

(1991) 11 OHC CK 0037

In the Orissa High Court

Case No : O.J.C. No's. 1945, 1946 and 2102 of 1990

Ananta Kumar alias Charan Jena and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 12-11-1991

Acts Referred:

Constitution of India, 1950 — Article 226

Orissa Education (Management of Private Colleges) Rules, 1979 — Rule 2(1), 3(3), 4, 5, 5(1)

Orissa Education Act, 1969 — Section 27

Citation : AIR 1992 Ori 121 : (1992) 1 OLR 377

Hon'ble Judges : R.C. Patnaik, J;A. Pasayat, J

Bench : Division Bench

Advocate : G. Rath, B.R. Sarangi, S.C. Dash and R.C. Rout, for the Appellant; Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

Pasayat, J.—Since the point at issue in these three writ applications is common, they are taken up together and are disposed of by this common judgment.

2. The dispute relates to powers of the State Government to nominate a President in place of an already nominated President before expiry of the term of office of a Governing Body constituted under the provisions of the Orissa Education Act, 1969 (hereinafter referred to as "the Act") and the Orissa Education (Management of Private Colleges) Rules, 1979 (hereinafter referred to as "the Rules").

Undisputed factual position is that in each of the cases the Sub-Collector, Balasore has been nominated as the President in place of persons nominated earlier. The three colleges in question are Dr. Harekrushna Mahatab College, Kupari (OJC No. 1945/90); Belabhumi Mahavidyalay, Avana (OJC No. 1946/90); and Gopalpur College, Gopalpur (OJC No. 2102/90). In OJC Nos. 1946 and 2102 of 1990, the substituted President amongst others has challenged fresh

nomination, whereas in OJC No. 1945 of 1990 one of the members of the Governing Body has challenged the action. In all the cases the impugned order indicates that the State Government nominated the Sub-Collector, Balasore as the President of the Governing Body of the colleges in question for its next term. The President was requested to furnish a proposal for reconstitution of the Governing Body in accordance with the provision of Rule 3(3) of the Orissa Education (Management of Private Colleges) (Amendment) Rules, 1988 (hereinafter referred to as the "amendment rules") for consideration and approval by the Director of Higher Education, Orissa. It is relevant to state here that the colleges in question are aided colleges within the meaning of the Act and the Rules.

3. Main plank of petitioners' argument is that once a President is nominated, a Governing Body is constituted as per his suggestion and approval, and the same continues in office for a term of five years in terms of Rule 3(3)(a) of the Rules. The legislative history of the said rule, and Rules 4 and 5 is necessary to be indicated.

4. The provisions contained in Rule 3(3)(a) prior to amendment by amendment Rules, and on amendment reads as follows :

Before Amendment:

"3. Composition of Governing Body:--(1) & (2) xxx xxx xxx

(3) The Governing Body of a private college which is in receipt of aid from the State Government shall consist of not less than thirteen and not more than fifteen members, namely:--

(a) the Collector or the Additional District Magistrate or the Sub-Divisional Officer nominated by the Collector, shall be the President of the Governing Body:

Provided that in case of the college established and managed by any charitable trust, a member may be nominated by that trust to be President of the Governing Body:

Provided further that the State Government shall have the power to nominate non-official as the President of the Governing Body, if they so desire, notwithstanding anything contained in this clause."

After Amendment:

"3. Composition of Governing Body: --(1) & (2) xxx xxx xxx

(3) The Governing Body of a private college which is in receipt of aid from the State Government shall consist of not less than thirteen and not more than fifteen members, namely:

(a) the Collector or the Additional District Magistrate or the Sub-Divisional Officer nominated by the Collector, shall be the President of the Governing Body:

Provided that in case of college established and managed by any charitable trust, a member may be nominated by that trust to be the President of the Governing Body.

Provided further that notwithstanding anything contained in these rules, the State Government in the interest of the institution shall have the power to nominate a person interested in the field of Education as the President of the Governing Body."

