(1985) 07 OHC CK 0038

In the Orissa High Court

Case No : O.J.C. No. 499 of 1982

Kulamani Parida APPELLANT

Vs

State Social Welfare Advisory Board and Others RESPONDENT

Date of Decision : 22-07-1985

Acts Referred:

Constitution of India, 1950 — Article 12, 226, 227
Orissa Service Code, 1939 — Rule 71

Citation : (1985) 60 CLT 379

Hon'ble Judges : R.C. Patnaik, J;D.P. Mohapatra, J

Bench : Division Bench

Advocate : R.K. Mohapatra, D.S. Misra and C.S. Das, for the Appellant; I. Ray, P.K. Mohanty, G. Das, B. Misra, R. Behera, Devananda Misra and Bijan Ray, for the Respondent

Final Decision : Allowed

Judgement

D.P. Mohapatra, J.—This application under Articles 226 and 227 of the Constitution of India is filed by one Kulamani Parida, erstwhile Office Secretary of the State Social Welfare Advisory Board, Orissa. (for short ''the State Board'') challenging the order No. 591 dated 30-1-1982 of the for the opp. parties. Chairman of the State Board prematurely retiring him from service with effect from 31-1-1982 (Annexure-9). The Petitioner has also, challenged the proceedings (Annexure-10) of the 86th Meeting of the State Board held on 23rd/24th of December, 1981 wherein the decision to retire him is said to have been taken. The State Social Welfare Advisory Board, Orissa represented through its Chairman, Dr. Smt. Belarani Dutta, the Central Social Welfare Board (for short ''the Central Board'') represented through its Chairman and Dr. Smt. Belarani Dutta are impleaded as opposite parties 1 to 3 in the writ application. The other opposite parties were the members of the State Board at the relevant time.

2. The gist of the averments made in the writ application may be stated thus:

The Central Social Welfare Board came into existence in pursuance of the

Resolution No. F-2-6/53-DE-2 dated 12th August; 1953 of the Ministry of Education. It was set up with the object of giving financial assistance to voluntary Social Welfare Organisations throughout the country to maintain and develop their existing programme and to dovetail them into the general pattern as laid down in five years plans. The Petitioner alleges that the Central Board (opposite party No. 2) is an agency of Government of India and runs on grants from and in accordance with the directions issued by the said Government. It transpires from records that the Central Board is a Company registered under the Indian Companies Act. The State Board (opposite party No. 1) came into existence by virtue of the Resolution of Government of Orissa in the Cabinet (Planning Department) dated 7th August, 1954. As the notification indicates the Central Board advised the State Government to constitute a State Welfare Advisory Board for the purpose of better co-ordination amongst the institutions in States the State Government and the Central Social Welfare Board and also for a wider coverage and intensive study of the working of such institutions in the State and to follow up frequently their programmes and activities. Acting on this advice the State Government constituted the State Board with effect from 19th July, 1954 in consultation with the Central Social Welfare Board. The Petitioner further alleges that the State Board was comprised of members 50% of whom were nominated by the State Government and 50% by the Central Board. The Chairman was appointed by the State Government in consultation with the Central Board.

3: The Petitioner was appointed as Inspector with effect from 14-7-1955 under the State Board and the said appointment was approved by the Central Board. He became the Office Secretary in the State Board with effect from 1-10-1982 in pursuance of the Resolution of the Board dated 29th of September, 1962, which again was approved by the Central Board on 1st of October, 1962. The Petitioner became the Secretary with effect from 28-1-1975 on the designation of the post being changed under instructions from the Central Board by its latter dated 10-1-1975 (Annexure-5). The Petitioner claim to have acquired valuable experience during the 26 years of his service under the Central Board as well as the State Board having had the opportunity of serving under eminant persons keenly interested in social welfare works like late Smt. Durga Bai Deshmukh and Late Smt. Indira Gandhi. The Petitioner in his writ application goes on to allege that in due discharge of his duties when he tried to expose certain activities in the State Board involving financial irregularities, misappropriation of funds and misutilisation of official position by opposite party No. 3, the then Chairman of the Board, he fell from the grace of the latter. She withdrew the powers of the Petitioner by her order dated 12-11-1981 (Annexure-8) which according to the Petitioner was against the rules, regulations and instructions or the Central Board. The duties or the Secretary are fixed under the regulation and the Chairman or the State Board had no power to denude the Secretary or his power as prescribed in the regulations or the Central Board. The Petitioner challenged the action or the opposite party No. 3 in the writ application, O.J.C. No. 3091 or

