

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.C(OAC) No.1093 of 2012

Surendranath Pal

....

Petitioner

-versus-

State of Odisha & Others

....

Opposite Parties

CORAM:

JUSTICE BIRAJA PRASANNA SATAPATHY

O R D E R

28.3.2022

Order No

6.

1. This matter is taken up through Hybrid Mode.

2. Heard Mr. D.K. Panda, learned counsel for the Petitioner and Mr. Prusty, learned counsel for the State-Opposite Parties.

3. This Writ Petition has been filed by the Petitioner challenging the communication dated 14.03.2012 under Annexure-10 to the Writ Petition, wherein the Opposite Party No.1 directed the Opposite Party No.2 not to act upon the letter issued by self-same Department on 01.02.2012 under Annexure-7.

4. It is submitted by Mr. Panda, learned counsel for the Petitioner that the Petitioner was appointed as an Assistant Teacher in a Primary School in the year 1972. While the Petitioner was so continuing in Level-IV, persons junior to him were given promotion on the basis of the seniority list prepared by the Department taking into consideration the date of passing of the B. Ed Examination. The Petitioner being aggrieved moved the learned Tribunal in O.A No.609 of 1994. The learned Tribunal vide order dated 07.11.1998 when disposed of the matter, the same was

challenged before this Court in OJC No.4193 of 1999.

5. It is submitted by Mr. Panda, learned counsel for the Petitioner that this Court vide its judgment dated 21.09.2006 under Annexure-1 disposed of the aforesaid OJC No.4193 of 1999 along with two other Writ Petitions. The operating portion of the said order passed by this Court is enumerated below:-

“The seniority list of the teachers who were already promoted on the basis of the Government Resolution dated 2.12.1991 shall not be disturbed. Further, the teachers who were entitled to be considered for promotion as Headmasters before the subsequent Government Resolution dated 8.1.1996 on the basis of their seniority which was to be determined pursuant to the Government Resolution dated 2.12.1991 shall be considered with effect from the date of promotion of their next juniors under the criteria laid down in the Government Resolution dated 2.12.1991”.

6. It is submitted by Mr. Panda, learned counsel for the Petitioner that taking into account the order passed by this Court on 21.09.2006 and the further order passed in the Contempt Petition No.1259 of 2007 steps were taken and the Petitioner vide order dated 16.1.2010 was given promotion to the post of Headmaster in the scale of pay of Rs.1400-2600. It was indicated in the said order dated 16.01.2010 vide Annexure-2 that the Petitioner is so promoted from the date of promotion of the next junior i.e. w.e.f. 16.08.1996.

7. It is submitted by Mr. Panda that in spite of the order

passed on 16.01.2010 under Annexure-2 when the financial benefit was not extended, the matter was raised before the learned Tribunal in C. P. Case No.1259 of 2007. Taking into account the order passed by this Court under Annexure-1 and the order of promotion passed on 16.01.2010, necessary direction was issued by the Government-Opposite Party No.1 on 01.02.2012 under Annexure-7 with a direction on the then D.I. of Schools, Balasore to take necessary step to clear the differential arrear salary of the Petitioner for the period from 16.08.1996 to 15.01.2010. The said communication of the Government-Opposite Party No.1 was duly forwarded by Opposite Party No.2 on 24.02.2012 under Annexure-8 and vide letter dated 25.02.2012 under Annexure-9 the then D.I of School, Balasore prayed for placement of fund to the tune of Rs.3,71,900/- to pay the differential salary of the Petitioner from 16.08.1996 to 15.01.2010. It is submitted that surprisingly, vide the impugned communication dated 14.03.2012, the Government-Opposite Party No.1 without assigning any reason whatsoever withdraw the earlier communication issued on 01.02.2012 under Annexure-7. Because of such action of the Opposite Party No.1 in issuing the impugned communication under Annexure-10, the Petitioner was deprived from getting the benefit of differential salary for the period as indicated above.

It is also submitted that the Petitioner in the meantime had also retired from service on attaining the age of superannuation on 31.03.2010.

8. Mr. Panda, learned counsel for the Petitioner contended that the impugned communication dated

14.03.2012 under Annexure-10 has been issued without assigning any reason whatsoever and that too in complete violation of the orders passed by this Court under Annexure-1.