Rule 4 lays down the procedure for Constitution and approval of the Governing Body. Rule 5 which deals with the term of office, prior to its amendment and after its amendment, so far as is relevant reads as follows :

BEFORE AMENDMENT:

"5. Term of office of the members of the Governing Body-- (1) The term of office of the members of the Governing Body, other than ex officio member, shall be three years and no member other than an ex officio member or one nominated by the Charitable Trust, shall be nominated for more than two consecutive terms:

Provided that the Director, on his own motion except in case of a Charitable Trust, or on receipt of proposal from the Vice-Chancellor or the Administrator, as the case may be, of the University, the President of the Governing Body or from the Charitable Trust, as the case may be, if considers it so expedient in the interest of the institution, may substitute any of the nominated members at any time prior to the expiry of the term of such members. When, however, any substitution of membership is initiated by the Director, he shall intimate in writing the reasons for doing so to the Vice-Chancellor or the Administrator of the University or the President of the Governing Body, as the case may be, inviting his suggestions within a reasonable time. If Vice-Chancellor or the Administrator of the University, or the President of the Governing Body does not furnish the suggestions, so required, within the time, or differs from the proposal so initiated the Director may, after considering the suggestions, if any, pass necessary orders. When it is proposed to substitute any nominated members, the members so proposed to be so substituted may be given a reasonable time to represent against the proposed action. On receipt of such representation the matter may be duly considered by the Director who may either reject or grant the representation :

Provided further that a person who is a member in his ex officio capacity shall cease to be a member of Governing Body as soon as he ceases to hold that office.

(2) Any member of the Governing Body, other than ex officio member may, at any time, resign from the office by sending a letter of resignation to the President, but such resignation shall take effect from the date on which it is accepted by the Governing Body.

(3) If the member of the Governing Body, other than an ex officio member absents himself from four consecutive meetings of the Governing Body without

prior permission of the President he shall cease to be a member.

(4) If for any reason, the Governing Body has not been reconstituted and the term of the old Governing Body has expired as prescribed in Sub-rule (1), the old Governing Body shall be deemed to be in office until the new Governing Body comes into office :

Provided that the provisions of this Sub-rule shall not apply to the case where a Governing Body has been reconstituted under the proviso to Sub-section (1) of Section 11 of the Act.

(5) The member substituted under Sub-rule (1) or a member nominated in place of any vacancy caused due to death, resignation or otherwise shall continue as member only for the residue of the term for which the person whose place he has filled, would have been a member.

(6) The Governing Body of a college constituted in accordance with these rules shall continue in office for a full term of three years notwithstanding any change of its character in relation to receipt of grant-in-aid during the continuance of its terms."

AFTER AMENDMENT

"5. Term of the office of the members of the Governing Body-

(1) The term of office of the Governing Body, shall be five years and no member other than the ex officio members, donor-members and those nominated by the charitable trusts shall be nominated for more than two consecutive terms:

Provided that the Director, on his own motion except in case of a Charitable Trust, or on receipt of proposal from the Vice-Chancellor or the Administrator, as the case may be, of the University, the President of the Governing Body or from the Charitable Trust, as the case may be, if considers it so expedient in the interest of the institution, may substitute any of the nominated members at any time prior to the expiry of the term of such members. When, however, any substitution of membership is initiated by the Director, he shall intimate in writing the reasons for doing so to the Vice-Chancellor or the Administrator of the University or the President of the Governing Body, as the case may be, inviting his suggestions within a reasonable time. If Vice-Chancellor or the Administrator, of the University, or the President of the Governing Body does not furnish the suggestions, so required, within the time, or differs from the proposal so initiated, the Director may, after considering the suggestions, if any, pass necessary orders. When it is proposed to substitute any nominated members, the members so proposed to be so substituted may be given a reasonable time to represent against the proposed action. On receipt of such representation the matter may be duly considered by the Director who may either reject or grant the representation;

Provided further that a person who is a member in his ex officio capacity shall

cease to be a member of Governing Body as soon as he ceases to hold that office.

Note:--- For the purpose of this Sub-rule the member of the Parliament or the member of the Legislative Assembly referred to in Clause (f) of Sub-rule (3) of Rule 3 shall be deemed to be the ex officio members notwithstanding his nomination by name.

(2) Any member of the Governing Body, other than ex officio member may at any time resign from the office by sending a letter of resignation to the President, but such resignation shall take effect from the date on which it is accepted by the Governing Body.

(3) If the member of the Governing Body, other than an ex officio member absents himself from four consecutive meetings of the Governing Body without prior permission of the President he shall cease to be a member.

(4) If for any reason, the Governing Body has not been reconstituted and the term of the old Governing Body has expired as prescribed in Sub-rule (1), the old Governing Body shall be deemed to be in office until the new Governing Body comes into office:

Provided that the provisions of this Sub-rule shall not apply to the case where a Governing Body has been reconstituted under the proviso to Sub-section (1) of Section 11 of the Act.