1981, filed in this Court. This Court passed an interim order directing the opposite parties to maintain statuts quo in the matter. When the case was pending and indeed was being heard the impugned order prematurely retiring the Petitioner from service was brought to the notice or the Court, whereafter by order dated 14-1-1982 this Court permitted the application to be withdrawn as having been rendered infructuous with the observation that the Petitioner, if he chooses, may file a separate writ application challenging the order or termination.

4. Regarding the impugned order Annexure-9, the case or the Petitioner shortly stated is that indeed there was no decision by the State Board in its 86th meeting held on 23rd/24th or December, 1981 to retire him prematurely. The Board simply decided that disciplinary action, if any, may be initiated against the Petitioner for the alleged misconduct, in consultation with the Conuntinity Development and Rural Reconstruction Department as wall as the Law Department or the State Government. Hence, the Petitioner contends that the Chairman, opposite party No. 3, had no jurisdiction to issue the order or premature retirement (Annexure-9) to him. It is the further case or the Petitioner that the conditions of service applicable to him do not contain any provision for premature retirement of an employee. The relevant provision, Rule 71 of the Orissa Service Code, in exercise of the powers under which the impugned order is purported to have been passed are not applicable to the employees or the State Board, particularly, the Petitioner. The Petitioner also alleges that considering the nature or allegation and the back ground or the case the impugned order though couched in innocuous terms is indeed penal in character and has been passed in utter disregard or principles of natural justice. Even the service records, particularly, the alleged adverso entries in the C.C. Rs. which are said to be the basis for the decision were neither brought to his notice nor was he given an opportunity of offering his explanation thereto. According to the Petitioner, the action of the opposite party No. 3 in prematurely retiring him from service is actuated by mala fides due to her annoyance towards him in the circumstances stated earlier. The Petitioner alleges that the opposite party No. 3 has been manipulated the minutes of the proceedings or the 86th meeting to show as if the State Board took a decision to prematurely retire him from service though in fact no such decision was taken in such meeting. The very fact that the order was passed during the pendency or the writ application (O.J.C. No. 3091 or 1981) filed by the Petitioner challenging the action of the Chairman (opposite party No. 3) so that the said application may be rendered infructuous shows the malicious and unfair attitude of the latter in the matter.

5. Two sets of counter affidavits have been filed on behalf of the opposite parties. Opposite party No. 15, Smt. Taramani Acharya has filed a counter affidavit wherein she has categorically denied that in the 86th meeting of the Board any decision was taken to retire the Petitioner compulsorily. According to her version an unanimous decision was taken in the said meeting that disciplinary action could be taken against the Secretary in consultation with the Community Development and Rural Reconstruction Department and Law Department of the

Government of Orissa and after approval of the Central Social Welfare Board, New Delhi. The said decision was taken as per the suggestion of the Secretary, C.D. & R.R. Department, a Member of the Board, the counter affidavit filed by opposite party No. 15 thus goes to support the case of the Petitioner.