9. It is also submitted by Mr. Panda, learned counsel for the Petitioner that because of the illegal action and inaction of the Opposite Parties, the Petitioner was not given promotion, even though his juniors were given promotion to the post of Headmaster. Because of the interference of the learned Tribunal and the order passed by this Court under Annexure-1, the Petitioner only vide order dated 16.01.2010 was given promotion to the post of Headmaster from the date his juniors were given such promotion i.e. w.e.f. 16.08.1996. It is accordingly submitted that since the Petitioner for no fault of his own was denied promotion for a petty long period and only due to the interference of this Court, the Petitioner was given promotion and that too w.e.f. 16.08.1996, the Petitioner was rightly extended with the benefit of differential pay for the period from 16.08.1996 to 05.01.2010 as per Annexure-7 communication.

10. Mr. Prusty, learned counsel for the State-Opposite Parties on the other hand submitted that even though vide order dated 16.01.2010, the Petitioner was given promotion w.e.f. 16.08.1996, but since the Petitioner never discharged the duty of Headmaster in the said post, he is not eligible to get the benefit of differential pay basing on the principle of 'No work No pay'.

11. Mr. Prusty, learned counsel for the State relied on the decision of the Hon'ble Apex Court reported in **1989 (2) SCC-541**.

12. Mr. Panda, learned counsel for the Petitioner on the other hand relied on the decision of the Hon'ble Apex Court reported in **2008(9) SCC-24**. In the said reported decision of the Hon'ble Apex Court held that, once a judgment had attained finality, it could not be termed as wrong, and its benefit ought to have been extended to other similarly situated persons.

13. Mr. Panda, learned counsel for the Petitioner also relied on another decision of the Hon'ble Apex Court reported in **A.I.R 2015 SC 2904**. In the said decision the Hon'ble Apex Court held that principle of 'No work No pay' could not be attracted where the employee is not in fault.

14. Mr. Panda, learned counsel for the Petitioner also relied on the Constitution Bench decision of the Hon'ble Apex Court reported in **(1974) 4 SCC 3** and another Constitution Bench decision reported in **A.I.R 1958 S.C 538**.

15. Paragraph-14 of the aforesaid reported decision in **A.I.R 1958 S.C 538** and **Paragraphs-85 and 86** of the reported decision in **(1974) 4 SCC 3** is enumerated hereunder:-

(14) Learned counsel for the petitioners next contends that if the Act is good in the sense that has declared its policy and laid down some principle for the guidance of the Government in the exercise of the power conferred on it, the appropriate Government has failed to exercise its discretion properly on the basis of a, reasonable classification. Article 14 protects all persons from discrimination by the legislative as well as by the executive organ of the State. "State" is defined in Art. 12 as including the Government and "law " is defined

in Art. 13 as including any notification or order' It has to be conceded, therefore, that it is open to the petitioners also to question the constitutionality of the notification. The attack against, the notification is that the Government has not properly implemented the policy or followed the principle laid down in the Act and has consequently transgressed the bounds of the authority delegated to it. It is pointed out that in March, 1946, one Shri Tricumdas Dwarkadas, a solicitor of Bombay, had been appointed an officer on Special Duty to indicate the lines on which the Indian Companies Act was to be revised. He made a report which was, however, incomplete in certain particulars. Thereupon the Government appointed Shri Thiruvenkatachari, the Advocate-General of Madras, to make further inquiry. The last mentioned gentleman submitted his report and on the basis of that report, it is said, a memorandum containing tentative proposals was prepared and circulated to elicit the opinions of various organizations. On October 28, 1950, a Committee called the Indian Company Law Committee-popularly known as the Bhaba Committee-was appointed. That Committee went round and collected materials and made its comprehensive report on the basis of which the new Indian Companies Act has recently been remodeled. As nothing new has since then happened why, it is asked', should any further inquiry be made? The conclusion is pressed upon us that there can, in the circumstances, be no definite matter of public importance which can possibly call for an inquiry. We find no force in this argument. In the first place the Bhaba Committee at p. 29 of its Report recommended that further inquiries may, in future, have to be made regarding some matters relating to Companies and, therefore, the necessity for fresh inquiry cannot be ruled out. In the next place the appropriate Government is empowered to appoint a Commission of Inquiry if, in its opinion, it is necessary so to do. The preambles to the notification recite that certain matters enumerated under five heads had been made to appear to the Central Government in consequence of which the Central Government had come to the conclusion that there should be a full inquiry into those matters which, in its opinion, were definite matters of public importance both by reason of the grave consequences which appeared to have ensued to the investing public and for determining such measures as might be deemed necessary in order to prevent a recurrence thereof. Parliament in its wisdom has left the matter of the setting up of a Commission of Inquiry to the discretion of the appropriate Government and if the appropriate Government has formed the opinion that a definite matter of public importance has arisen and calls for an inquiry the court will not lightly brush aside the opinion".