(5) The member substituted under Sub-rule (1) or a member nominated in place of any vacancy caused due to death, resignation or otherwise shall continue as member only for the residue of the term for which the person whose place he has filled, would have been a member."

Rule 2(1)(d) prescribed that "Governing Body" means the Governing Body constituted under the Rules consisting of the President, the Secretary and the members. Prior to amendment, Rule 2(1)(d) contained definition of "member" to mean a member of the Governing Body also includes its Secretary and President. After amendment, and substitution of definition of "member" by definition of Governing Body, there is no statutory definition of "member".

5. Therefore, in the normal course members of a Governing Body including the President are to remain in office for five years. Question is whether the nomination of a person, which has already worked out, can be withdrawn and a fresh nomination made during the currency of term of office (five years after amendment to Rule 5) of the Governing Body. Undisputedly Sub-rule (3)(a) of Rule 3 provides that the Collector or the Additional District Magistrate or the Sub-divisional Officer nominated by the Collector, shall be the President of the Governing Body. In other words, statutorily the Collector or the Additional District Magistrate or the Sub-divisional Officer nominated by the Collector is to be the President. In terms of the second proviso, however, notwithstanding anything contained in the Rules, the State Government in the interest of the institution have power to nominate a person interested in the field of education as President

of the Governing Body. Once having exercised that option in the interest of the institution, in our considered opinion, it is undesirable to withdraw the nomination and substitute the nominated person by one of the named functionaries of the State or any other person unless it is considered expedient in the interest of the institution. The procedure for such substitution is laid down in Rule 5(1). Nothing has been placed before us to show that the Sub-divisional Officer (in the instant case the Sub-Collector, Balasore), was a person nominated by the Collector. At least from the counter affidavit in OJC Nos. 1945 and 1946 of 1990 filed this aspect has been disclosed. It may, however, be indicated that Rule 3(3) statutorily prescribed the Collector, or the Additional District Magistrate or the Sub-divisional Officer nominated by the Collector shall be the President. In such a case, question of nomination by State Government does not arise. In case of Sub-divisional Officer, nomination is to be that of Collector. Power of nomination by State Government flows from second proviso to Rule 3(3)(a). The exercise of the power is hedged by the condition that the person nominated is one interested in the field of education. Sub-divisional Officer is the official designation of a person holding the post. Nomination of a person in the style of the official designation he holds shall not meet requirements of law, because the requirement of the person-nominated being interested in the field of education has to be objectively decided, before nomination by the State Government. True it is that welfare of the educational institution is of paramount consideration. But the State Government has to work within the frame work of law. In its wisdom it chose to nominate a person interested in the field of education as the President of the Governing Body. Nomination in such cases has to be on the basis of objective satisfaction of the Government, keeping in view the statutory mandate that the person must be interested in the field of education, and the nomination is in the interest of institution. At this juncture, the power of substitution in terms of proviso to Rule 5(1) may be noticed. It prescribed that when it is proposed to substitute any nominated member, the member so proposed to be so substituted has to be given a reasonable time to represent against the proposed action. On receipt of such representation, the matter is to be duly considered by the Director who may either reject or grant the representation. The said proviso prescribes that if it is considered expedient in the interest of the institution, any of the nominated members may be substituted prior to expiry of the term of such member. Before, however, any substitution is made, the procedure prescribed has to be adopted. The membership aspect is provided in Clause (f) of Sub-rule (3) of Rule 3. There is fair amount of ambiguity on the aspect whether President is covered by Rule 5, because Rule 2(d) defines "Governing Body" to mean the President, the Secretary and the members. Juxtaposed, Rule 3(3) provides that the President is one of the members of the Governing Body. The Principal of the college in the ex officio capacity is the Secretary of the Governing Body. Harmoniously construing and considering the entire scheme of the Rules, we feel President is a member so far as Rule 5 is concerned. The State and its functionaries have sought to support the action by reference to the second proviso to Sub-rule (3) of Rule 3. Instead of furthering

their case, the provision clearly rules out exercise of power in the manner suggested and/or done. Though it cannot be denied that the State Government has power in the interest of the institution to nominate another person interested in the field of education the same is not in terms of Rule 3(3). The said rule cannot be construed to authorise nomination as and when desired. In a hypothetical case, it may so happen that every day there may be change of the President. Such a position cannot be contemplated in Law,

