
(1992) 02 OHC CK 0035
In the Orissa High Court
Case No : O.J.C. No. 3244 of 1988

Managing Committee, Majhipada M.E. School	APPELLANT
Vs	
State of Orissa and Others	RESPONDENT

Date of Decision : 21-02-1992

Acts Referred:

Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 — Rule 5, 5(8)
Orissa Education Act, 1963 — Section 10A(1), 10A(3)

Citation : (1992) 1 OLR 447

Hon'ble Judges : B.L. Hansaria, C.J.; B.N. Dash, J

Bench : Division Bench

Advocate : Deepak Misra, R.N. Naik and A. Deo and J.K. Rath, Amicus curiae, for the Appellant; A.K. Nayak and Debakinandan Mohapatra and Addl. Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

B.L. Hansaria, C.J.—An important question relating to the security of service of teachers of aided schools is involved in the present case. The importance of the subject-matter itself calls for a cautious approach by us. A feeling of security of service being necessary for drawing the best out of men, a Court cannot be a party which would shake this faith of teachers whose contribution is also material for the progress of a nation as they build the future citizens of a country.

2. We have opened the judgment with the above thoughts, because we have been called upon in the present case to decide whether the termination of the service of opp. party No. 6, Rasananda Lenka, who was serving at the relevant time as the Headmaster of Majhipada M.E. School, was in accordance with law or not.

3. The facts of the case lie in a narrow compass. Rasananda had been first appointed in the school as an Assistant Teacher on 1-7-1983 temporarily, but he continued to serve as such till he was appointed as the Headmaster of the

school, first on ad hoc basis and then permanently, by order dated 4-4-1987 with effect from 6-4-1987. The school started receiving the grant-in-aid from 1-8-1987. Subsequently, a new Managing Committee was constituted which assumed office on 27-10-1987 and the first "holy" act did was to terminate the service of Rasananda. Rasananda preferred an appeal before State Education Tribunal u/s 10 A (3) of the Orissa Education Act, 63 (for short, "the Act") and the learned Tribunal set aside the termination order on the ground that prior approval of the concerned authority as required by Section 10-A (I) of the Act had not been taken and so it ordered for reinstatement of Rasananda by observing that he would be entitled to his salary for the intervening period. The Managing Committee has assailed this order of the learned Tribunal in this petition.

4. It is not in dispute before us that prior approval of the concerned authority as required by Section 10-A (I) of the Act was not taken. It is also not in dispute that this requirement is mandatory in nature, as stated by a Bench of this Court in *Nityananda Panigrahi v. Managing Committee Sindol Fakirmohan ME. School 62* (1986) CLT 30, because of which if Section 10 A(I) were to apply, termination of service without obtaining prior approval of the concerned authority would be invalid. There cannot also be any dispute to the submission advanced by Shri Nayak for opp. party No. 6 that a Managing Committee has to act in accordance with the provisions of the Act and the Rules and should not behave in a manner which would give an impression as if the institution is its private property, as stated in *Sanjukta Samantray v. State of Orissa* 58 (1984) CLT. 92.

5. Shri Misra appearing for the petitioner has taken an altogether different stand. According to him, the continuance of Rasananda in the school beyond six months of his first appointment was in violation of Rule 5 (3) of the Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 (hereinafter, "the Rules"), inasmuch as prior approval of the concerned authority had not been taken as required by the Rules ; and so, the appointment of Rasananda in the school beyond the period of six months was void, for which reason prior approval contemplated by Section 10-A(I) of the Act was not required to be taken. In support of this submission, Shri Misra refers to *Kiran Shankar v. State of West Bengal* 1977 LABIC 371 in which case a learned Single Judge of the Calcutta High Court stated in paragraph 28 that if any appointment is invalid, it is said to be null and void, and void acts are usually destitute of legal effect. Reference is then made to *Premavati v. Narendra Manila Vidyalaya* 1984 (3) SLR 291, in which a learned single Judge of the Allahabad High Court, by relying upon a Bench decision in *A.K. Pathasala v. M.D. Agnihotri* 1971 ALLJ 983 held in paragraph 10 that sanction of educational authorities for termination of the service of a teacher as required by the concerned section was not necessary as the appointment itself was bad for breach of the mandatory provision and therefore did not exist in the eye of law. On the facts of the case, the learned Judge found that the appellant was continuing as a teacher "by indulgence" and the institution could well ask

her not to continue and in such a situation approval was not required.

