
(2008) 02 OHC CK 0052
In the Orissa High Court

Narayan Prasad Mishra and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 07-02-2008

Acts Referred:

Constitution of India, 1950 — Article 226, 32

Citation : (2008) 105 CLT 792 : (2008) 1 OLR 570 Supp

Hon'ble Judges : P.K. Tripathy, J;L.K. Mishra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

P.K. Tripathy, J.—Both the review petitions were heard analogously on 29.01.2008 and this common order shall abide the result.

Fifteen Petitioners in Review Petition No. 10 of 2003 claim to be the teaching staff of the Mangala Mahavidyalaya, Kakatpur Governing Body of the said institution have filed the other Review Petition. In both the review petitions, the prayer is common. They pray to recall/review Judgment in O.J.C. No. 9794 of 2000 passed on 26.08.2002. Petitioners in that O.J.C. are Opp.Parties 4 to 18 and 3 to 17 respectively in the above noted two review petitions. Secretary and Director, Higher Education representing the State were the Opposite Party Nos. 1 and 2 in all the cases/petitions. Petitioner in Review petition No. 136 of 2003 is Opposite Party No. 3 in the other two proceedings.

2. For the sake of convenience, the teaching staff who have -applied for review are hereinafter described as Petitioners, the governing body of the educational institutions as Governing body, Opposite Party Nos. 1 and 2 as the State and the Writ Petitioners in O.J.C. No. 9794 of 2000 as Opposite Parties.

3. Petitioners have filed W.P.(C) No. 5352 of 2002 challenging .; legality and correctness of the order of the Director, Higher Education passed on 08.03.2000. After conducting enquiry, by that order, the Director ordered reinstatement of the Opposite Parties along with service benefit from the date of Judgment in O.J.C.

No. 3174 of 1989.

W.P.(C) No. 12505 of 2003 has been filed by the Governing Body with similar prayer.

Apart from that a contempt application registered as CONTC No. 143 of 2002 is pending against the Governing body for violation of Order Dated 26.08.2002 passed in O.J.C. No. 9794 of 2000. It may be noted here that several disputes by teaching and non-teaching staff or the Governing Body were dealt with and disposed of in the past. There is no necessity to trace the entire past except the relevant facts for disposal of these two review petitions.

4. The Opposite Parties filed O.J.C. No. 9794 of 2000, inter alia, with the prayer to direct the Governing Body to implement the order of the Director passed on 08.03.2000 by recommending their names and with the further direction to the State to pass necessary order in relation to approval of their appointments and to provide grant-in-aid. In that case, Governing Body filed counter inter alia stating that after the Order Dated 08.03.2000, the Director on 27.04.2000 sent letter through special messenger to not to implement the Order Dated 08.03.2000 and therefore, the Principal awaits instruction from the Director. On 26.08.2002, O.J.C. No. 9794 of 2000 was disposed of. After noting facts and contention of the Opposite Parties and the Governing Body, the Bench recorded that

4. In view of the said averments made in the counter affidavit filed on behalf of Opp. Party No. 3, we passed orders on 26.7.2002 requesting Mr. Das, Learned Addl. Govt. Advocate to obtain instructions from the Director, Higher Education, Orissa and Mr. Das and Mr. Patnaik. Learned government Advocates have produced before the Court the written instructions dated 1.8.2000 of the Deputy Director, N.G.C.-II, Orissa, of the office of the Directorate of Higher Education, Orissa to the effect that at present the term of the Governing body is already over and the new Governing Body has not been approved and as such no decision has been made by the Governing Body for reinstatement of the Petitioners and submission of proposal for grant-in-aid.

5. In the Order Dated 8.3.2000 in Annexure-1 to the Writ Petition, the Director-in-charge of Higher education, Orissa, Bhubaneswar has held:

In the above premises, I am of the considered opinion that the reinstatement of those retrenched persons, Sri S.C. Rath and others during 1996 is valid and they are required to get the service benefits from the date of Judgment passed in OJC No. 3174/89 subject admissibility of posts.

It is clear from the aforesaid order that reinstatement of the Petitioners has been made in 1996 and such reinstatement has been held to be valid. By the said order, the Director, Higher Education Orissa further held that the Petitioners were required to get the service benefits from the date of the Judgment passed in OJC No.3174/89 subject to admissibility of posts. Thus, the Petitioners are to be

treated as having been reinstated in 1996 and they are to be paid their salary components payable by the Governing Body of the college. So far as payment of grant-in-aid is concerned their claim has to be processed by the Director of Higher Education, Orissa and the Government.

