
(2007) 07 OHC CK 0086
In the Orissa High Court

Justice Debendra Mohan Patnaik

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 31-07-2007

Acts Referred:

Constitution of India, 1950 — Article 112, 113, 124, 202, 203
Consumer Protection Act, 1986 — Section 16

Citation : AIR 2008 Ori 28 : (2007) CLT 223 Supp : (2007) 2 OLR 581 Supp

Hon'ble Judges : B.P. Das, J;A.K. Samantaray, J

Bench : Division Bench

Judgement

B.P. Das, J.—The writ petitioner while functioning as sitting Judge of this High Court, was appointed as the President, State Consumer Disputes Redressal Commission, Orissa ("State Commission", hereinafter) and assumed charges on 21-4-1999. He remained in dual charges till 31-8-1999, when he retired as a Judge of this High Court. Thereafter, he continued as the President of the State Commission till 21-4-2004.

2. Sub-section (2) of Section 16 of the Consumer Protection Act, 1986 (hereinafter called as "the Act") provides that the salary or honorarium and other allowances payable to, and the other terms and conditions of service (including tenure of office) of the members of the State Commission shall be such as may be prescribed by the State Government. Rule 6 of the Orissa Consumer Protection Rules, 1987 framed under the Act provides:

6. Salary or honorarium and other allowances and terms and conditions of the President and members of the State Commission - (Section 16(2)) - (1) President of the State Commission, shall receive the salary of the Judge of a High Court if appointed on whole-time basis or an honorarium of Rs. 200/- per day for the sitting if appointed on part-time basis. Other members, if appointed on whole time basis, shall receive a consolidated salary of Rs. 3,000/- per month or an honorarium of Rs. 150/- per day for the sitting if appointed on part-time basis.

3. While continuing as the whole-time President of the State Commission, the

petitioner was paid salary of a High Court Judge, i.e. Rs. 26,000/- per month with admissible dearness allowance and other allowances after deducting the pension amount, i.e. Rs. 12,724/-, therefrom. The annual pension of the petitioner was fixed at Rs. 1,52,696/- considering his length of qualifying service, i.e., 23 years, 7 months and 28 days. According to the learned Counsel for the petitioner, the action of the O. Ps. in deducting the pension component from the salary paid to the petitioner as President of the State Commission is illegal and arbitrary and contrary to the decision rendered by this Court in the case of Justice S. K. Ray v. State of Orissa and Ors. 90 (2000) CLT 362, which on being appealed was affirmed by the Apex Court, Rule 6(1) of the Orissa Consumer Protection Rules, 1987, which is framed in terms of Section 16(2) of the Act provides that the President of the State Commission shall receive the salary of the Judge of a High Court, which, according to the learned Counsel for the petitioner, means that the President will get his salary and there is no question of deducting the pension, which is received by a Judge from the Consolidated Fund of India as per Article 112, Clause (3)(d)(iii) of the Constitution of India. In this background of fact, our attention is drawn to the following observations made by the Apex Court in the case of Union of India (UOI) Vs. Sankalchand Himatlal Sheth and Another, :

52. Every Judge of a High Court is entitled to hold office until he attains the age of 62 years and unless he voluntarily resigns his office or is removed from his office by the President in the manner provided in Clause (4) of Article 124 by a procedure analogous to impeachment for proved misbehaviour or incapacity or he is appointed to be a Judge of the Supreme Court or is transferred to another High Court he cannot be removed from office. His security of tenure upto the age of 62 years is guaranteed, vide Article 217, Clause (1). The salary and allowances of a High Court Judge are charged on the Consolidated Fund of the State under Article 202, Clause (3)(d) so that under Article 203, Clause (1) they are not subject to the vote of the Legislative Assembly, the object being that the legislature should not be in a position to affect the independence of the High Court judiciary by exercising pressure through refusal to vote the salary and other allowances. Similarly, the pension payable to a High Court Judge is charged on the Consolidated Fund of India under Article 112, Clause (3)(d)(iii) so that under Article 113, Clause (1) is not required to be submitted to the vote of Parliament and it is put out of the power of Parliament to refuse to vote pension and thus hold out a threat of injury to a High Court Judge. Further, under Article 221, Clause (2) it is provided that "neither the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment." Then there is Article 211 which prohibits any discussion in the Legislature of a State with respect to the conduct of a Judge of a High Court in the discharge of his duties. The High Court Judge is insulated from fear of criticism of his judicial acts by the Legislature which is essentially a political assembly. This would enable a High Court Judge to act fearlessly in administering justice in the discharge of his duties. Article 215