The other counter affidavit has been filed on behalf of the opposite parties 1, 3, 5, 6, 7, 8, 9, 10, 11, 12, 14, 16, 17, 18, 19 and 20. It has been sworn to by one Pradyot Kumar Mallick, Personal Assistant to Chairman, State Social Welfare Board. In his affidavit the deponent claims to be acquainted with the facts of the case and the relevant office records in connection there with. It is pertinent to mention here that there is no averment in the affidavit that the deponent was present in the 86th meeting of the State Board held on 23rd and 24th of December, 1981, the happenings wherein are crucial for the case. In this counter affidavit most of the averments made in the writ petition have been denied. It is stated that the State Board, opposite party No. 1, having been created by Resolution issued by the State Government, has no legal status and hence not amenable to the writ jurisdiction. In para 5 of the counter affidavit it is stated that the State Board was the appointing authority of the Petitioner to the post of Office Secretary, subsequently redesignated as Secretary in 1975 as per instructions of Central Board on all India basis. The allegations of financial and other irregularities committed by opposite party No. 3 have been denied in the counter affidavit. In para 19 of the counter affidavit it is stated that the State Board has accepted the service conditions of the State Government applicable to the Heads of the Department. In para 22 of the counter affidavit it is averred that as opposite party No. 1 took final decision as per the State Government Rules for premature retirement, the Petitioner raised allegations against her in order to malign the Chairman. The allegation that opposite party No. 3 interpolated with the minutes of the proceedings of the 86th meeting was also denied in the counter affidavit. It is asserted that the decision taken in the said meeting was subsequently approved by the Standing Committee as well as in the next meeting of the Board. The deponent asserts in para 23 of the counter affidavit that opposite party No. 3, the Chairman of the Board has at no point of time taken any whimsical decision. Whatever decision she has taken as the Chairman of the Board is in accordance with the rules followed by the Board and as per the powers vested in her as head of the office in matters of plan and policy. In para 25 of the counter affidavit it is stated that minutes of the meeting are never recorded by the Chairman but it is recorded by the officers of the Board and then placed before the Chairman for approval. The premature order of retirement was issued in consultation with the C. D. & R. R. Department and Law Department of the State Government and Central Social Welfare Board. The order was sent to the Petitioner with three months pay through the Accountant, an Officer of the Board, but the former refused to receive it. In para 28 of the counter affidavit the deponent states that as the Chairman has no personal ill feelings with the Petitioner but as the Head of the Board and keeping in view the discipline and dignity of the Board for its proper and better functioning she was bound to take action against the Petitioner and that the opposite party No. 3 (Chairman) had the full authority to take the decision in the matter in the interest of the Board. According to these opposite parties the Board carefully perused the service records of the Petitioner and in view of the several adverse entries therein, was satisfied that his continuance in service was riot desirable in public interest and accordingly decided to retire him prematurely.

6. From the pleadings discussed aforesaid the following points arise for consideration:

(a) Whether the State Board, opposite party No. 1 is amenable to the writ jurisdiction of this Court?

(b) Whether opposite party No. 1 had at all any power to prematurely retire the Petitioner?

(c) Whether opposite party No. 1 in its 86th meeting held on 23rd and 24th of December, 1981 took the decision to prematurely retire the Petitioner?

(d) Whether the impugned order of premature retirement can be said to have been vitiated for non-compliance with the principles of natural justice? And

(e) Whether the decision to prematurely retire the Petitioner is vitiated by malice and unfairness on the part of opposite party No. 3.

7. As earlier stated serious allegations of manipulation, interpolation with records, malice and unfairness were made against opposite party No. 3 in in the writ petition. The Petitioner while asserting in the writ petition that no decision to prematurely retire him was taken in the 86th meeting of the State Board has stated that he was personally present hi the said meeting. His presence in the said meeting is admitted. The counter affidavit filed by the opposite parties, other than opposite party No. 15, has been sworn to by a person who does not claim to have been present in the meeting in question, as such has no personal knowledge about the happenings in the said meeting. He is not a person competent to state that opposite party No. 3 bore no personal ill will or grudge against the Petitioner since the state of mind of the opposite party No. 3 could not be known to the deponent. In these circumstances we are constrained to observe that the counter affidavit denying the averments relating to the decision taken in the 86th meeting of the State Board and the allegations made against opposite party No. 3 have not been controverted by a competent person.

8. Taking up of the question whether the State Board, opposite party No. 3, is amenable to the writ jurisdiction of this Court, it depends on the answer to the question whether the said opposite party can be said to be an ''authority'' within the meaning under Article 12 of the Constitution. This question has been the subject matter of a large number of decisions of different High Courts as well as the Supreme Court. Several decisions have also been cited before us by the learned Counsel for the parties. We will presently refer to some of them. To start with the observations made by the Supreme Court in the case of Ajay Hasia and

Others Vs. Khalid Mujib Sehravardi and Others, , may be quoted:

Where a Corporation is an instrumentally or agency of the government, it must be held to be an ''authority'' within the meaning of Article 12 and hence subject to the same basic obligation to obey the Fundamental Rights as the government.