6. We, therefore, dispose of this Writ Petition with the direction that the Petitioners be paid their salary components and arrear salary payable by the Governing Body of the College. Such salary components payable by the governing body of the college towards current salary will be paid forthwith and the arrear salary payable by the Governing Body of the college will be paid within six months from the date of receipt of a certified copy of this order by the Principal-cum-Secretary of the Governing body of the College. The new governing Body of the college will be approved by the Director of Higher Education, Orissa, within a period of two months from the date of receipt of a certified copy of this order by the Director, higher Education, Orissa and within a period of two months from such approval, the new Governing body will send the proposal for approval and grant-in-aid in respect of the Petitioners to the Director of Higher Education, Orissa.

5. Review petition No. 10 of 2003 has been stated to be under Order 47, Rule 1 of the CPC and the prayer is

The Petitioners, therefore, pray that Your Lordships would be graciously pleased to admit this Civil Review, call for the records from the Opposite Parties and after hearing the parties allow the revision application filed by the Petitioners and recall the Order Dated 26.8.2002 passed in O.J.C. No. 9794 of 2000.

In furtherance of the above prayer, Petitioners state that they were validly appointed in 1993-94 and the Opposite Parties are the retrenched employees. Order of retrenchment challenged by the Opposite Parties in O.J.C. No. 3174 of 1989 went against them. On 16.8.1990, while dismissing the Writ Petition by not interfering with the order of retrenchment, the Bench passed order and relevant portion thereof is quoted below:

While the Petitioners say that some of them would come within the staffing pattern according to the Learned government Advocate as well as according to the Principal, the retrenched employees were not within the staffing pattern. One of the grounds for retrenchment also was that the names of the Petitioners did not find place in the attendance register maintained for the non-teaching staff of the college and pursuant to order of this Court the attendance register was produced by Mr. Mohanty, which does not disclose the names of any of the retrenched employees.

In the premises as aforesaid, we are not inclined to interfere with the impugned order of retrenchment. We would however observe that if, as alleged by Mr. Nayak, some of the Petitioners could come within the yardstick in respect of non-teaching staff of the college, then the principal would do well to reinstate those who would come within the yardstick.

Petitioners further state that another employee named R. Swain filed O.J.C. No. 3796 of 1990 against order of retrenchment and on 23.04.1991 a Bench of this Court passed somewhat similar order. Relevant portion thereof is quoted below:

3. While the Petitioner says that he would come within the staffing pattern, according to the Learned Govt. Advocate, Petitioner was not within the staffing pattern. One of the grounds for retrenchment also was that the name of Petitioner did not find place in the Attendance Register maintained for non-teaching staff of the college.

4. In the premises as aforesaid, we are not inclined to interfere with the impugned order of retrenchment. We would, however, observe that if as alleged by Mr. Nayak, the Petitioner would come within the yardstick in respect of non-teaching staff of the college, Principal would do well to reinstate him if he comes within the yardstick.

6. Petitioners further state that reconstitution of the Governing -Body was successfully challenged in O.J.C. No. 2781 of 1996, which was disposed of on 26.08.1996, but that outgoing Governing Body allowed reinstatement of the Opp. Parties. As against that, Petitioners filed O.J.C. No. 4940 of 1996 and the Opp. Parties filed O.J.C.No.7990 of 1997. Both the Writ Petitions were disposed of on 15.02.1999 with direction to the Director, Higher Education to conduct enquiry and take decision. The Director passed the order on 08.03.2000, which is subject matter of challenge in W.P.(C) No. 5352 of 2002 and W.P.(C) No. 12505 of 2003 (still pending).

7. Petitioners allege that while the matter stood thus, Opposite Parties filed O.J.C. No. 9794 of 2000 without impleading the Petitioner and therefore on 26.08.2002 order was passed in their (Opp. Parties) favour directing the authorities to sanction their post and pay their salary and that order directly affects the rights and interest of the Petitioners. In that respect, they advance factual grounds in support of their claim of approval of service and payment of salary. Simultaneously, they advance grounds/reasons as to why the Opp. Parties are not entitled to the relief, which they got in O.J.C. No. 9794 of 2000.

8. Review petition No. 136 of 2003 has also been stated to be under Order 47, Rule 1 of the CPC and the prayer is to recall/review the Judgment in O.J.C. No. 9794 of 2000. In furtherance of the prayer for recall/review, the Governing Body also states the same set of facts (as in the other review petitions) and alleges that by suppressing facts and taking advantage of the Director's order (dated 08.03.2000), the Opp. Parties could get the order from this Court on 26.08.2002. The Governing Body further states that order of the Director is under challenge inter alia on the ground that he passed that order after retirement from service and such order of the director is contrary to the decision in O.J.C. No. 3179 of 1989.

