

ORISSA HIGH COURT: CUTTACK

WPC (OAC) NO. 1095 OF 2011

In the matter of an application under Articles 226 and 227 of the Constitution of India.

AFR Smt. Bishnupriya Devi Petitioner

-Versus-

State of Odisha and others Opp. Parties

For Petitioner : Mr. P.C. Chhinchani,
Advocate

For Opp. Parties : Mr. S. Jena,
Standing Counsel, S&ME

P R E S E N T:

THE HONOURABLE DR. JUSTICE B.R.SARANGI

Date of hearing and judgment: 13.10.2022

DR. B.R. SARANGI, J. By means of this writ petition, the petitioner seeks to quash the order dated 29.03.2010 passed by the Joint Secretary to Government, School and Mass Education Department, Govt. of Odisha, under Annexure-14, by which it has been decided to regularize

the service of the petitioner for the period from 21.06.2005 to 16.07.2007 (957 days) by sanctioning of leave due and admissible as well as leave not due, and consequential communication made by the Deputy Director, Directorate of Secondary Education, Orissa to the Inspector of School, Koraput Circle, Koraput vide Annexure-15 dated 21.04.2010 to the same effect. The petitioner further seeks direction to the opposite parties to grant and disburse the salary and other consequential benefits to her by treating the intervening period from 21.06.2005 to 16.07.2007 as duty, within a stipulated time.

2. The factual matrix of the case, in a nutshell, is that the petitioner, who was working as a P.E.T. at Govt. Girl's High School, Gunupur, was transferred to Govt. Girl's High School, Rayagada, vide order dated 06.06.2002, pursuant to which she joined in the new school on 08.07.2002. Thereafter, she was again transferred, vide order dated 13.06.2005. Aggrieved by the

said order of transfer, the petitioner approached the tribunal by filing O.A. No. 451 of 2005, on the plea that her transfer was only for adjustment of one Soudamini Mishra. After due adjudication, the tribunal disposed of the said Original Application on 21.06.2005, directing the authority to consider the representation of the petitioner within a fortnight. In compliance of the order passed by the tribunal, the representation of the petitioner was rejected by the authority on the ground that the order of transfer was passed in the interest of public service.

2.1 Against the order of rejection of representation, the petitioner again approached the tribunal by filing O.A. No. 826 of 2005. On being noticed, the opposite parties filed their counter affidavit and taking into consideration the judgment of the apex Court in the case of **B. Varadha Rao v. State of Karnataka**, AIR 1986 SC 1955, wherein the apex Court held that a transfer is mala fide when it is made not for professed purpose, such as in normal course or in public or administrative interest or in the exigencies

of service but for other purpose than is to accommodate another person for undisclosed reasons and that it is the basic principle of rule of law and good administration that even administrative actions should be just and fair, the tribunal passed the following orders:-

“..... In the instant case, respondent no.3 only to accommodate the respondent no.4 in Government Girls’ High School, Rayagada where she has already served for 25 years has transferred the applicant on the pretext exigency of public service which is a colourable exercise of power and actuated with malice and as such it is not sustainable in eye of law and is liable to be quashed in view of the ratio laid down by the Apex Court (supra).

14. In the result, the O.A. is allowed. The transfer order No.2891 dated 13.06.2005 (Annexure-3/Annexure-A) as well as the transfer order No.2804 dated 13.06.2005 (Annexure-4) and the order of the Respondent No.3 rejecting the representation of the applicant (Annexure-10) passed by the respondent no.3 are hereby quashed. Respondents No.2 and 3 are directed to take back the applicant to Government Girls’ High School Rayagada within thirty days from the date of this order and to allow her to continue in the said school. No cost.”

As the tribunal quashed the order of transfer dated 13.06.2005 annexed as Annexure-3 to the Original

Application and Annexure-A to the counter affidavit, as well as the order of rejection of representation in Annexure-10 passed by the authority and directed the opposite parties no.2 and 3 to take back the petitioner to Government Girl's High School, Rayagada within thirty days, in compliance thereof the petitioner was taken back to her earlier place, i.e., Government Girl's High School, Rayagada, where she had been discharging her duties. But the petitioner claims that the period from 21.06.2005 to 16.07.2007, during which the petitioner was under the order of transfer, should be regularized. In the above context, the petitioner submitted a representation before the authority which was duly forwarded by the Deputy Director (H&S), Govt. of Orissa and on consideration of the same the Government passed order on 29.03.2010 under Annexure-14 stating inter alia *"it has been decided to regularize the service of the petitioner for the period from 21.06.2005 to 16.07.2007 (957 days) by sanctioning of leave due and admissible as well as leave not due"* and, as such, the same was communicated by the Deputy

Director, Directorate of Secondary Education, Orissa to the Inspector of School, Koraput Circle, Koraput vide Annexure-15 dated 21.04.2010. Hence, this writ petition has been filed seeking direction to the opposite parties to grant and disburse the salary and other consequential benefits to the petitioner by treating the intervening period from 21.06.2005 to 16.07.2007 as duty, within a stipulated time, by quashing Annexures-14 and 15.