It is immaterial for determining whether a Corporation is an authority whether the Corporation is created by a statute or under a statute. The test is whether it is an instrumentality or agency of the Government and not as to how it is created. The inquiry has to be not as to how the juristic person is born but why it has been brought into existence. The Corporation may be a statutory corporation created by a statute or it may be a Government company or a company formed under the Companies Act or it may be a society registered under the Societies Registration Act or any other similar statute. Whatever be its genetical orgin, it would be an ''authority'' within the meaning of Article 12 if it is an instrumentality or agency of the Government and that would have to be decided on a proper assessment of the facts in the light of the relevant factors. The concept of instrumentality or agency of the Government is not limited to a corporation created by a statute but is equally applicable to a company or society and in a given case it would have to be decided, on a consideration of the relevant factors, whether the company or society is an instrumentality or agency of the Government so as to come within the meaning of the expression "authority" in Article 12. A juristic entity which may be "State" for the purpose of Parts HI and IV would not be so for the purpose of Part-XIV or any other provision of the Constitution.

In the case of A.L. Kalra Vs. Project and Equipment Corporation of India Ltd., , the Court while discussing the status and character of the Respondent. Corporation in order to determine whether it is an instrumentality of the State and therefore comprehended in the expression ''other authority'' of Article 12 of the Constitution, placed reliance on Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, , and answered the question in the affirmative. In the case of B.S. Minhas Vs. Indian Statistical Institute and Others, , the relevant considerations that weighed with the court to hold that the Indian Statistical Institute is an ''authority'' within the meaning of Article 12 of the Constitution were that the money required for running the Institute is provided entirely by the Central Government and even if any other moneys are to be received by the Institute it can be done only with the approval of the Central Government, and the accountants of the Institute have also to be submitted to the Central Government for its scrutiny and satisfaction. The society has to comply with all such directions as may he issued by the Central Government. The Court observed that the control of the Central Government is deep and pervasive and, therefore, to all intents and purposes, it is an instrumentality of the Central Government and as such is an ''authority'' within the meaning Article 12 of the Constitution. In another case, namely, P.K. Ramachandra Iyer and Others Vs. Union of India (UOI) and Others, , the question arose whether the Indian Council of Agricultural Research (''ICAR'' for short) audits affiliate Indian Veterinary Research Institute (''IVRI'' for short) are such other authorities as would be comprehended in the expression ''other authority'' in Article 12 of the Constitution. The Court on consideration of the relevant facts observed that ICAR being almost an inseparable adjunct of the Government of India, having an outward form of being a society, it could be styled as a Society set up by the State and therefore, would be an instrumentality of the State.

9. Applying the principles laid down in the decisions referred to above to the present case it is undisputed that the Central Board opposite party No. 2, is a Company the registered under the Companies Act, 1956. It is set up by the Central Government, run by the finance provided by said Government. The rules and regulations of the Central Social Welfare Board produced before us go to show that the activities of the Central Board, in all the spheres, are controlled by the Central Government. The Board has been set up with 110 vowed purpose of attracting public co-operation and enthusiasm of voluntary workers, in particular, for the fulfilment of the five years plans. The programme in the plan was made with the object of giving assistance to the voluntary social welfare organisation through out the country to maintain and develop their existing programme and to dovetail them into the general pattern as laid down in five years plans. The Central Social Welfare Board consisting of representatives of Social Welfare Organisations, Members of Parliament as well as representatives of the Ministries of the Government of India actively concerned with the Social Welfare Programme was set up by the Government of India to implement this programme. From the aforesaid there can be little doubt that the Central Board is lion adjunct of the Central Government set up for the purpose of implementing social welfare activities amongst the States. It cannot be, questioned that such activity is an important part of Governmental programme in a Social Welfare State 1108 ours. The control of the Central Government over the Central Board is deep and pervasive.

