

(1952) 08 OHC CK 0009
In the Orissa High Court
Case No : O.J.C. No. 12 of 1952

Manjula Manjari Dei

APPELLANT

Vs

M.C. Pradhan, Director of Public Instruction

RESPONDENT

Date of Decision : 08-08-1952

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 1952 Ori 344

Hon'ble Judges : Jagannadha Das, C.J;Panigrahi, J

Bench : Division Bench

Advocate : Muralidhar Mohanty, for the Appellant; Adv.-General, for the Respondent

Final Decision : Dismissed

Judgement

Panigrahi, J.—The petitioner is the proprietrix of a firm of publishers known as Mahaprasad Brothers who published an Oriya book known as "AMA ITIHASA GAPA" which was prescribed as a text-book for Class IV in the Schools of Orissa. This book was in the list of approved text-books published by the Director of Public Instruction, Orissa, and was recommended as a suitable text-book for Class IV for the year 1951-52. For the next year, namely 1952-53, a fresh list of approved text books was published by the Director of Public Instruction in which the above publication did not find a place. The petitioner's grievance is that she sustained a loss of about Rs. 4,000/-as, by the omission of her publication from the approved list, 7000 copies of the same remained unsold. She has therefore applied, under Article 226 of the Constitution of India, praying for the issuances of a writ in the nature of mandamus or certiorari against the Director of Public Instruction, Orissa, directing that officer to include the said book in the list of approved text-books for the year 1952-53.

2. The sheet-anchor of the petitioner's case is that once a publication is approved by the Director of Public Instruction as a text book it will ordinarily continue on the approved list for at least two years, according to Article 831 of

the Bihar and Orissa Education Code. Relying on this rule, the petitioner printed and published 20,000 copies of her publication known as "AMA ITIHASA GAPA". This rule was extended to South Orissa by a Gazette Notification dated 15th March 1940, issued by Government, and the Secretary of the Text Book Committee, Orissa issued a notice that with

"the commencement of the school year 1940-41 the minimum period for which a book approved as a text book in South Orissa has to be included in the approved list, will be two years instead of five years as at present."

The petitioner, therefore, expected that her publication would be continued as an approved text book at least for the year 1952-53 and she had accordingly printed 20,000 copies, out of which however only 13,000 copies were sold in, the year 1951-52. It is, therefore, contended that the Director of Public Instruction acted contrary to the Rules in setting up a Committee of his own for approval of text books and in dropping the petitioner's publication from the list of approved text-books for the year 1952-53. She further complains that the Committee set up by the Director was not in accordance with the rules as it did not consist of twenty members and that its constitution is not warranted by Article 792 of the Bihar and Orissa Education Code. It is accordingly urged that the notification issued by the Secretary of the Text Book Committee, Orissa, in 1940, is still in force and that the opposite party has acted illegally in removing the petitioner's publication from the list of approved text-books before the expiry of two years. The action of the Director of Public Instruction is challenged as being arbitrary and opposed to the rules framed by Government.

3. On behalf of the opposite party it is contended firstly, that the Orissa Text Book Committee was suspended by an order of Government, communicated in their letter No. 1783-E (c) dated 13th May 1942 and all powers exercised by the Committee till then vested in the Director of Public Instruction with effect from that date; secondly, that a new Text Book Committee has not been constituted till now, Government having directed by another letter No. 5046-E dated 21st August 1951 that no new Committee should be constituted on account of financial stringency and being of opinion that the work of reviewing text-books, as at present, was going on smoothly and with the minimum expense; and thirdly, that Government authorised the Director of Public Instruction by a letter. No. 5056-E., dated 10th Sept. 1947 to call for books from various publishers for examination and approval, subject to the condition that as soon as any new book is printed by Government in any subject for any class, it will be made a text book from the next Session and that he will cease to call for books from any publishers in that subject for that particular Class. The Government had also directed, in that letter, that all text-books should aim at imparting education in various subjects which would make the boys and girls patriotic and alive to their sense of responsibility and duty as free citizens of an independent country.

