
(2025) 04 OHC CK 1417
In the Orissa High Court
Case No : Writ Petition (C) No.4632 Of 2003

Nimai Harichandan Panda

APPELLANT

Vs

State Of Odisha And Another Vs

RESPONDENT

Date of Decision : 08-04-2025

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 227

Citation : (2025) 04 OHC CK 1417

Hon'ble Judges : G. Satapathy, J

Bench : Single Bench

Advocate : P.K. Das(1), A.K. Apat, A.K. Panigrahi

Final Decision : Dismissed

Judgement

G. Satapathy, J.

1. The Petitioner by means of this writ petition has invoked the extra ordinary jurisdiction of this Court under Articles 226 & 227 of the Constitution of India with following prayers:-

- (i) to adjust him in any other department taking into account his experience;
- (ii) to declare the decision taken by the State Cabinet Committee under Annexure-5 as illegal so far as it relates to him;
- (iii) to quash the letter dated 26.10.2022 issued by the Commissioner-cum-Secretary, Government of Orissa, Department of Water Resources and the subsequent action of the State Government in abolishing the post of tracer against which he was continuing under Annexure-7;
- (iv) to direct OP No.1 to accept the option exercised by him and allow him to join in the Directorate of Ground Water Survey and Investigation(GWS&I) and pass appropriate order protecting his services in the same status in the same Department or any other sister department of the State Government; and

(v) to direct the Opposite Parties to adjust/absorb in the Directorate of GWS&I under Water Resources Department w.e.f 11.10.2007 as allowed to two co-employees tracers, namely Smt. Manorama Mishra and Smt. Bishnupriya Mishra and pay his retiral dues, EPF contribution from 2002, arrear wages/salary, gratuity, full and final EPF dues, unpaid wages from 21.10.2008 to 31.01.2008 and pensionary benefits within a stipulated period.

2. The Petitioner case in nutshell is that he having acquired the qualification of I.T.I. Draftsman (Civil) was initially joined as Tracer on NMR basis in Orissa Lift Irrigation Corporation Ltd. (OLIC) in the year 1982, but later was appointed as regular tracer and posted at Hydrological Division, Jeypore in the District of Koraput on 28.11.1985. The OLIC vide notification No. 14034 dated 21.05.1986 abolished the Hydrological Division and created a new division called LI Division(West), Kendrapara w.e.f 01.06.1986 and the Petitioner was posted at Kendrapara vide Office order no. 1349 dated 29.05.1986 and subsequently, he was posted as a tracer in LI (KFN) Division, Cuttack and while continuing as such, a gradation list of different cadre including the Tracers working under OLIC was prepared in which the Petitioner's name found place at Serial No. 35. According to the Petitioner, OLIC consisted of two cells, namely Ground Water Survey and Investigation (GWS&I) and Lift Irrigation Corporation Cell, but the Directorate of GWS&I was created in R.D. Department Resolution No. 25469 dated 29.12.1995 and it was transferred to the Administrative Control of the Department of Water Resources w.e.f. 01.01.1996 along with Staffs on "as is where is basis" and the Tracers continued in the OLIC cell were allowed to continue in the said cell as a Corporation Staff, but it was decided, if the number of employees in position is less than the number of sanctioned posts, then the senior most employees in each category may be given the first option to go over to the Directorate of GWS&I, but in case, the employees do not exercise the option, the next junior shall have to join in the directorate and in case, the junior did not join, he may have to be reverted or retrenched. Accordingly, 16 numbers of posts of Tracers were transferred to GWS&I and one post was still vacant. The Petitioner further alleges that the employees after being transferred from OLIC to GWS&I, a gradation list was prepared by the Directorate of GWS&I on 24.12.1998, wherein juniors had been retained in the gradation list ignoring his case as he is senior to most of them and one Jadumani Das who stands at Serial No. 01 in the gradation list having been promoted to the post of Draughtsman created another vacancy in the post of tracers and thereby, vacancy of overall two posts remained to be filled up. While the matter stood thus, on 03.01.1996 the Managing Director(MD), OLIC, Bhubaneswar(OP No.2) asked the Petitioner to exercise option within seven days about his willingness to opt for service in the Directorate of GWS&I and accordingly, the Petitioner exercised his option in time, but the same was not carried out by the Department as his service was essential in the Corporation, notwithstanding to the fact that OP No.2 had sponsored his name to GWS&I and thereafter, the Petitioner made representation to OP No. 1 time and again including his last representation on 12.12.2001, but his case was