6. To decide whether Shri Misra's submission merits acceptance, we have to first see whether Rule 5 (8) of the Rules applies in the case and, if so, what is the effect of non-fulfilment of the requirement of that rule, the first question does not present any problem, as the school having become aided on 1-8-1987, the Rules which are meant for aided institutions would not have applied to the cases of teachers appointed before 1-8-1987. On this ground itself. Shri Misra's contention merits to be rejected. But then, having heard the learned counsel for the parties at length on the question of the effect of non-fulfilment of the requirement of Rule 5 (8)--on which aspect we even sought the assistance of Shri J.K. Rath, which he gladly made available for which we appreciate, his action--we would like to give our views on this important point.

7. Though Shri Rath has contended in this connection that the requirement of obtaining prior approval, of which mention has been made in Rule 5 (8), is not mandatory because Rule 5 (8) states "appointment may be made by the Managing Committee or the Governing-Body, as the case may be, with the prior approval of the Inspector.....", as against the use of the word "shall" in Section 10-A (1) of the Act in this connection, we cannot hold the provision of prior approval to be not mandatory for the reason assigned by Shri Rath, inasmuch as the words "may be" as finding place in Rule 5 (8) of the Rules deals with the question of appointment, and not with the question of prior approval.

8. Shri Rath then draws our attention to the Proviso to Rule 5 (8) which is in the following language :

"Provided that where it appears to the Inspector or the Director, as the case may be, that the appointment to a vacancy or vacancies in accordance with the provisions of this rule is being circumvented by making appointments in pursuance of this Sub-rule, the Director suo motu or on the receipt of a report from the Inspector, as the case may be, shall be competent to proceed against the Managing Committee or the Governing Body u/s 11 of the Act."

and contends that this would show that if the Managing Committee be circumventing the requirement of Rule 5 (8) in making appointments, this provision contemplates action against the Managing Committee u/s 11 of the Act. which speaks of supersession and reconstitution of the Managing Committee under certain contingencies. The learned counsel submits that this would indicate even if an appointment of a teacher be against the provision of Rule 5 (8), his appointment is not to become invalid in any way. but appropriate action shall be taken against the Managing Committee. There seems to be some force in this contention. We do not, however, propose to decide the question solely on the basis of this provision.

9. Shri Rath then refers to a recent decision of this Court in *Basanti Pradhan v. State of Orissa*, 1991 (I) OLR 423, in support of his submission that even if appointment of a teacher of an aided school be without prior approval of the

concerned authority, the same would be treated to be valid in the eye of law. A perusal of the aforesaid case, however, shows that this question had not come up for examination there. What was decided in that case was that the requirement of continuing as a teacher "validly and lawfully", when the Orissa Aided Educational Institutions (Appointment of Teachers Validation) Act, 1989 came into force to bring the appointment within the purview of this Act, would be satisfied if the teacher had served as such for some period of time sufficient to constitute continuity, in that case, the teacher's appointment had been approved with effect from 29-1-1936 and as she had thereafter continued to serve in the school till 24th May, 1989 when the aforesaid Act came into force, it was held that this period of about three years was long enough to satisfy the aforesaid requirement. So, the question whether without prior approval an appointment can be said to be valid was not the subject-matter of decision in that case.

10. Shri Rath also brings to our notice Education and Youth Services Department letter No. XE, S.127/77-28586-EYS dated 22-8-1977 as printed at pages 739-40 of Panda's Orissa Education Manual, 1990 Edition, which has dealt with the subject of extension of service of teachers appointed on ad hoc basis beyond six months in aided High and M. E. Schools", and has stated that prior approval of the Government to extend the term of appointment beyond six months as required by Rule 5 (9) of the Rules may be taken to have been accorded. It is stated by Shri. Rath that such an order was also issued by the Government in 1987. The purpose behind drawing our attention to this letter is that though Rule 5 (9) speaks of "prior approval" post facto approval was accorded by the Government by a general communication covering a large number of cases. It has also been the experience of this Court that prior approval as required by Rule 5(9) of the Rules is very rarely taken of the concerned authority and matter is referred to the authority only after appointment is made by the Managing Committee and the concerned authority thereafter accords approval retrospectively with effect from the permissible date. So, the strict letter of the rules has not been insisted upon and we would be upsetting the general convention followed after the making of the rule, if we were to hold that any appointment made without prior approval would be illegal in the eye of law. This we should not like to do indeed, we would use the thinking of the relevant authorities about the real requirement of the rule according to them, to interpret the same in that vein. This aid is permissible.