In accordance with this letter, the Director of Public Instruction issued a warning to all publishers from the year 1948 and successively every year thereafter that

"books may be removed from the list or replaced by Government publications next year". The Director of Public Instruction repeated this warning in the notification dated 3rd April 1951 published in the Orissa Gazette dated 13th April 1951. This notification contains a list of approved textbooks for the schools session of 1951-52, including the petitioner's publication. On 8th September 1951 the Director of Public Instruction issued a set of rules indicating how books for approval as text books should be submitted, how books on language subjects should be written, and what topics are to be followed in compiling readers for classes IV & V and these directions were duly published . These rules also contain a warning in the following terms:

"Books on General Readers, supplementary Readers, Historical Readers, and Geographical Readers, which are continuing on the list of approved text books for the year 1951-52 should be revised in the light of the instructions set out above, revised editions thereof should be submitted for consideration along with new books for the schools session, 1952-53."

It is contended for the opposite party having regard to the facts stated above, that the action of the Director of Public Instruction in eliminating the petitioner's publication from the approved list of text books was justified since, admittedly, she did not comply with the instructions issued by him on the subject.

4. In support of her contention that a book once approved shall ordinarily remain on the approved list for at least two years, the petitioner relies on Article 822 of the Orissa Education Code (corresponding to Article 831 of the Bihar & Orissa Education Code). That Article runs as follows:

"Any book approved for use will ordinarily continue on the approved list for at least two years."

Secondly, the petitioner contends that the warning published by the opposite party to the effect that books may be removed from the approved list unless they complied with certain directions given by him has not the sanction of Government and is, therefore, inoperative in law. In the alternative she argues that the warning given by the opposite party, properly interpreted, means that an approved text book can only be replaced by a Government publication and not until a Government publication is actually available. Thirdly, she urges, relying on Rule II of the rules for submission of text books published by the Director of the Public Instruction, that books already approved or rejected need not be submitted again for scrutiny.

5. It is conceded that the Orissa Education Code has no statutory effect and that it is no more than a compilation of Rules framed from time to time for the guidance of the Director of Public Instruction and his subordinates and mainly relate to the administration of the educational instructions in accordance with the educational policy of Government. It is, therefore, urged on behalf of the opposite party that although text books, once approved, are ordinarily continued for two years, it is always left to the discretion of the Director of Public

Instruction, who has taken over the functions of the Text Book Committee, to replace a particular publication by another one available in the open market, in any particular year, if he considers that to be more suitable. It is admitted that Government no doubt intended to publish text books themselves on the various subjects for all classes in the Schools, but it is urged that the option always lay with the Director of Public Instruction to substitute more suitable books for the existing ones as and when they were available in the open market. The phraseology of the warning issued by the Director, from time to time, in which he says publishers are warned that "books may be removed from the list or replaced by Government publications" is, in my view, wide enough to justify this interpretation. Moreover, this warning was systematically being repeated every year, beginning from 1948, and, in my opinion, the petitioner was taking a great risk in expecting that her publication would be continued as an approved text-book for Class IV not only for the year 1951-52 but also for the subsequent year 1952-53, as a matter of course, and in printing an excess number of copies.

Having regard to the fact that the Text Book Committee was suspended in 1942 by an order of Government, I am satisfied that the Notification issued by the Secretary of the Text Book Committee on 15th April 1940, on which the petitioner has relied, ceased to have any force. I am also satisfied that the Article in the Orissa Education Code laying down that approved text books will ordinarily continue for at least two years, also ceased to operate by virtue of the subsequent instructions of the Director of Public Instruction, and no publisher had a right to expect that his or her publications would be approved or continued for a second year in succession as a matter of course. It was also not necessary for the Director of Public Instruction to obtain the sanction of Government for approval or removal of a text book as that function had been delegated to him and could be exercised at his discretion. In any event on the facts of this case, I am quite clear in my mind that the petitioner has acquired no legal right which could be enforced against Government so as to insist that her publication must be taken as approved for the second year, namely 1952-53. These contentions have accordingly no substance.