never considered in adjusting him under Water Resources Department and as a result, his service has been going to be dispensed with in response to the abolition of post of tracers under OP No.2 which according to the Petitioner is arbitrary and he filed the writ petition to interfere in the matter to quash the decision to abolish the post of tracers depriving him of his legitimate claim. Later on, the Petitioner being permitted to amend the averments in the writ petition has taken another plea that in the meantime, two tracers namely Manorama Mishra and Smt. Bishnupriya Mishra have been absorbed in the Directorate of GWS&I by State Government and they were allowed to join in the directorate on 11.10.2007 and when the Petitioner could know about this, he again applied to the Secretary, Water Resource Department on 11.10.2007 to consider his case, but in vain. However, these aforesaid two tracers without exercising option in time were found to have absorbed in the Directorate of GWS&I and thereby, the authority concerned has clearly discriminated the Petitioner and thereby, they are guilty of violation of Articles 14 & 16 of the Constitution of India. This is the basis of claim of the petitioner to the relief sought for.

It is to be noted here that the Petitioner by virtue of the status quo order of this Court passed on 16.05.2003 continued in the department till his superannuation from service on attaining age of 60 years on 31.01.2018.

3. In response to the notice of the writ, OP No.2 filed its counter affidavit stating inter-alia that the newly created GWS&I started functioning w.e.f 01. 01.1996 and all its employees are declared as Government employees, whereas the Directorate of Lift Irrigation is under the control of Managing Director which remained as a Corporate Body and at the time of creation of the Directorate, the Rural Development Department, Government of Orissa had invited option from the senior most employees in different cadres for filling up the posts vacant prior to 01.01.1996 asking the staff existing in Ground Water Divisions of OLIC on "as is where is basis", but the Petitioner has not exercised his option within the stipulated date and accordingly, the transfer of the employees to the newly created Directorate was made "as is where is basis" and a gradation list was prepared of the existing employees in the cadre of tracers by GWS&I and thereby, OLIC has nothing to do with such gradation list of GWS&I. It is further stated in the counter affidavit that taking into account the severe financial crisis and the decision taken by the State Cabinet Committee, the Government of Orissa feeling the necessity to down size OLIC had dispensed with 7341 posts including 39 posts of tracers in the process of restructuring in the Corporation and in the process, all the posts of tracers were found surplus and decided to be abolished and all the available tracers including the service of the Petitioner was to be dispensed with by offering VRS/VSS and the Petitioner had accordingly applied for VRS and the same was accepted by the Competent Authority. OP No.2 after being permitted to file second additional affidavit has stated therein that due to subsequent development of transfer of L.I. points to Pani Panchayats, the work of the Corporation reduced considerably and the Cabinet decided to dispense with 7341 number of employees from the corporation in the process of

restructuring on the principle of "last come first go" and the Petitioner being opted for VRS was giving such VRS w.e.f 31.05.2003, but subsequently, the Petitioner refused to receive the benefit of VRS and continued on interim order of the Court and since the State Cabinet has decided to abolish the post of tracers from the Corporation, the post of tracers has become zero category and the claim of the Petitioner, therefore, is not acceptable.

4. In the course of hearing, Mr. Pradeep Kumar Das(1), learned counsel for the Petitioner has submitted that although the Petitioner has duly exercised his option within time, but the authority concerned has never adjusted the Petitioner in any department by taking into account his experience and even if two posts were lying vacant in GWS&I, the Petitioner was never absorbed against any such vacant post of tracers and thereby denied the Petitioner of his legitimate claim on one or some other pretext, like the Petitioner application for VRS has already been accepted, but fact remains that the Petitioner although has applied for VRS, but subsequently, refused to accept the VRS and unless an employee is relieved of his duty after acceptance of his request for VRS, the jural relationship of the employees and employer does not come to an end and in this case, the Petitioner's service was protected by way of an interim order which has been passed in the writ petition on 16.05.2003, the Petitioner cannot be said to have been given VRS. It is further submitted by Mr. Das that since two of the co-employees being junior to the Petitioner having been allowed and absorbed in GWS&I and post having already lying vacant at the time of the application of the Petitioner, he should have been adjusted in such post and, therefore, the action of the authority being not in consonance with right to equality, the Petitioner may kindly be adjusted nominally in any post since he has already superannuated in the meantime to regularize his service with payment of retiral dues. Accordingly, Mr. Das has prayed to allow the writ petition.