The State Board (opposite party No. 1), no doubt, is neither a Corporation nor a Company registered under the Companies Act nor a Society registered under the Societies Registration Act. As noticed earlier, it has been set up by Resolution issued by the State Government under instructions from the Central Government and the Central Social Welfare Board. The nature of its activities and the manner of its functioning show that the State Board is a creature of and functions as an affiliate body of the Central Board. The finance For the State Board comes in the shape of grants from the State Government as well as from the Central Board. All the vital activities of the State Board are closely guided and controlled by the Central Board and the State Government. Appointment of staff, disciplinary action taken against them, the annual budget for expenditure, the programmes undertaken during a year are all required to be approved by the State Government as well as the Central Board. Thus, the Board and its activities have the full backing of the State Government and the Central Government through the Central Board. The functions of the State Board closely concern the public at large and partakes of Governmental functions. In this connection, it will be helpful to quote a passage from a Bench decision, of this Court in the case of B. Rajkumar Patra v. Union of India represented by the B. Rajkumar Patra Vs. Union of India (UOI) and Others, , wherein the Court considered the question whether the Indian Rare Earths Limited is an instrumentality of the State:

That no particular test has a predominant role to play. The cumulative effect has to be looked into. Where the functions are closely related to Governmental functions and where a department of government is transferred to a corporation or where rule making of regulation making power has been given which when made would regulate the conduct of the people at large, are clear features in support of treating the institution as an instrumentality or agency of government. Where, however, Government while embarking upon a commercial activity putting the entire money, exercise direct or indirect control and receive toe profits, these by themselves may not be adequate to hold the institution to be an agency or instrumentality of Government.

In the facts of that case the Court on consideration held that the company, Indian Rare Earths Limited cannot be held to be an instrumental of a Government since its activities are of a limited type.

In the present case, as discussed above, the activities of the Board can neither be said to be of a limited type nor it can be said that the State Government in setting up the Board have embarked upon commercial activities from which it expects to receive any profit. On the other hand, the activities of the Board, a creature of the State Government and an affiliate of the Central Board concern the people at large. The Board is empowered to frame its regulation and perform its activities subject to the over all control of the Central Board and the State Government. In these circumstances we take the view that the State Board and the Central Board, opposite parties 1 and 2 respectively, come within comprehension of ''other authority'' under Article 12 of the Constitution and hence are amenable to writ jurisdiction under Article 226 of the Constitution of India.

10. The next question for consideration is whether the State Board had not power to prematurely retire the Petitioner from service. Before proceeding to discuss the question it would be convenient to quote the impugned order (Annexure-9) in extense:

Order No. 591 Dt. 30-1-1982

ORDER

In pursuance of the powers conferred by the first proviso to Sub-rule (a) of Rule 71 of the Orissa Service Code, the State Social Welfare Advisory Board, Orissa, Bhubaneswar do hereby retire Sri Kulamani Parida, Secretary from services of the state Social Welfare Advisory Board Orissa in the public interest with effect from 31-1-1982 afternoon on payment of three months pay and allowances in lien of 3 months notice as required by the said Rule.

By order of the Board.

Sd/- B. Dutta. 30-1-1982 Chairman.

Memo No. 592 Dt. 30-1-1982.

Copy to Shri K. Parida, Secretary of the Board for information. He is directed to a sum of Rs. 4347/- towards 3 months pay and allowances in advance in lieu of 3 months notice.

Sd/- B. Dutta 30-1-1982 Chairman.

As the order shows, action to prematurely retire the Petitioner was taken in purported exercise of powers under Rule 71(a) of the Orissa Service Code. The stand taken in the counter affidavit filed by opposite parties 1, 2 and 3 is that since the Petitioner had completed 50 years of age by the date of the, impugned order a review of his service career was made on the basis of the records before the decision in question was taken. The further case of the opposite parties is that the State Board had adopted the conditions of service applicable to the employees of the State Government for the purpose of its own employees. But surprisingly no document has been placed before us to show either that the provisions of the Orissa Service Code in general were made applicable to the employees of the State Board or Rule 71 of the Code, in particular, was made a part of the conditions of service of such employees. This decision could be taken by a resolution of the Board. No such resolution has been brought to our notice. Some general provisions have been placed to show that rules applicable in the State Government, so far as relevant, were decided to be followed by the State Board. This, however, could be of little help. Power to prematurely retire an employee on the ground that his continuance in service is not desirable in public interest is of far reaching consequence. It vitally concerns the service career and future of the employees. Such a decision cannot be sown-out by implication from some instructions or even resolutions of the Board. Such a decision should be shown to have been taken by the Board consciously after due deliberation. The other case of premature retirement of an employee during the period of the existence of the Board, for over three decades, has been brought to our notice. Further, regarding employees of the State Government the provision of premature retirement of an employee by the employer contains a pari materia provision vesting option with the employee to retire on giving notice to the employer on completion of the prescribed years of service or on reaching the prescribed age. The Opposite parties are totally silent whether the rules applicable to employees of the State Board left any such option with its employees. In these circumstances, it cannot be said that the power of premature retirement provided under Rule 71 of the Orissa Service Code bad been adopted by the State Board for its employees in general or the Petitioner in particular. As such, the State Board bad no power to prematurely retire the Petitioner in exercise of powers under Rule 71 of the Orissa Service Code.