6. The third contention also may be disposed of in a few words. It is undisputed that the petitioner did not comply with the instructions laid down by the Director of Public Instruction on 8th September 1951 laying down that historical readers should be revised in the light of the instructions set forth by him in his letter, & did not print a revised edition for submission to the Director for his consideration, as required, along with the new text books for the school session of 1952-53. Paragraph 11 of the Rules for submission of text books on which the petitioner relies is in general terms whereas special instructions have been given in that very letter as to how historical readers should be compiled for Classes IV and V. The petitioner's publication is a historical reader intended for use in Class IV, and the special instructions issued in respect of historical readers for that Class should have been followed and the text book in question should have been revised and re-submitted to the Director of Public Instruction for his approval in

the light of those special instructions. The petitioner having, admittedly, failed to do so, cannot legitimately complain that her publication has been unjustly or arbitrarily dropped from the list of approved text books.

7. The petitioner's counsel addressed us at length on the propriety of issuing a direction in the nature of a mandatory order as his client has suffered pecuniary loss on account of the acts of an executive officer. From the facts of the case narrated above, it is clear--and it was conceded--that the petitioner has acquired no contractual or statutory right which can be enforced by means of a suit. But it is claimed that, as she has suffered some pecuniary loss, she had acquired an equitable right which could be enforced by the issue of a writ of mandamus.

8. The principles governing the issuance of a writ of mandamus are well recognised. It is an extraordinary legal remedy with which equity has nothing to do and in consideration of which no equitable rights or principles can be taken into consideration except solely for the purpose of determining whether, in the exercise of legal discretion, a writ should issue. It is subject to the exercise of a sound judicial discretion--the appropriate remedy to enforce a ministerial duty imposed by law upon officers who refuse or neglect to perform such duty when there is no other adequate or specific legal remedy. The Courts will not interfere with the exercise of official duties unless some specific act or thing which the law requires to be done has been omitted. It must be a legal duty, coupled with pecuniary loss to the plaintiff which cannot be compensated by damages that is usually necessary to make out a prima facie case founded on a substantial right. On the one hand the petitioner should satisfy the Court that she has a clear legal right; on the other, that there is a corresponding duty on the part of the person to whom the writ is directed for, in the ultimate analysis, the question for determination is whether the right of the aggrieved party is so free from doubt and the duty of the officer concerned so clear and free from any substantial question that an order should issue to him to compel performance.

If the right be doubtful, mandamus will not lie to establish as well as to enforce a claim of uncertain merits. It is also well established that mandamus is not a writ of right. Before granting a writ the Court should look to the larger public interest which may be concerned--an interest which private litigants are apt to overlook when striving for private ends. The essence of the writ being discretionary, the Court will always take into consideration all the surrounding facts and circumstances, and in the exercise of its sound judicial discretion a writ may be denied although a clear legal right thereto is established, if public interest will otherwise suffer. We have to examine the present case with reference to these principles. The petitioner's contention, however, is that the Court is not fettered by these well-recognised principles which have been propounded for the guidance of British and American Courts. The argument is that under Article 226 of the Constitution High Courts in India have been vested with much larger powers than those in England or America and that the object of the Article would be defeated if this Court were to deny jurisdiction by appealing to the practice

obtaining in the Courts of those countries.

9. Article 226 runs as follows:

"Every High Court shall have power to issue to any person or authority, including any Government directions, orders, or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them, for the enforcement of any of the rights conferred by Part III, and for any other purpose."