3. Mr. P.C. Chhinchani, learned counsel for the petitioner contended that even though the service of the petitioner was regularized for the period from 21.06.2005 to 16.07.2007 (957 days), but the same has been done by sanctioning of leave due and admissible as well as leave not due. It is contended that even though there was no fault on the part of the petitioner in rendering service for the said period, but with mala fide intention the said period has been regularized by the opposite parties by sanction of leave due and admissible as well as leave not due. It is contended that this issue was considered by the

tribunal in the previous Original Application and accordingly the order of transfer issued by the authority was quashed. Therefore, once the order of transfer was quashed and the petitioner was directed to be taken back to her earlier place, i.e., Govt. Girl's High School, Rayagada, for the lapses on the part of the authority, the petitioner should not have been suffered by regularizing the period from 21.06.2005 to 16.07.2007 (957 days) by sanctioning of leave due and admissible as well as leave not due. Rather, the said intervening period should have been treated as on duty and the petitioner should have been given the salary and all other consequential benefits, such as increments, etc., as due and admissible to her.

To substantiate his contention, learned counsel for the petitioner relied upon the judgment of the apex Court in the case of **Debendra Pratap Narain Rai Sharma v. State of U.P.**, AIR 1962 SC 1334.

4. Mr. S. Jena, learned Standing Counsel appearing for School and Mass Education Department

contended that no illegality or irregularity has been committed by the Government in passing the order impugned under Annexure-14 and communication made thereof by the Deputy Director (H&S), Orissa under Annexure-15. It is further contended that since the petitioner had not discharged her duty for the period from 21.06.2005 to 16.07.2007 for 957 days, the Government in its wisdom decided that the same should be sanctioned as leave due and admissible, as well as leave not due. Thereby, no illegality or irregularity has been committed in passing the order impugned, so as to warrant interference with the same by this Court. It is further contended that the petitioner is not entitled to get any relief, as claimed in the writ petition. Consequentially, he seeks for dismissal of the writ petition.

5. This Court heard Mr. P.C. Chhinchani, learned counsel appearing for the petitioner and Mr. S. Jena, learned Standing Counsel appearing for School and Mass Education Department by virtual mode and perused the

records. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties this Writ Petition is being disposed of finally at the stage of admission.

6. The undisputed fact, as discussed above, clearly indicates that the order of transfer was passed by the authority which was the subject matter of challenge before the tribunal in O.A. No. 826 of 2005 and after due adjudication, the tribunal disposed of the Original Application by quashing the order of transfer, as already stated hereinbefore. As such, the opposite parties have also implemented the direction given by the tribunal by taking back the petitioner to her earlier place, i.e., Govt. Girl's High School, Rayagada within the time specified by the tribunal. Thereby, the order of the tribunal has already been complied with and, as such, the opposite parties have not challenged the said order before any higher forum. Once the order passed by the tribunal reached its finality, the question arises whether the

intervening period from 21.06.2005 to 16.07.2007 should be treated as on duty and the petitioner should be extended with the consequential service and financial benefits or not.

7. As it appears, the petitioner claims for treating the period from 21.06.2005 to 16.07.2007 as on duty and for grant consequential service and financial benefits, for which she made representation before the authority concerned and, as such, the same was recommended by the Director, vide letter dated 18.03.2009 under Annexure-3. But the Government in its wisdom decided that the said period, i.e., from 21.06.2005 to 16.07.2007 (for 957 days) be regularized by sanctioning of leave due and admissible as well as leave not due and in support of such order it has been clarified in the counter affidavit that the petitioner had not discharged her duty for the said period and, therefore, the order impugned was passed.

8. It may be noted, the order of transfer was adjudicated by the tribunal and it was found that the same was mala fide and having so found the order of transfer was quashed and direction was issued to the opposite parties to take back the petitioner to her earlier place and in compliance of the order passed by the tribunal the petitioner has been allowed to join at Govt. Girl's High School, Rayagada. Thus, there was no fault on the part of the petitioner for not discharging her duties during the intervening period from 21.06.2005 to 16.07.2007 and, as such, there is ample force on the contention of learned counsel for the petitioner that for the lapses on the part of the authority if the petitioner is deprived of getting her legitimate dues, then grave prejudice will be caused to her. Therefore, this Court is of the considered view that if by transferring the petitioner with a mala fide intention she was put to harassment and ultimately the said order of transfer was set aside by the tribunal and consequentially the opposite parties have already implemented the order passed by the tribunal by

taking back the petitioner to her earlier place, the petitioner should not have been put to peril by not granting the benefit for the period from 21.06.2005 to 16.07.2007 (for 957 days), during which she could not be able to discharge her duty because of pendency of the case before the tribunal.