11. Though the answers to the two questions discussed above are sufficient to dispose the writ application since a lot of controversy has been raised whether a decision to prematurely retire the Petitioner was at all taken in the 86th meeting of the Board held on 23rd and 24th of December, 1981 we propose to deal with that question also. A bare perusal of the extract of the proceedings of the 86th meeting filed as Annexure-10 to the writ application and Annexure-10 to the counter affidavit would show that under item No. 7 the subject matter of discussion was ''Departmental action to be taken against Sri Kulamani Parida, Secretary of State Social Welfare Advisory Board, Orissa, Bhubaneswar''. From the discussions recorded under said item it appears that the Board decided to retire the Petitioner from service prematurely in public interest and direct decision of the Board in accordance with P. & S. Department Circular No. 9406-Gen. dated 15-6-1974. In the counter affidavit filed on behalf of the opposite parties 1 and 3 stated that the opposite party No. 3 passed the impugned order (Annexure-9) after consulting the C. D. & R. R. Department and the Law Department of the State Government. Such consultation, if any, must be available on record since it could not have been oral. Peculiarly enough no such document has been produced to show if there was any such consultation and if so what was the advice tendered by the departments concerned in the matter. Further, the P & S. Department Circular referred to in the minutes of the meeting prescribed a particular procedure for review of the service records of the employees before taking the decisions to prematurely retire him. There is no indication in the proceeding that the procedure prescribed therein was followed before the impugned order was passed.

This controversy is essentially a factual one. As discussed earlier, the Petitioner who was personally present in the 86th meeting of the Board has repeatedly asserted in the petition that no decision was taken to prematurely retire him in the said meeting of the State Board. The deponent in the counter affidavit filed on behalf of the opposite party 3 and others does not state to have been present in the said meeting hence his assertion that a decision to this effect was in fact taken in the meeting can at best be said to be based on a perusal of the proceedings of the meeting and not based on any personal knowledge. One of the members of the Board, as it appears from the records also disputed the position and stated that no decision to prematurely retire the Petitioner was taken in the 86th meeting. The Petitioner has also made allegations about interpolations while recording the proceedings of the 86th meeting to which it is stated in the counter affidavit that though the Petitioner, Secretary to the State Board was present in the meeting he was not permitted to record the proceedings since under item No. 7 his further continuance in service was being discussed. It is further stated in the counter affidavit that other officers of the Board recorded the proceeding of the said meeting but who were those officers is not disclosed though several affidavits have been filed on behalf of the opposite parties. Taking all these into consideration we are of the opinion that there is serious doubt if the Board at all decided in its 86th meeting to prematurely retire the Petitioner and if Annexures-10 and H are true and faithful reflections of the happenings of the meeting.

12. The contention was raised on behalf of the opposite parties 1 and 2 that if it is found that the impugned order, Annexure-9 cannot stand scrutiny as an order of premature retirement, it may be considered as an order of termination of service. This contention, in our opinion, cannot be entertained in view of the clear language in which the impugned order is couched. Therein it is expressly stated that in exercise of powers under Rule 71 of the Orissa Service Code the Petitioner is being prematurely retired. There is no material whatsoever to show that the Board ever intended to terminate the services of the Petitioner. As such the contention has to be rejected as devoid of merit.

13. In view of the discussions aforesaid it is not necessary to consider the other questions formulated. In the result, the writ petition is allowed with costs, the impugned order dated 30-1-1982 (Annexure-9) prematurely retiring the Petitioner from service is set aside. Hearing fee is assessed at Rs. 500/-.

R.C. Patnaik, J.

14. I agree.