On a plain reading of the Article, it would appear that the Court can issue not only the well-known writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari, but also directions, orders, or writs in the nature of what are known as "High Prerogative Writs" and that this power may be exercised not only for the enforcement of any of the rights conferred by Part III, but for any other purpose as well. The expression "for any other purpose" has been used to make it clear that the power of the High Court is not confined or limited only to the enforcement of the Fundamental Rights embodied in Part III but may also include any other right not falling under that classification. In view of the amplitude of power conferred by Article 226, it may be said that the High Courts in India are not fettered by the practice obtaining in Courts either in England or in the United States or by the preexisting Indian law (that is to say, the law as it existed before the Constitution), and that they may, in appropriate cases, exercise this power where they are satisfied that no other remedy is available.

But, in the exercise of that power, the Courts will certainly have regard to the practice obtaining in other countries and will not ordinarily depart from well-established rules. It is not to be supposed that this power will be used in such a manner as to entitle the Court to issue writs for any fanciful purpose, according to the whim of a particular Judge. Such unfettered exercise of this power will ultimately result in bringing governments to a standstill and the only restraint that can be imposed upon an arbitrary use of Article 226 is the sense of self-restraint of the Court. While, therefore, I am prepared to concede that it will be futile to attempt to define the limits within which the power vested under Article 226 may be exercised, it must be well-recognised that the power is not to be exercised arbitrarily, capriciously, or indiscriminately. That power is subject to sound judicial discretion and its exercise is governed by well-established legal principles. Too often, litigants resort to this Article and invoke the interference of the High Court in the normal administration of the country. Courts have so far been indulgent in entertaining such applications, but I am not aware of any case in which the power has been excessively used. As at present advised I am of opinion that the proper interpretation of Article 226 would be that in enforcing a fundamental right guaranteed under the Constitution the Court is under a duty to exercise its power under that Article while in exercising this power for any other purpose it has a discretion.

10. At one stage of the arguments, it was contended that any person, whether

directly affected or not, can challenge the order of the Director of Public Instruction in this case on the ground that it is "ultra vires". No authority was cited before us in support of this extraordinary proposition. Indeed, many reported cases would appear to lay down the contrary.

In "Commonwealth of Massachusetts v. Andrew Mellon (1923) 262 U S 447 a tax-payer sought to challenge the enforcement of a Federal Appropriation Act on the ground that it was invalid and would increase the burden of his taxes, and his claim was rejected on the ground that his interest in the moneys of the Treasury was comparatively minute and indeterminable. Sutherland J. observed:

"If one tax-payer may champion and litigate such a cause then every other tax-payer may do the same, not only in respect of the statute here under review, but also in respect of every other Appropriation Act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained."

It was accordingly held that, it is only where the rights of persons or property are involved and where such rights can be presented under some judicial form or proceeding that a Court of Justice can interpose a relief.

In the "Indian Sugar Mill Association v. Secy. to the Government of Uttar Pradesh Labour Department", 1950 All L J 767 a Full Bench of the Allahabad High Court held that an application for the issue of a writ in the nature of mandamus is not maintainable unless it has been filed by a person whose rights have been directly affected and where he has no other adequate and specific remedy available to him.

In "Nathamooni Chetti v. Viswanatha Sastry" AIR 1951 Mad 250 the High Court refused to exercise its extraordinary power by way of issue of a prerogative writ when the petitioner was found guilty of laches.

In Bagaram Tuloule Vs. The State of Bihar, the petitioner prayed for the issue of a writ of mandamus upon the State of Bihar, directing it to refer an industrial dispute to a tribunal for adjudication under the Industrial Disputes Act. Government had refused to make a reference on the ground that it considered it inexpedient to refer the matter to arbitration. The Full Bench held that no question of bona fides or mala fides at all arose since the matter was left entirely to the discretion of Government. As it was a matter of discretion mandamus was refused following the well-settled practice in England and in America : as in "King v. Marshland Smeeth and Fen District Commissioners (1920) 1 K.B. 155 In the matter of "Robert L. Cutting", (1877). 94 U S 14 "Intestate Commerce Commission v. United States of America", (1922) 260 U S 32.