11. In this connection, we would first refer to K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, wherein the interpretation put on a statutory provision by the Central Board of Direct Taxes was accepted in paragraph 11 as furnishing legitimate aid in construction of the provision by characterising the views taken by the Central Board of Direct Taxes in the concerned circular in the nature of "contemporanea expositio". Reference was made in this connection to what was stated in paragraph 219 of Crawford on Statutory Construction (1949 Edition) wherein the learned author observed that practical construction, although not controlling, is entitled to considerable weight. The observation of

Mookherjee, J. in *Baleswar Bagarti v. Bhagirathi Das* ILR 35 Cal 701 was also noted wherein he had stated that in construing a statute Courts will give much weight to the interpretation put upon it at the time of its enactment and since by those whose duty it has been to construe, execute and apply it. This statement was quoted with approval by the apex Court in *Desh Bandhu Gupta and Co. and Others Vs. Delhi Stock Exchange Association Ltd.*,

12. On the question of reliance on convention to construe a provision, we should like to refer to the important decision of the Supreme Court in *S.P. Gupta Vs. President of India and Others*, in paragraphs 618 and 747 of which relevance of constitutional conventions in interpreting a provision of the Constitution was recognised. What has been stated in that decision about interpretation of the Constitution should apply while construing a statutory provision also.

13. We would, therefore, read, down the requirement of the rule relating to prior approval as mere approval, which can be post facto also. It may be stated that in law it is permissible to read down a statutory provision to make the same intra vires and reasonable. Reference may be made in this connection to *In re Hindu Women's Right to Property Act 1941* FC 72 : *All Saints High School, Hyderabad and Others Vs. Government of Andhra Pradesh and Others*, Maxwell on Interpretation of Statutes, 12th Edition, page 109 : *Bidie v. Gen. Accident, Fire and life Insurance Corporation*, (1948) 2 All E.R. 995 to the observations of Holmes, J. in *Towne v. Eigner*, (1917) 245 US 413 : 62 L.Ed. 372. to what was stated by Gwyer, J. in *Central Provinces and Berar Act, (1939)* FCR 18 and to the observation of the apex Court in *Kedar Nath Singh v. State of Bihar* (1962) Supp. (2) SCR 769. According to us, it would be unreasonable, as it would unsettle the settled practice, if we were to hold that the letter of the law, which requires prior approval, must mean what it says, and giving of approval afterwards would not meet the requirement of law. To make the provision reasonable, we would therefore, read it down.

14. So, because of lack of prior approval, appointment of a teacher cannot be regarded to be invalid. But then, what view has to be taken regarding the validity of the appointment if there be no approval even afterwards? As to this question, we would say that the answer would depend on the fact as to who is questioning the appointment. If the approving authority raises this question, the same would be permissible, and what it too can do is to refuse approval, the effect of which would be that the teacher cannot continue after the approval is refused. This action would not amount to invalidation of the very appointment, so much so as to regard the same as void, because of which it could even be suggested that the teacher was not entitled to receive his salary for the period of service rendered by him prior to the date of refusal of the approval which would have disastrous consequences. We cannot permit such a consequence to take effect, because if it were to be held that in such a case the teacher was not even entitled to receive his salary, an effort may be made to recover the same from him. There is another reason for our taking the aforesaid view, which is based on the de facto

doctrine, which is invoked when a prayer for issuing a writ of quo warranto is issued when the holder of the office has no valid title to it, inter alia, because he lacks the necessary eligibility condition to be appointed to the office in question. If the de facto doctrine can apply, as it does, even when the office holder lacks the requisite qualification to hold the office, the same has to apply, a fortiori, to those cases where infirmity in appointment is based on non-fulfilment of a statutory condition like approval of some other authority. The de facto doctrine does not permit invalid appointments to be treated as void appointments because of the serious consequences that might follow if the appointments were to be treated as void.

15. We may make it clear that what we have stated, above would not, however, apply to the requirement of prior approval visualised by Section 10-A (1) of the Act, because that section in clear terms states that service of a teacher shall not be terminated without obtaining prior approval. This Court in Nityananda Panigrahi's case {supra} has already held this requirement to be mandatory in nature. Any other view in the matter would seriously affect the security of service of teachers.

16. The above is the position in law, according to us, when an appointment is challenged by the approving authority. If, however, the Managing Committee, who had given the appointment itself, wants to challenge the validity of the same on the ground of non-approval of the appointment by the concerned authority, we would say that it would be estopped from doing so. Not only estopped, the act of appointment by the Managing Committee without obtaining prior approval would constitute waiver on its part in challenging the validity of the appointment on this ground. We are of the firm view that any other thinking on the subject would create almost a havoc in the state in the educational field because there are cases galore where succeeding Managing Committees or for that matter succeeding Secretaries or other influence-building officials of the Managing Committees try to appoint their own favorites in the schools as teachers even by displacing those who were earlier appointed by their predecessors. We cannot give handle to the Managing Committee or its functionaries to do so. It would introduce almost a chaotic condition and seriously jeopardise the security of the service of teacher, to which we cannot be parties.