(85). The last two grounds of challenge may be taken up together for consideration. Though we have formulated the third ground of challenge as a distinct and separate ground, it is really in substance and effect merely an aspect of the second ground based on violation of 14 and 16. Art. 16 embodies the fundamental guarantee that Arts. 14 as there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Art. 16 is only an instance of the application of the concept of equality

enshrined in Art. 14. In other words, Art. 14 is the genus while Art 16 is a species, Art. 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Arts. 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any; attempt to truncate its all-embracing scope and meaning, for to do so Would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14, and if it affects any matter relating to public employment, it is also violative of Art. 16. Arts. 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situated and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would: amount to mala fide exercise of power and that is hit by Arts. 14 and 16. Mala fide exercise of Power and arbitrariness are different lethal radiations emanating from the same vice : in fact the latter comprehends the former. Both are inhibited by Arts. 14 and 16.

(86). It is also necessary to point out that the ambit and reach of Arts. 14 and 16 are not limited to cases where the public servant affected has a right to a post. Even if a public servant is in an officiating position, he can complain of violation of Arts. 14 and 16 if he has been arbitrarily or unfairly treated or subjected to mala fide exercise of power by the State machine. It is, therefore, no answer to the charge of infringement of Arts ' 14 and 16 to say that the petitioner had no right to the post of Chief Secretary but was merely officiating in that post. That might have some relevance to Art. 311 but not to Arts. 14 and 16. We must, therefore, proceed to consider whether the transfer of the petitioner first to the post of Deputy Chairman and then to the post of Officer on Special Duty was arbitrary, hostile and is mala fide exercise of power. What was the operative reason for such transfer; was it the exigencies of public administration or extra administrative considerations having no relevance to the question of transfer ? Was the transfer to the post of Deputy Chairman or Officer on Special Duty so irrational or unjust that It could not have been made by any reasonable administration except for collateral reasons? These are the questions which call for our consideration".

16. Accordingly, Mr. Panda, learned counsel for the Petitioner submitted that in view of the decision cited

(supra), the Petitioner is eligible to get the differential salary for the period as indicated above and the Opposite Party No.1 without assigning any reason issued the impugned communication under Annexure-10.

17. Mr. Panda, also submitted that since the impugned communication dated 14.03.2012, no reason was given for recalling the earlier order dated 01.02.2012, the stand taken by the Opposite Party that the Petitioner is not entitled to get the benefit basing on the principle of 'No work No pay' cannot be accepted in view of the decision of the Hon'ble Apex Court in the case of ***Mohinder Singh Gill & Another vs. The Chief Election Commissioner, New Delhi & Others*** reported in ***A.I.R 1978 SC-851***.

18. It is also argued by Mr. Panda, learned counsel for the Petitioner that while the Petitioner was denied the differential salary for the period as indicated above, but similar order passed by the learned Tribunal relying on the order passed by this Court under Annexure-1 in O.A. No.737(C) of 2008 has been complied by the Opposite Parties by extending the benefit vide order dated 26.02.2011 under Annexure-11.

19. Having heard learned counsel for the Parties, this Court finds that the Opposite Party No.1 without assigning any reason issued the impugned communication dated 14.03.2012 under Annexure-10 and thereby recalling his

earlier communication issued on 01.02.2012 under Annexure-7.

20. Accordingly, this Court has no hesitation in quashing the said communication dated 14.03.2012 issued by Opposite Party No.1 under Annexure-10. While quashing the same, this Court further directs the Opposite Parties to pay the differential salary of the Petitioner as due and admissible from 16.08.1996 to 15.01.2010 within a period of three months from the date of production of the certified copy of this order.

21. Since the Petitioner is unnecessarily dragged to this present litigation, this Court while imposing a cost of Rs.10,000/- (rupees ten thousand only) on the Opposite Parties directs for its payment along with the arrear entitlements of the Petitioner.

22. With the aforesaid observation and direction the Writ Petition(OAC) is disposed of.

23. Issue urgent certified copy of the order as per rules.

(Biraja Prasanna Satapathy)
Judge