued in respect of 15 Junior Engineers including the petitioner. That apart, Mr. Behera has

referred to the decision of this Court rendered in W.P.(C) No. 9279 of 2015 and W.P.(C) No. 8401 of 2016 and batch in support of his contention that despite being a society registered under the Societies Registration Act, the employees of the ITDA are entitled to receive all such benefits as available to other Government employees.

Mr. Behera has also referred to the case of one Suratha Mallik who has received pension as per order passed by the erstwhile OAT. Concluding his argument, Mr. Behera submits that the petitioner was all along treated as a Government employee and his retirement was also stated as 'retirement from Government service' and therefore, it is not open to the opposite party to take a stand at this belated stage that he is not entitled to pensionary benefits.

7. Per contra, Mr.N.K. Praharaj argues that ITDA is a society registered under the Societies Registration Act, 1860 having its own bye-laws and memorandum of association. The Government may have extended some financial assistance but the same does not change the character of the agency from a society to a Government

undertaking. Mr. Praharaj further argues that extension of benefits like revision of pay etc. by themselves do not prove that the petitioner was a regular Government employee. In so far as pension is concerned, Mr. Praharaj argues, the same is available only to regular Government servants, which the petitioner is not. Therefore, his claim was rightly rejected. It is further argued that since provisional pension was wrongly sanctioned, the same was withheld.

8. From the rival contentions noted above and on the backdrop of undisputed facts of the case it is evident that the moot question that falls for consideration is, whether the petitioner having been appointed by the ITDA, Jeypore can be treated as a Government employee for the purpose of availing pension and other pensionary benefits.

9. Reference to the appointment order dated 07.03.1981, copy of which is enclosed as Annexure-1 to the writ petition, reveals that the same was issued by order of the Collector, Koraput, pursuant to instructions communicated in letter no. 5396/CD dated 24.05.1978 of Government in CD and SW Department. It further reveals

that the said order was apparently a general order issued in respect of some diploma holders wherein the petitioner's name found place at serial no.12 and he was posted in Jeypore ITDA. Despite several orders, the aforementioned letter dated 24.05.1978 of the Government was not produced for perusal of the Court.

10. Be that as it may, it can be safely inferred that the appointment of the petitioner was not an isolated one but an appointment made pursuant to a decision of the Government and he was posted in ITDA, Jeypore. The Collector being the Chairman of the ITDA issued the appointment order. It has been argued that the petitioner must be held to be an employee of ITDA, which is not a Government concern but a society registered under Societies Registration Act. There is no dispute that ITDA, Jeypore is a society registered under the Societies Registration Act on 15.09.1979 as per copy of the bye-laws and a rules and regulations produced by the State Counsel. The memorandum of association of ITDA, lists its objective as under:-

*“III. The main objective of the society shall be:
i) The formulation of a comprehensive long-term
and annual plan for the integrated socio-*

economic development of the operational area of the Society with main focus on the tribals inhabiting. The plan will follow the guidelines issued by Government of Orissa from time to time and will indicate the total programme to be taken up with funds flowing from Government of Orissa, Government of India and the Financing Institutions.-

- ii) Implementation of such a plan by taking execution of schemes directly or through private, co-operative or public sector agencies with assistance received from Government of Orissa, Government of India and Institutional agencies and co-ordinating the execution of schemes taken up by other agencies of Govt.*
- iii) Undertaking such other activity from time to time as may be deemed necessary, conducive, incidental or ancillary for the integrated development of the area and objectives of the Society.”*

11. It is further forthcoming from the materials on record that the governing body of the society being headed by the Collector is comprised of people's representatives and Government Officers of the area in question and officials of some banks. A reading of the rules and regulations reveals that power is vested on the Governing body to create or sanction any new posts of any category subject to the limitation as the Government of Odisha may from time to time impose and delegate powers to any competent authority as it may deem fit for making appointment to the post. The above shows that the Government has deep and pervasive control over the

affairs of the society (ITDA). As was held by a seven Judge Bench of the Apex Court in the case of **Pradeep Kumar Biswas vs. Indian Institute of Chemical Biology**, reported in (2002) 5 SCC 111.

“The picture that ultimately emerges is that the tests formulated in Ajay Hasia are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be-whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.”

Examined in light of the above principles, it is seen that the Government, particularly through its ST and SC Development Department exercises substantial control over the functioning of the ITDAs. It not only provides financial grants but also exercises administrative control as would be evident from reference to the facts narrated hereinafter.