In a recent case reported in "Veerappa Pillai v. Raman and Raman Ltd." 1952 S.C.J. 261 the Supreme Court set aside an order of the Madras High Court

directing the Regional Transport Authority to grant permits to a person on the ground that the issue or refusal of a permit was solely within the discretion of the transport authorities and that it was not a matter of right. It was held that, however, extensive the jurisdiction under Article 226 may be. it was not so wide or so large as to enable the High Court to convert itself into a Court of Appeal and examine for itself the correctness of the decisions impugned and decide what is the proper view to be taken or the order to be made.

Where the act complained of is purely administrative in character it is not amenable to a writ--See *Province of Bombay Vs. Kusaldas S. Advani and Others*, .

The Court would refuse to exercise its power under Article 226 and interfere with the action of an executive officer unless it is satisfied that that officer is under an obligation to do something or forbear to do something--See *Emperor Vs. Jeshingbhai Ishwarlal*, --though in that particular case, the Court issued a writ as the act complained of involved the infringement of a fundamental right.

The public duty enforceable by mandamus is an imperious duty, that is to say, a duty as to which no liberty of choice as to the performance and non-performance of it is left with the officer that has to discharge it. Whenever it is the duty of a person to do an act the Court will order him to do it by mandamus: "*King v. Mayor of Fowey* 1824 2 B & C 584.

If the law requires a certain thing to be done, the Court may order it to be done by the party upon whom the obligation of doing it is imposed. If he is to act according to his discretion--and he will not act or even consider the matter--the Court may compel him to put himself in motion to do a thing, but cannot control his discretion--Per Best, J., in "*King v. Justices of Northriding of Yorkshire*" (1823) 2 B & C. 286 .

It is, therefore, clear that there is a well-marked distinction between the class of cases in which there is a legal duty imposed to exercise judicial discretion and the class of cases where there is no such duty but where the matter is left quite at the will and pleasure of some person or body. In the latter class of cases, the Court will never interfere at all; in the former class it will. See Short on Mandamus, p. 282.

In "*Ex Parte, Napier*" (1852) 18 Q. B. 692 the petitioner, Sir Charles Napier claimed from the East India Company certain arrears of pay alleged to have been wrongfully withheld by the Company. The Company pleaded that the applicant had received a larger share of the prize-money than what was due to him and accordingly withheld the excess from the salary due to him. On his application the Court observed that a legal obligation which is the proper substratum of mandamus can only arise through common law, or from statute or from contract. The statutory obligation of the Company to pay the salaries claimed was not established. The petitioner, however, merely relied on practice which may amount to an honourable, but does not amount to a legal, obligation, that is to say an obligation which was binding in moral equity and conscience but lacking the

"vinculum juris".

If the right of the petitioner is not clear, and the duty of the Officer, the performance of which is to be commanded, is not plainly clear and peremptory, mandamus is not an appropriate remedy: See "United States v. Guy T. Helvering (1937) 81 Law Ed. 1273.

11. Having regard to the principles enunciated in the various authorities cited above I have no hesitation in coming to the conclusion that the petitioner cannot be granted any relief by way of a writ or any other order. She has established no legal right which could be enforced against a public officer. The choice of suitable text-books is entirely in the discretion of the Director of Public Instruction, since the suspension of the Text Book Committee in 1942, and he exercised his discretion according to the instructions of Government. He was under no legal obligation to recognise any particular publication as a text-book, and in doing what he did he acted bona fide and in good faith.

I would, therefore, discharge the Rule and dismiss this petition with costs. Hearing fee Rs. 100/- (Rupees one hundred).

Das, C.J.