confers upon the High Court a power to punish for contempt of itself and thus protect itself against interference in the course of administration of justice from whatever source it may come. Form VIII in the Third Schedule which is the form of oath prescribed for a Chief Justice or a Judge of a High Court also emphasizes the absolute necessity for judicial independence if the oath is to be observed, because it requires the Judge to swear that he will perform the duties of his office "without fear or favour, affection or ill-will". The independence of the High Court is also sought to be reinforced by Article 229 which provides that appointments of officers and servants shall be made by the Chief Justice or such other Judge or officer as he may appoint, so that there, is not even indirect interference with judicial administration by the executive. And hovering over all these provisions like a brooding omnipresence is Article 50 which lays down, as a Directive Principle of State Policy, that the State shall take steps to separate the judiciary from the executive in the public services of the State. This provision, occurring in a chapter which has been described by Granville Austin as "the conscience of the Constitution" and which embodies the social philosophy of the Constitution and its basic underpinnings and values, plainly reveals, without any scope for doubt or debate, the intent of the constitution makers to immunize the judiciary from any form of executive control or interference.

4. We are also taken through the judgment of the Apex Court rendered in *Union of India and others Vs. Pratibha Bonnerjea and another*, , paragraph-6 of which is quoted below:

6. xxxxx We have already pointed out the provisions dealing with the appointment of High Court Judges. The entire procedure outlined for their appointment is totally different from that provided for other services. That is because the constitution makers were conscious that the notion of judicial independence must not be diluted. If the relationship between the Government and the High Court Judge is of master and servant it would run counter to the constitutional creed of independence for the obvious reason that the servant would have to carry out the directives of the master. Since a High Court Judge has to decide cases brought by or against the Government day in and day out, he would not be able to function without fear or favour if he has to carry out the instructions or directives of his master, the whole concept of judicial independence and separation of judiciary from the executive would crumble to the ground if such a relationship is conceded. High Court Judges would not be true to their oath if such a relationship is accepted. That is why not only Judges but even the staff members are insulated from executive influence. Article 229 clearly provides that appointments of officers and servants of a High Court shall be made by the Chief Justice of the Court or such other Judge or officer as he may direct. Even the conditions of service of officers and servants shall be such as may be prescribed by the chief Justice or his nominee authorized by him to make rules; the approval of the Government is necessary only if the rules relate to salaries, allowances, leave or pension. This provision also shows that officers and servants of the High Court are also under the exclusive control of the Chief

Justice and not the Government. If that be the relationship between the officers and servants of the High Court vis-a-vis the Government, it is difficult to imagine a master and servant relationship between the Government and Judges of the High Court. We have therefore, no hesitation in coming to the conclusion that the relationship between the Government and Judges of the High Court. We have therefore, no hesitation in coming to the conclusion that the relationship between the Government and High Court Judges is not of master and servant. They cannot be said to be holding a post under the Union/State.

5. Apart from the aforesaid judgments of the Apex Court, our attention is also drawn to the decision of this Court in the case of Justice S. K. Ray v. State of Orissa and Ors. (supra). The relevant portion of the said judgment is quoted below:

xxxxx Law is now well settled that the relationship between the Government and the High Court Judges is not of master and servant and they could not be said to be holding a post under the Union /State. A retired High Court Judge, therefore, could not be said to be a person holding a pensionable post under the Union or a State. As already indicated, under the Pre-amendment Schedule, the salary of Lokpal was liable to be reduced if he was in receipt of pension in respect of any previous service under the Government. The petitioner as Chief Justice was not in service under the Government of India and was not holding pensionable post. As such question of reduction of his salary in respect of service as Lokpal by the amount of pension received by him as retired Chief Justice did not arise. He was, however, in receipt of pension from the Government of India. In view of the substitution of the expression as per the amendment which reads "if the Lokpal...is in receipt of...pension from the Government of India, or any Government of any State, his salary as Lokpal get reduced by the amount of pension. He has thus been affected by the amended provision. The question is whether such amendment made with retrospective effect can be made applicable to the case at hand. Its answer lies in the second proviso to Sub-section (5) of Section 5 of the 1970 Act which provided that allowance and other conditions of service of Lokpal shall not be varied to his disadvantage after his appointment. The amendment to the Second Schedule made by Orissa Act 8 of 1980 is definitely to the petitioner's disadvantage inasmuch as by such amendment his salary as Lokpal got reduced by the amount of pension which he was receiving as retired Chief Justice. For the reasons aforesaid the amended Schedule has to be read down to make it applicable prospectively. We are, therefore, of the opinion that the petitioners' salary in respect of his service as Lokpal is not liable to be reduced by the amount of pension which he was getting as the retired Chief Justice. The opposite parties have acted illegally in deducting his pension from the salary of the Lokpal. They are hereby directed to refund the illegal deduction within two months of receipt of writ from this Court.