12. In the communication bearing no.148/ITDA dated 18.01.2010 issued by the project Administrator, ITDA, Baliguda (enclosed as a part of Annexure-7 series), the detailed service particulars of the petitioner have been

given in a tabular form, which is reproduced herein below:-

SL No.	Name of Office where he worked.	Period of service		Remarks
		From	To	
1	2	3	4	5
1	I.T.D.A. Jeypore as Sub-Asst. Engineer	23.03.1981	31.10. 1988	Appointed as Sub-Asst. Engineer in Jeypore ITDA vide Order No.1740/VII-7/81 Dev. Dtd.7.3.81 of Collector, Koraput and joined on 23.3.81 A.N.
2	ITDA, Rayagada	1.11.1988	20.07.1992	Transferred to ITDA Rayagada as Jr. Engineer vide Govt. in H&TW Deptt. Order NO.19899 dated 29.06.1988 & relieved from ITDA, Jeypore vide order No.3876 dated 31.10.1988
3	Phulbani ITDA	20.07.1992	18.10.1996	Transferred in ITDA, Phulbani as Jr. Engineer vide Govt. in H&TW Deptt. Order No.20661 dated 29.06.1992 & relieved on F.N. of 20.07.1992 from ITDA, Rayagada vide order No. 2338 dated 25.7.1992
4	Nilagiri, ITDA	19.10.1996	03.07.2002	Transferred to ITDA, Nilgiri as Jr. Engineer vide Govt. in Welfare Deptt. Order No. 22502 dated 13.09.1996 & relieved from ITDA, Phulbani vide order NO.1483 dated 18.10.1996
5.	Balliguda, ITDA	4.07.2002	Till date	Transferred to ITDA, Balliguda as Jr. Engineer vide Govt. in SSD Deptt. Order No.20305 dated 11.06.2002 & relieved from ITDA, Nilagirui on 3.7.2002 F.N. vide o No. 683 dtd. 3.07.02.

Thus, on every occasion, the petitioner was transferred from one ITDA to another as per order passed by the Government. This clearly reveals that the Government exercises direct administrative control over the employees, at least in respect of Junior Engineers like the petitioner engaged in the ITDAs. This also suggests that even though the petitioner was initially posted in

ITDA, Jeypore, it would be incorrect to treat him as an employee exclusively of the said ITDA, as otherwise, he could not have been transferred to as many as four ITDAs after being so appointed. Therefore, the stand taken by the Government that the petitioner is an employee of the society is not tenable.

13. There is no dispute that the petitioner has been granted all service benefits such as revised scale of pay as per ORSP Rules, 1985 and 1996 and also TB scale of pay along with the RACP etc. as are applicable to regular Government employees. Two employees, namely, Prakash Mishra and Purna Chandra Sahu who were appointed as Statistical Assistant and Peon respectively in different ITDPs (ITDA) and all through served in such ITDAs till their retirement were granted pension. The Government in its counter has given a somewhat vague explanation that Prakash Mishra was appointed by the Collector while Purna Chandra Sahu was appointed by the Tahasildar. This, to say the least, does not answer the query as to how they could be granted pension if they were employees of the ITDA.

14. From a conspectus of the discussion made herein before thus, it transpires that the ITDA, notwithstanding its status as a society is an instrumentality of the State. In so far as the petitioner is concerned, the administrative control exercised over him by the Government by transferring him from one ITDA to another only goes to show that he is a regular Government servant and cannot be treated as an employee of ITDA, Jeypore only. Even otherwise nothing has been brought on record by the State to show as to on what basis the employee of a particular society could be transferred to another society. The memorandum of association and rules and regulations of the society do not contain any such provision. In any case one ITDA being a society cannot obviously be held to possess the power of transfer of its employees to another society and therefore, only the authority exercising power over all such societies, i.e., the Government, can do so. This Court therefore, finds that denial of pension and pensionary benefits to the petitioner on the unconscionable ground that he is not a regular employee of the Government is not only unjustified and

illegal but also unfortunate for the reason that the State, which is expected to be a model employer cannot take such plea to thwart the legitimate dues of its employees. This Court further finds that the provisional pension was rightly granted but withdrawn/withheld basing on the decision taken by the Government, which cannot be countenanced in law. This Court therefore, holds that the petitioner is entitled to pension and pensionary benefits as admissible in law.

15. For the foregoing reasons therefore, the writ petition is allowed. The impugned order under Annexure - 12 is hereby set aside. The opposite parties-authorities are directed to take steps to grant pension and pensionary benefits as admissible in law to the petitioner without any further delay and in any case, not later than two months from the date of communication of this order or on production of certified copy thereof by the petitioner.

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Sashikanta Mishra,
Judge

*Orissa High Court, Cuttack,
The 6th December, 2022/ B.C. Tudu*