

(1991) 07 OHC CK 0015

In the Orissa High Court

Case No : Original Jurisdiction Case No. 2241 of 1991

Md. Dawood Shariff

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 08-07-1991

Acts Referred:

Orissa Lokpal and Lokayukta Act, 1970 — Section 3(2)

Citation : (1991) 2 OLR 221

Hon'ble Judges : B.L. Hansaria, C.J.;D.M. Patnaik, J

Bench : Division Bench

Advocate : M.S. Panda, for the Appellant; Sovesh Roy, General, for the Respondent

Final Decision : Dismissed

Judgement

B.L. Hansaria, C.J.—This petition assails the appointment of Justice S.K. Ray (O.P. 2) as Lokpal, Orissa on the ground that the same was illegal as well as mala fide.

2. the short facts which, need be noted are that before Justice Ray had been appointed as Lokpal, Justice B. K. Patra was so working till his demise in the year 1986. Justice Ray after holding the post of Chief Justice of this Court had retired on superannuation in the year 1980. After the demise of Justice Patra, the post of Lokpal remained vacant till the same was filled up by the appointment of Justice Ray on 5-8-1989 which post he joined on 17-8-1989.

3. To appreciate the challenge on the ground of illegality, we may note the eligibility condition as mentioned in Section 3 (2)(a) of the Orissa Lokpal and Lokayuktas Act, 1970 (for short "the Act). It reads as below :

"3(2) A person shall not be qualified for appointment as___

(a) Lokpal unless he is or has been a Judge of the Supreme Court or of a High Court..."

As Justice Ray had retired in 1980 and the appointment was in 1989, after a gap of nine years, Shri Panda contends that the requirement of "has been a Judge of a High Court" cannot be said to have been satisfied because the phrase "has been" indicates a time immediately preceding the event. It is urged that if the legislature would have intended appointment of a person after a long gap of his retirement, past imperfect "was" in place of "has been" would have been used. The use of the present tense denotes continuation up to the present, submits the counsel.

4. 3In support of the submission, Shri Panda has first referred to the difference made out between "has been"" and "was" at page 35 of Geoffrey N. Leach's "Meaning and the English Verb" (1975). In para 61 of the aforesaid page dealing with "continuation up to present time", the learned author has illustrated the use of the aforesaid words by-stating as below:

"His sister has been an invalid all her life (i.e. "She is still alive"), "His sister was an invalid all her life (i.e. "She is now dead")."

The above shows that the legislature could not have used the word "was" in place of "has been"_that might have meant that the person concerned is not alive. If we say about a person that he was a Judge, that may indicate that he is not alive.

5. Shri Panda has then drawn our attention to the meaning of the expression "has been" as given in "Stroud's. Judicial Dictionary", Vol.2 4th Edition, wherein it has been stated at page 1212 that "Hath been"", construed as "is", in the sense of indicating a continuous fact. As to this we would like to say that because of use of both "is" and "has been" in Section 3 (2)(a) of the Act, the one cannot be equated with the other. In this dictionary, it has been further stated by referring to *in re Anthlumney* 1898 Q.B. 547 that the expression "has been" does not indicate a retrospective operation. As regards this, we would like to say that it is not even the contention of Shri Panda that the expression "has been" in Section 3.2)(a) of the Act has no retrospective operation. His submission rather is that it can take within its fold an event which had immediately preceded it and cannot denote a time as remote as nine years. This would also follow from what has been stated at page 1214 of the aforesaid dictionary while defining the meaning of the phrase "have been" by referring to *In re Storie's University Gift* 30 L.J. C. 193 . While explaining the meaning of the phrase "have been", it has stated that it frequently means ""immediately prior to a specified time". It is then Stated that the requirement that exhibitions were to be elected from boys who "have been" three years at school would mean that only those boys were eligible who had been three years at the school at the time of and immediately preceding, the ejection, This shows that the phrases like "have been"" and "has been" do have retrospective operation, How far backwards they can travel has not been indicated in any of the decisions or dictionaries to which reference has been made by Shri Panda.