12. I agree with my learned brother that this application should be dismissed with costs.

13. We admitted this application to consider whether the rules in the Bihar and Orissa Education Code which are said to have been violated in this case by the Director of Public Instruction have any statutory basis or other basis having the force of law. Learned counsel for the petitioner, however, at the very outset of the final hearing frankly conceded that he could discover no such basis. He could not also satisfy us that his client had anything like a legal or justiciable right. His argument, however, was, if I understand him right that the action of the Director of Public Instruction in this case constituted a mala fide breach of faith and an arbitrary exercise of his power and that though his client's position could not be defined in terms of a legal right, she had sufficient legally-recognisable interest in securing the correction of the arbitrary and mala fide exercise of the power of the Director of Public Instruction. It was said that his power, though not statutory was regulated by well-defined departmental rules which have got to be observed in the interest of the public and of the student population as well as in the interest of the individual publishers, who act on the faith of the due observance of these rules. We have been shown no ground for thinking that we can exercise any such corrective power over the acts of an executive authority such as the Director of Public Instruction, whose acts are guided by the departmental rules, which vest in him large discretionary powers. The characterisation of such exercise of powers by uncomplimentary terms like "arbitrary" or "mala fide" does not by itself without more give us any corrective jurisdiction. As has been pointed out by the Supreme Court in their recent decision in "Veerappa Pillai v. Raman & Raman Ltd." 1952 S.C.J. 261 the High Court cannot constitute itself a

court of appeal over executive officer by invoking its jurisdiction under Article 226 of the Constitution.

14. The whole burden of the argument of the learned counsel for the applicant is that the scope of Article 226 of the Constitution is very much wider than that of the prerogative writs. It is pointed out that the jurisdiction under Article 226 of the Constitution is very wide in two respects. (1) The High Court can issue not merely the well-known prerogative writs but other writs, directions and orders. (2) The directions can be issued "for any other purpose" in addition to the enforcement of fundamental rights. The use of the words "for any other purpose" and the fact that directions which can be issued need not be confined to prerogative writs indicate, according to the learned Counsel for the applicant, that the power under Article 226 can be exercised for purposes other than those usually covered by prerogative writs. His argument, therefore, was that though he was unable to make out a legal obligation on the part of the opposite party, the Court's powers under Article 226 were wide enough to grant the relief which he seeks. The arguments have accordingly covered a wide range but it had to be admitted that the very wide language used in Article 226 cannot be construed to vest in us unrestricted powers to administer supposed equity not based on a justiciable foundation. Learned Counsel, except merely stressing the wide language of Article 226 could not formulate any legal basis or justiciable foundation for the exercise of our jurisdiction under Article 226, in the facts of this case. Without, therefore, attempting to define the limits of the High Court's power to exercise jurisdiction under Article 226 of the Constitution it is enough to say that the present case cannot by any stretch of reasoning be brought within the scope of Article 226 of the Constitution. It may be added that the only decision on which the learned Counsel laid repeated stress in support of his position was of B. Ramamurthy by next friend and father B.S. Chetti Vs. The Director of Public Instruction, . That, however, is the decision of a Single Judge and is not clear from the report whether the rule he was considering had or had not any statutory or other legal force. If it had not, the correctness of the learned Judge's decision may be doubted.

15. As regards the merits of the case, I agree with the views expressed by my learned brother. The only plausible argument that the applicant's counsel put forward was that the Gazette Notification of the 3rd April 1951, which included the applicant's book as a recognised text book for the 4th and 5th classes, itself shows that it was to be in force for about two years and that the warning conveyed in the same notification was meant to vest in the Director of Public Instruction a power to withdraw the text book from recognition before the expiry of the two years period only in the contingency of another equally good Government publication being, available to take its place and not in other circumstances. His argument also was that the instructions issued on the 8th September 1951, by the Director of Public Instruction as regards submission of text books for scrutiny before recognition and the further instruction contained therein, as regards the revision of text books do not apply to his case. A perusal,

however, of the relevant rules in the Education Code and of the Gazette notification dated the 3rd April 1951, clearly shows that ample power and discretion has been vested in the Director of Public Instruction as regards these matters. I agree, therefore, that in respect of such matters, this Court cannot give any relief to the petitioner under Article 226 of the Constitution. The petitioner's counsel having attempted to persuade us that the action of the Director of Public Instruction was arbitrary and mala fide, it is only fair to say that we were not satisfied that the said! imputation has been substantiated.