9. Petitioners and the Governing Body seek for review of the Judgment dated 26.08.2002 passed in O.J.C. No. 9794 of 2000, because of the directions

contained in paragraph-6 of the Order Dated 26.08.2002 (quoted in para-5 of this order). While the Petitioners state that by virtue of that direction, the right and eligibility of the Petitioners for approval in service and grant-in-aid is infringed, the Governing Body state that the aforesaid direction is not in conformity with the conspectus of fact situation as noted earlier (in this order). Petitioners also allege that the Opp. Parties got the order in O.J.C. No. 9794 of 2000 behind their back, inasmuch as, they were not added as parties in that proceedings. The aforesaid contentions are considered as follows:

(I) When the Opp. Parties filed O.J.C. No. 9794 of 2000 with the prayer to direct the authorities to implement the Order Dated 08.03.2000 of the Director, there was no necessity to implead the Petitioners as Opposite Parties because, they (the Opposite Parties) were the beneficiaries on implementation of that order. Therefore, that grievance of the Petitioners has no leg to stand.

(II) When the Governing Body represented by the Secretary, participated in the proceeding by filing a counter affidavit in O.J.C. No. 9794 of 2000 and did not raise any of the contentions, which have been raised in the review petitions, therefore, it is to be seen whether the inaction of the Governing Body in that manner is due to non-aware of the development and different orders passed or relating to existence of relevant evidences for its inability to make averment in the counter affidavit filed in O.J.C. No. 9794 of 2000. The Governing Body nowhere explains in the review petition as to why it did not put forth the above contentions. On the other hand, the counter affidavit of the Governing Body in O.J.C. No. 9794 of 2000 gives clear indication that it wanted to implement the Order Dated 08.03.2000 of the Director, but because of the instructions from the latter, the matter was not to be placed in the scheduled meeting of the Governing Body and that new Governing Body having not been constituted, the proposal remained pending for consideration of the Governing Body. That circumstance is very much relevant while considering the application for review filed by the Governing Body.

(III) Petitioners state that order passed in O.J.C. No. 3174 of 1989 did not direct for reinstatement of the Opposite Parties, regularizing their service and for recommendations to the State for providing grant-in-aid. Petitioners state that only observation was made with the view that if any of the retrenched employees were coming within the prescribed yardstick, then their case may appropriately be considered. The aforesaid argument is attractive but devoid of any substance, inasmuch as, while disposing of O.J.C. No. 4940 of 1996 and 7990 of 1997, the High Court directed the Director of Higher Education to conduct enquiry and to take a decision on the employment and all allied issues after providing opportunity of hearing to both the parties (i.e. the Petitioners and the Opposite Parties). Therefore, the order and the observations in O.J.C. No. 3174 of 1989 did not lead to anything against the Opp. Parties or anything in favour of the Petitioners. On the other hand, direction for enquiry in the latter two Writ Petitions became a positive steps for ascertaining the facts in course of enquiry

by the Director. Thus, the Order Dated 08.03.2000 became the basis for the Court to take a decision in O.J.C. No. 9794 of 2000. Indeed, Order Dated 08.03.2000 of the Director as noted earlier is under challenge in W.P.(C) No. 5352 of 2000 filed by the Petitioners and W.P.(C) No. 12505 of 2003 filed by the Governing Body. It may be noted here that both the Writ Petitions were instituted after disposal of O.J.C. No. 9794 of 2000. Therefore, the Bench considering the matter in O.J.C. No. 9794 of 2000 could not have foresee the action of the Petitioners or the Governing Body (in challenging the Order Dated 08.03.2000 of the Director). Such fact and circumstance has great bearing while considering the prayer for review/recall of the Order Dated 26.08.2002 in O.J.C. No. 9794 of 2000.

(IV) After taking note of the dispute between the Opp. Parties and the State and the developments made therein from the date of their retrenchment and thereafter the directions of the Court in the Writ Petitions and the contention of the Governing Body throwing the blame on the Director for non-implementation of the Order Dated 08.03.2000 and the contention of Learned Addl. Government Advocate under instruction that the proposal would be considered after the constitution of the new Governing Body that this Court passed the order as contained in above quoted paragraph-6 (in the order under Review).

10. Order 47, Rule 1, C.P.C. mandates that motion for review may be entertained if the applicant satisfies the Court that

(i) it has discovered new and important matter of evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order under review was made;

(ii) there was some mistake or error apparent on the face of the record and because of that a wrong order has been passed; and

(iii) for any other sufficient reason, it is necessary to make a review of the order. This clause obviously means review may be made on exceptional circumstance in furtherance of ends of justice.