9. In **Devendra Pratap Narain Rai Sharma** (supra), the apex Court held as follows:-

"10. The High Court in dealing with the appellant's claim to salary during the period of his suspension pending the earlier enquiry observed that there was no justification for "not granting the appellant his full pay" for the period after the date of the suit. But the counsel for the State of Uttar Pradesh asserted that it is open to the State, notwithstanding the direction, to award as remuneration to the appellant for the period for which he was under suspension any amount which on a reconsideration of the matter in the light of the relevant rules and after hearing the appellant the State Government considers just and proper. This power, counsel contends, arises by virtue of Rule 54 of the Fundamental Rules framed by the State of Uttar Pradesh under the authority conferred under Art. 309 of the Constitution. Counsel says that it was because of this rule that the High Court directed the State Government to reconsider the matter in the light of the relevant rules.

11. In our view, this contention is wholly misconceived. Rule 54, as amended in 1953, stands as follows:-

"54. (1) When a Government servant who has been dismissed, removed or suspended is reinstated, the authority competent to order the reinstatement shall consider and make a specific order-

(a) regarding the pay and allowances to be paid to the Government servant for the period of his absence from duty and

(b) whether or not the said period shall be treated as a period spent on duty.

(2) Where such competent authority holds that the Government servant has been fully exonerated or, in the case of suspension, that it was wholly unjustified, the Government servant shall be given the full pay to which he would have been entitled, had he not been dismissed, removed or suspended, as the case may be together with any allowances of which he was in receipt prior to his dismissal, removal or suspension.

(3) In other cases, the Govt. servant shall be given such proportion of such pay and allowances as such competent authority may prescribe.

Provided that the payment of allowances under clauses (2) and (3) shall be subject to all other conditions under which such allowances are admissible.

(4) In a case falling under clauses (2) the period of absence from duty

shall be treated as the period spent on duty for all purposes.

(5) In a case falling under clause (3) the period of absence from duty shall not be treated as period spent on duty unless such competent authority specifically directs that it shall be so treated for any, specified purposes.”

This rule has no application to cases like the present in which the dismissal of a public servant is declared invalid by a civil court and he is reinstated. This rule, undoubtedly enables the State Government to fix the pay of a public servant whose dismissal is set aside in a departmental appeal. But in this case the order of dismissal was declared invalid in a civil suit. The effect of the decree of the civil suit was that the appellant was never to be deemed to have been lawfully dismissed from service and the order of reinstatement was superfluous. The effect of the adjudication of the civil court is to declare that the appellant had been wrongfully prevented from attending to his duties as a public servant. It would not in such a contingency be open to the authority to deprive the public servant of the remuneration which he would have earned had he been permitted to work.”

10. Applying the above ratio to the present case, since against the mala fide order of transfer the petitioner had approached the tribunal and during pendency of the Original Application before the tribunal she could not be able to discharge her duty, that *ipso facto* cannot debar

the petitioner from getting the benefits, as due and admissible to her for the period from 21.06.2005 to 16.07.2007 during which she had not discharged duty due to no fault of her. As such, the effect of adjudication of the tribunal is that the order of transfer was passed by the authority with mala fide intention, in view of the ratio decided by the apex Court in the case of **V. Vardha Rao** (supra). Consequentially, if the said order of transfer was quashed by the tribunal because of illegality or irregularity committed by the authority, the petitioner should not have been deprived of getting her legitimate claim and, as such, the regularization as has been done in the order impugned treating the period from 21.06.2005 to 16.07.2007 (for 957 days) by sanctioning of leave due and admissible as well as leave not due, cannot sustain in the eye of law. Rather, if such order is allowed to stand, it will amount to double jeopardy, which hits by Article 20 of the Constitution of India.

11. In the above view of the matter, this Court is of the considered view that if the petitioner was suffered for the mala fide action of the opposite parties and was deprived of discharging her duty and, as such, after due adjudication the tribunal, while setting as the order of transfer, directed the authorities for taking back the petitioner to her previous place, instead of treating the said period as leave due and admissible as well as leave not due, the opposite parties-authority should have granted the consequential service and financial benefits in favour of the petitioner, as due and admissible to her in accordance with law, for the said period. Hence, the order dated 29.03.2010 passed by the Joint Secretary to Government, School and Mass Education Department, Govt. of Odisha, under Annexure-14, by which it has been decided to regularize the service of the petitioner for the period from 21.06.2005 to 16.07.2007 (for 957 days) by sanctioning of leave due and admissible as well as leave not due, and consequential communication made by the Deputy Director, Directorate of Secondary Education,

Orissa to the Inspector of School, Koraput Circle, Koraput vide Annexure-15 dated 21.04.2010 to the same effect, cannot sustain in the eye of law and the same are liable to be quashed and are hereby quashed. Since the petitioner has retired from service, the opposite parties are directed to compute the entire period and grant the consequential benefits in favour of the petitioner, as expeditiously as possible, preferably within a period of four months from the date of production of certified copy of this judgment.

12. In the result, the writ petition is allowed. However, there shall be no order as to costs.

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DR. B.R. SARANGI,
JUDGE

Orissa High Court, Cuttack
The 13th October, 2022, Ashok/GDS