17. What we have stated above applies to the requirement of prior approval or approval. If the teacher concerned be, however, lacking any requisite qualification to hold the post despite which appointment had been given for some oblique motive, it would be open to the concerned authority, more particularly the new Managing Committee, to take up the matter with the teacher by issuing a formal notice to him as to why his service should not be terminated because of lack of qualification to hold the post. If the teacher would fail to satisfy the authority about his eligibility to hold the post, action of termination can be thought of, but the same would not be brought into effect without obtaining prior approval of the concerned authority visualised by Section 10-A (1) of the Act.

Here also, we would make an observation and the same is that such a step would be taken as early as possible after the fact of disqualification to hold the post comes to the knowledge of the concerned authority. It may also be stated that if the concerned teacher had worked for a long time despite his being ineligible to hold the post, the concerned authority shall duly consider various aspects of the matter, including the motive of the Managing Committee, and the laches on its part before taking a final decision in the matter. If lack of qualification be relatable to the period of experience, a strict view in this regard would not be called for after the teacher had served for long years. We have said so because of the view taken by the apex Court in *Miss Shainda Hasan Vs. State of Uttar Pradesh and others*,

18. It is not necessary to delve into the matter as to whether appointment of teacher without prior approval is void or voidable. We have taken this stand because, as already observed, we would not regard an appointment made without prior approval as void. This apart, the controversy as to when an action or order is void and when it is voidable is too complicated and we do not think it necessary to enter into the mess or quagmire, because, as observed by Krishna Iyer, J. in *Nawabkhan Abbaskhan Vs. The State of Gujarat*, the judicial dichotomy of void and voidable presents "a picture of juristic jungle" where the case law "affords the usual spectacle of anarchy upon which order can hardly be superimposed". We may with profit refer in this connection to *Calvin v. Carr* 1979 2 ALLER. 440 in which Lord Wilberforce speaking for the unanimous Privy Council stated as below while dealing with the question as to whether where an initial order is void, appeal against that order would not lie as the order is a nullity whose effect is that it did not exist in the eye of law :

This argument led necessarily into the difficult area of what is void and what is voidable, as to which some confusion exists in the authorities. Their Lordships' opinion would be, if it became necessary to fix upon one or other of these expressions, that a decision made contrary to natural justice is void, but that, until it is so declared by a competent body or Court, it may have some effect or existence in law."

So, even if an order is void, it may exist in law until it is so declared by a competent body or Court. The same view was taken in *State of Punjab v. Gurdev Singh*, (1991) 4 SCC 1. Though a suggestion was made from the bar that instead of using the word void or voidable, we may think of "nullity" because of what has been stated in paragraph 21 of *Union of India (UOI) Vs. Tarachand Gupta and Bros*, and paragraph 38 of *A.R. Antulay v. R.S. Nayak* AIR 1982 SC 1531 we do not propose to play upon words.

19. In view of the above, we would say that it is not open to the petitioner in the present case to take a stand that the appointment of Rasananda as an Assistant Teacher was void or a nullity. This apart, in the present case Rasananda's service had been terminated when he was functioning as the Headmaster, appointment to which post had been made by the Secretary of the School on 4-4-1987. A

perusal of the impugned judgment of the learned Tribunal shows that the Managing Committee had duly resolved to appoint Rasananda as Headmaster on permanent basis with effect from 6-4-1987. before which he had served as such on ad hoe basis with effect from 7-7-1986. In paragraph 5 it has been clearly mentioned that the Secretary had given permanent appointment to Rasananda in the aforesaid post and the same was accepted by the Managing Committee. Though a plea was taken about interpolation of this part of the Managing Committee's resolution, the Tribunal did not accept the allegation. Another reason given by the Tribunal in rejecting the case of the Managing Committee that Rasananda was holding the post of Headmaster on ad hoc basis is that the Managing Committee in its resolution dated 27-10-1987 had decided to remove Rasananda from his service on the allegation of misappropriation of the School funds, which clearly shows that Rasananda was not holding the post on ad hoc basis.

20. This being the position, we cannot agree with Shri Misra that Rasananda had not been duly appointed to the post of Headmaster because of which prior approval of the Inspector as contemplated by Section 10- A (1) of the Act was not required. Because of this conclusion of ours, it is not necessary to further examine the question as to whether the termination having been ordered because of the alleged misappropriation of the School funds was in violation of the principles of natural justice which would also render the termination illegal entitling a person like Rasananda to reinstatement in view of the recent decision of this. Court in *Basanti Mohanty v. State of Orissa* 72 (1991) CLT 127.

21. No other ground having been urged, the petition is dismissed.

B.N. Dash, J.

I agree.