6. The judgment of this Court in the case of Justice S. K. Ray (supra) was challenged in the Apex Court by the petitioner since some other reliefs as

claimed were not granted by this Court, and the decision of the Apex Court is reported in Sri Justice S.K. Ray Vs. State of Orissa and Others, . As to the direction of this Court for refund of the amount, which was deducted from the salary to the extent of pension, learned Counsel appearing for Justice S. K. Ray made a statement before the Apex Court which has been indicated in the judgment, to the following effect:

Shri Raj Kumar Mehta, learned Counsel appearing for the appellant, submitted that the view taken by the High Court insofar as refund of the amount of pension deducted from the salary of the appellant for the period from 17-8-1989 to 16-7-1992 as well as payment of encashment of value of unutilized leave accrued to him during the said period is in order and that part of the order is not in challenge. The State also has not filed any appeal in respect of that part of the order.

7. In view of the aforesaid, the order of this Court remains unaltered so far as it relates to the question of reduction of salary to the extent of pension. That apart, we do not find any statutory provision either in the Act or in the Orissa Consumer Protection Rules to reduce the salary of the President of the State Commission to the extent of pension he receives as a retired Judge.

8. A counter-affidavit has been filed by the O. Ps. taking a stand that the petitioner has already been granted his entitlement on the basis of the guidelines of the Government of India. For this, reliance has been placed on Annexures-A/4 and B/4, which are the Office Memoranda dated 8-10-1987 and dated 12-8-1999 issued by the Government of India, Ministry of Finance, Department of Expenditure regarding the revision of guidelines in regard to the fixation of pay and other terms of retired Judges of the Supreme Court and High Courts on their appointment on Commissions/Committees of Enquiry. This is not applicable to the present petitioner as he was appointed on whole time basis as President of the State Commission under the Consumer Protection Act, 1986. In this connection, we have gone through the judgment rendered by this Court in the case of Prafulla Kishore Mohanti v. State of Orissa and Ors. in O.J.C. No. 6207 of 1997, the record of which was called for, for the purpose of reference. In Paragraph-11 of the said judgment, this Court observed:

xxxx It has been also mentioned that Justice B.K. Behera (retd.) who was the Chairman of the Liquor Tragedy Commission was allowed pay, allowances and benefits of a sitting High Court Judge including sumptuary allowance and rent free accommodation. Xxx

9. In this particular case, additional affidavit has been filed by O. P. No. 4 and reliance is placed on Annexure-G/4, which is the comparative statement showing the honorarium/remuneration being paid to Hon"ble Presidents of different State Commissions. Reliance is also placed on Annexure-M/4 in which it is indicated that the President of the National Commission shall be entitled to salary, allowances and other perquisites as are available to a sitting Judge of the

Supreme Court.

10. Be that as it may, we are concerned with the Rules framed by the State of Orissa which does not make any provision for deduction of pension from the total salary of the President, State Commission and in the past, as we have indicated, the State Government has paid the benefit of a sitting Judge to the Chairman of the Liquor Tragedy Commission and there is nothing before us to accept the reason why the petitioner shall not be given the benefit according to the provisions of the Act and the Orissa Consumer Protection Rules and the benefits so extended to Justice S. K. Ray by virtue of the order of this Court which was kept unaltered by the Apex Court.

11. Pension is not a bounty as has been held by the Supreme Court in several decisions. It is a part of one's own earning, which is retained and is given after superannuation as per the rules. Thus, an indefeasible right is created. That right cannot be taken away or abridged in any manner in course of a subsequent employment unless statute under which the employment is made specifically provides for such abridgement. In case of a statutory appointment like the one the petitioner was holding, namely, President of State Consumer Disputes Redressal Commission, which is made under the Consumer Protection Act, unless there exists a provision in the Act itself the indefeasible right to pension earned by a High Court Judge cannot be abridged in any manner particularly in the teeth of the constitutional provision of Article 221(2) as interpreted by the Supreme Court in *Union of India (UOI) Vs. Sankalchand Himatlal Sheth and Another*, . No such provision having been pointed out to us in the Consumer Protection Act or the Rules made thereunder, the conclusion is irresistible that no part of the petitioner's pension earned as a Judge of the High Court can be taken into account while fixing the salary for the period he served as whole time President of the State Commission under the Consumer Protection Act. Consequently the deduction of Rs. 12,724/- per month from his salary is illegal and would constitute a constitutional infraction.

12. In this view of the matter which we have elaborated in our foregoing discussions, we are drawn to an irresistible conclusion that the State Government has acted illegally and unreasonably by reducing the salary of the writ petitioner to the extent of pension he received during his tenure as the whole time President of the State Consumer Disputes Redressal Commission. Accordingly we direct the O. Ps. to pay the petitioner the amount that has been deducted from his salary for the period for which he functioned as whole time President of the forum which shall be computed within a period of three months from the date of issuance of writ and be paid to him within a month thereafter. The differential gratuity, which has also not been paid to the petitioner, be paid in the meantime.

With the aforesaid directions, the writ petition is disposed of. Appropriate writ be issued after the petitioner filed the requisites for the same.