6. From what is stated above it cannot be said that the phrase "has been" has no retrospective operation. The question, however, is- whether for a remote event, the legislature should have used the phrase "had been" in place of "has been". On Shri Panda being asked whether he had come across any statute laying down qualification wherein along with "is", the phrase "had been" has been used, he replied in the negative. On our own also, we have not come across any statute using the words "had been" in this context. We may mention here that it would not be wrong, use of English language for a person to say in his youth that "I have been a sportsman in my childhood". It may also be stated, as observed in para 5 of *M. Satyanarayana v. State of Karnataka* AIR 1936 SC 1162 that a statute cannot be construed merely with reference to grammar. It has to be construed reasonably and rationally to give effect to the intention and purpose of the legislature. The legislature not having used to our knowledge the phrase "had been" in this connection in any statute and the phrase "has been" being also capable of taking within its fold an event which has happened in the past, we are of the view that we would not be justified in laying down any limitation as to the point of time beyond which the qualification cannot be said, to come within the fold of the phrase "has been".

7. Learned Advocate General appearing for the opp. parties submits that if we were to put a limit on the retrospectively of the expression "has been", we would be legislating, which is not permissible. We do not think by giving meaning to a phrase, the Court can be said to be legislating and so If we would have otherwise been satisfied that keeping in view the legislative practice the phrase "has been" has limited retrospectively, we would have opined" so. But then, we cannot say that a person would be said to have been a Judge of the High Court if he had retired three years before the appointment, but would not be so regarded if he had retired nine years before the. appointment. According to us, the requirement of "has been a Judge" would be satisfied if this post had been held at some point of time by the incumbent. In this connection, we may refer to *Mubarak Mazdoor Vs. K.K. Banerji*, , a decision cited by learned Advocate General, wherein an objection to the appointment of a retired judge of a High Court as Election Tribunal was taken on the ground that he was not holding. the office of Judge at the time the appointment was made, the requirement being a person may be appointed as Election Tribunal "who has been a Judge of a High Court". The contention was that at the time of appointment the, person concerned must have been holding the post of a Judge. This contention was rejected Though this decision has not dealt with the controversy with which we are seized, the Bench has observed in passing that the phrase "a person who has been a Judge" means "a. person who has, at sometime, field the office as a Judge".

8. To buttress his submission, Shri Panda urges that the legislature could not have contemplated appointment of a person aged about 70 years as Lokpal as at that age no judicial officer functions under the Constitution. We would not accept this contention as a person can be appointed as Lokpal if he has been a Judge of the Supreme Court. It is well known that Supreme Court Judges retire at the age

of 65 years and as such the legislature might have well thought that a person aged about 70 years can also be appointed as Lokpal because even retired Supreme Court Judges have been made eligible for appointment to the post of Lokpal.

9. For the reasons aforesaid, we would not agree with Shri Panda that Justice Ray was not qualified to be appointed as Lokpal as he did not fulfil the eligibility condition mentioned in Section 3 2)(a) of the Act.

10. The submission relating to mala fide in the appointment has been advanced on the ground that Justice Ray was appointed to the post of Lokpal as he was related to the then Chief Minister and leader of opposition. It may be stated that the proviso to Section 3 of the Act requires consultation with the leader of opposition also, if there is any. The relationship about which mention has been made in the petition is, however, so tenuous that the charge of mala fide cannot be accepted. The relationship with the then Chief Minister is said to be that Justice Ray's son is the co-brother-in-law of the Chief Minister's son-in-law's younger brother. As to the relationship with the then leader of opposition, it is stated that the leader of opposition's nephew (uterine sister's son) is the brother-in-law of Justice Ray's son-in-law. We do not think if because of these types of distant relationship, we would be justified in accepting the allegation of favouritism.

11. Shri Panda has also urged that Justice Ray after his appointment as Lokpal reportedly disposed of till 4-10-1990 only few cases on preliminary ground of non-payment of court-fee, maintainability, want of jurisdiction etc. and has not disposed of a single case on merits, which according to the learned counsel, proves his incapacity. In this proceeding we are not concerned with the, alleged incapacity of Justice Ray as that had nothing to do with his initial appointment as Lokpal.

12. From what is stated above, we are not satisfied if the appointment of Justice Ray as Lokpal was either illegal or mala fide. The petition is, therefore, dismissed. D. M. PATNAIK, J. I agree, Petition dismissed.

D.M. Patnaik, J.

13. I agree.