11. In support of their prayer, Petitioner relied on the case of Common Cause, A Registered Society Vs. Union of India and Others, . In that case, review petition was filed to review the Judgment in Writ Petition No. 26 of 1995. In that Writ Petition, there was direction for investigation by Central Bureau of Investigation on the illegality in allotment of petrol pumps etc. and also there was direction to the Minister concern to pay exemplary cost of Rs. 50 lakhs to the Government Exchequer. While considering that review petition on very many grounds and taking note of the power of review of the Supreme Court under the Constitution of India and the Supreme Court Rules, Their Lordships observe that:

169. We may say that we maintain the rule of accountability and liability of the executive including public servants in administrative matters and confirm that there should be transparency in all what they do, specially where grant of

largesse is concerned. But, the present case is being decided on its own peculiar facts and features in which, the findings as to the commission of tort of misfeasance recorded by this Court or the award of exemplary damages as also direction for investigation by the C.B.I., cannot be sustained on account of errors apparent on the face of the record.

170. We may also point out that the powers of this Court under Article 32 and that of the High Court under Article 226 are plenary powers and are not fettered by any legal constraints. If the Court in exercise of these powers has itself committed a mistake, it has the plenary power to correct its own mistake as pointed out by this Court in *S. Nagaraj and Others Vs. State of Karnataka and Another*, in which it was observed as under:

Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to anyone. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative law as in Public Law. Even the Law bends before justice. Entire concept of writ jurisdiction exercised by the higher Courts is founded on equity and fairness. If the Court finds that the order was passed under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice then it cannot on any principle be precluded from rectifying the error. Mistake is accepted as valid reason to recall an order.

The Court also observed:

Review literally and even judicially means re-examination or reconstruction. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the Courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice. Even when there was no statutory provision and no rules were framed by the highest Court indicating the circumstances in which it could rectify its order the Courts culled out such power to avoid abuse of process or miscarriage of justice.

The Court further observed:

Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality.

Their Lordships found that when there was no allegation of any offence being committed, the direction for investigation of C.B.I, was uncalled for and therefore, in the absence of foundation of any allegation against the minister, direction for payment of cost of Rs. 50 lakhs was uncalled for. Accordingly, Their Lordships observed:

172. For the reasons stated above, the application for review is allowed. The direction for payment of Rs. 50 lakhs as exemplary damages as also the direction

for a case being registered by the C.B.I, against the Petitioner for Criminal Breach of Trust and investigation by then into that offence and the further direction to investigate whether Petitioner has committed any other offence are recalled. The amount of Rs. 50 lakhs, if paid or deposited by the Petitioner with the Union of India, shall be refunded to him. All applications for impleadment or intervention filed on behalf of allottees are rejected.

12. Keeping in view the statutory provision in Order 47, Rule-1 .C.P.C., fact situations involved in the case and the above quoted ratio, this Court finds that no reasonable grounds are available to the Petitioner or the Governing Body, while seeking the remedy of review. Therefore, it has to be seen whether the ground of "any other sufficient reason is existing in favour of the applicants.

13. As noted earlier, O.J.C. No. 9794 of 2000 was disposed of on the existing material. There is allegation of suppression of material facts, but that is not substantiated inasmuch as all the past events, directions or observations in other Writ Petitions become of less relevance when on the direction of this Court, the Director conducted enquiry and passed the Order Dated 08.03.2000. That order of the Director is subject to scrutiny of the superior authority on the administrative side and by the High Court on judicial side i.e. under Article 226 of the Constitution of India. Therefore, there is no question of suppression of material fact by the Opposite Parties while getting the relief in O.J.C. No. 9794 of 2000. Order Dated 08.03.2000 has been challenged by the Petitioners as well as the Governing Body only after disposal of O.J.C. No. 9794 of 2000. Therefore, it cannot be said that the Judgment passed on 26.08.2002 frustrates the ends of justice. The Writ Petitions filed by the Petitioner and the Governing Body are to be considered on their own merit and the Order Dated 08.03.2000 of the Director would be considered on various grounds advanced by the parties relating to its sustainability or otherwise. Therefore, the decision in the pending Writ Petitions would adjudicate the rights and entitlements of the parties. The decision rendered in O.J.C. No. 9794 of 2000 would be considered accordingly and it will not operate as res judicata if the Order Dated 08.03.2000 is found to be legally not sustainable inasmuch as validity or invalidity of the Order Dated 08.03.2000 was not considered in O.J.C. No. 9794 of 2000. The Bench proceeded with the supposition in favour of correctness of that order. Therefore, at this stage, the review applications filed by the Petitioner and the Governing Body on the ground stated therein does not bear any merit and both the review petitions are dismissed accordingly.

L.K. Mishra, J.

14. I agree.