6. Admittedly before action was taken, no notice to the President in office was given. Rule 5(1) specifically prescribes grant of opportunity before substitution is made. The rules of natural justice are not embodied rules. The extent of their application depends upon the particular statutory framework whereunder jurisdiction has been conferred on the administrative authority. Where the requirements of observing the principles of natural justice and/or recording reasons have not been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasi-judicial functions is required to grant opportunity and/or record the reasons for its decision. (See S.N. Mukherjee Vs. Union of India,). The object underlying the rules of natural justice is to prevent miscarriage of justice and secure fair play in action. Reasons which weighed with the authorities for directing fresh nomination have not been placed before us. It has been vaguely stated in the counter-affidavit filed in OJC No. 1945 of 1990 that it was expected that the person nominated was to take interest in the all round development of the institution and ensure proper administration and management of the educational institution, and when the person nominated has lost interest or is not taking any interest and has developed a very casual attitude towards the affairs of the college, then the State Government have the right to reconsider the nomination made in the greater interest of the educational institution. So far as the nomination of Shri B. Mahatab is concerned, it has been stated as follows:

"In the instant case the State Government have withdrawn the nomination of Shri B. Mahatab only in the interest of the education of the locality."

No materials whatsoever have been placed to show as to how Shri B. Mahatab, who was originally nominated had developed a very casual attitude towards the affairs of the college and had lost interest and/or was not taking any interest in the administration of the college.

7. No reason for non-grant of opportunity has been indicated. Power available to the nominator to reconsider the question cannot be in violation of prescribed grant of opportunities. Without affording an opportunity to the person who is sought to be replaced no action can be taken. That would be in violation of the principles of natural justice. The absence of arbitrary power is the first essential of the rule of law, upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon administrative and executive authorities must be confined within defined limits. The rule of law from this point of view means that decisions should be made by the application

of known principles and rules and, in general, such decision should be predictable and the citizen should know where he is. If a decision is taken without any principles or without any rule, it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (See *Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others*,). It is one of the fundamental rules of our constitutional set up that every citizen is protected against exercise of arbitrary authority by the State or its officers. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power and the rule of natural justice applies with full force. Where there is nothing in the statute to actually prohibit the giving of an opportunity to be heard, but on the other hand, the nature of the statutory duty imposed itself necessarily implied an obligation to hear before deciding, the *audi alteram partem* rule has to be imported. (See *The Scheduled Caste and Weaker Section Welfare Association (Regd.) and others Vs. State of Karnataka and others*,). In *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, while considering the question of wholesome removal of Government counsel engaged for conducting cases of a State, the Supreme Court disapproved the practice of removal on the ground that even in such cases there has to be fairness in the action and there cannot be hire and fire at the sweet will of the executive and/or administrator even without showing that there was anything deficient in the performance of the Government counsel who is removed for being so. In that case the apex Court found it hard to swallow that every Government counsel in all the districts of the State of U.P. were required to be replaced in order to streamline the conduct of Government cases. Judicial notice can be taken of the fact, because we have come across large number of writ applications that Government have nominated afresh either the functionary named in the Rule 3(3)(a), or another person, generally a member of the legislative assembly. The wholesome substitution raises a doubt about absence of fairplay, as was entertained by the Supreme Court in *Kumari Shrilekha Vidyarthi's* case (*supra*).

7A. The Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity, contrary to the professed ideals in the Preamble. Where there is arbitrariness in State action Article 14 springs in and judicial review strikes such action down. Whatever be the action of the public authority, it should meet the test of Article 14, (See *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*,). On facts, no attempt was made to show that any substitution was imperated. While it cannot be denied that the welfare of the students and the institution is the primary and paramount consideration, yet in the absence of any material to show that the welfare of an institution was jeopardised by the continuance of the earlier nominated person, fresh nomination is ruled out. Coupled with it the action is indefensible having been undertaken in violation of the principles of natural justice.

8. Looked at from any angle, the orders of renomination are indefensible. Consequentially, the writ applications are allowed and the impugned orders, i.e.,

Annexure 3 in OJC No. 1945 of 1990, Annexure 1 in OJC No. 1946 of 1990 and Annexure 1 in OJC No. 2102 of 1990 are quashed. No costs.

R.C. Patnaik, J.

9. I agree.