4.1. On the contrary, Mr. A.K. Panigrahi, learned counsel for the OP No.2 has, however, submitted that since the Petitioner has not exercised any option, his claim for adjustment in any post subsequently cannot have the basis to adjust him either in any post or in the post of tracers and the Petitioner having applied for VRS, he is estopped to claim any substantive post. Accordingly, Mr. Panigrahi has prayed to dismiss the writ petition. On the other hand, Mr. A.K. Apat, learned Additional Government Advocate echoing the aforesaid submission as advanced for OP No.2 has submitted that the claim of the Petitioner has no basis and thereby, the writ petition merits no consideration.

5. After having considered the rival submissions upon perusal of record, since the Petitioner has made a number of prayers, but this Court before taking other prayers into account, now confines itself to the prayer with regard to the decision taken by the State Cabinet Committee and the letter dated 26. 10.2002 issued by Commissioner-cum-Secretary, Government of Orissa and the action of the Government in abolishing the post of tracers jointly. It is, however, claimed by the Petitioner in his prayer that the decision of State Cabinet Committee under

Annexure-5 issued by OPs as illegal so far as the Petitioner is concerned, but fact remains that Annexure-5 is a letter issued by Directorate GWS&I to all tracers enclosing a copy of tentative gradation list of tracers. Be that as it may, the decision of the State Cabinet Committee and consequent letter issued by Commissioner-cum-Secretary dated 26.10.2002 under Annexure-7 reveals an issue regarding taking decision to dispense with 7341 numbers of employees from OLIC in the process of restructuring of Corporation. Accordingly, it is an admitted fact that the Government has taken decisions to dispense with 7341 post including 39 posts of tracers in the Corporation as revealed from the counter affidavit of OP No.2, but it is, however, very clear that the Government has power to create or abolish a post and whether a particular post is necessary is a matter depending upon the exigencies of the situation and administrative requirement. The creation & abolition of posts is a matter of Government policy and every sovereign Government has this power in the interest and necessity of internal administration. It is, however, clarified that unless the creation and abolition of post is actuated with any mala-fide, the Court should go slow to interfere in the matter. In this regard, this Court considers it useful to refer to the decision in State of Haryana and Others Vrs. Navneet Verma; AIR 2008 SC 417, wherein at paragraph-11, the Apex Court has held as under:-

"11. We summarized the power of Government in abolishing a post and the role of the Court for interference:

- (a) the power to create or abolish a post rests with the Government;
- (b) whether a particular post is necessary is a matter depending upon the exigencies of the situation and administrative necessity;
- (c) creation and abolition of posts is a matter of Government policy and every sovereign Government has this power in the interest and necessity of internal administration;
- d) creation, continuance, and abolition of posts are all decided by the Government in the interest of administration and general public;
- e) the court would be the least competent in the face of scanty material to decide whether the government acted honestly in creating a post or refusing to create a post or its decision suffers from mala fide, legal or factual;
- f) as long as the decision to abolish the post is taken in good faith in the absence of material, interference by the court is not warranted."

6. In the aforesaid backdrop of facts and the principle culled out by the Apex Court in the decision referred to above, this Court does not find any mala-fide with the decision of the Government to abolish the post in the process of restructuring and that decision having been taken in the year 2002, this Court does not feel it proper to interfere with such decision after twenty three years, when it is not established by the Petitioner that the decision to abolish the post is not taken in good faith.

7. In coming back to address, the plea of the Petitioner to adjust him in any other department taking his experience into account, it needs to be emphasized here that the Additional Secretary to Government by letter dated 30.12.1995 addressed to the Managing Director, OLIC Ltd., Bhubaneswar under Annexure-3 has made it clear that the Directorate of GWS&I newly created will stand transferred to the administrative control of Department of Water Resources w.e.f 01.01.1996 along with the staffs on "as is where is basis" and if the number of employees in position is less than the number of sanctioned posts, then the senior most employees in each of the categories may be given the first option to go over to the aforesaid Directorate and in case, they do not exercise the option, the junior most shall have to join in the directorate and if they do not join, they may have to be reverted/retrrenched. It is not disputed that the Petitioner was given with the option to come over to the Directorate of GWS&I vide Annexure-6 on 03.01.1996, but although the Petitioner claims to have exercised option within the time stipulated in Annexure-6, however, the OP claims that the Petitioner has never exercised such option. It is a matter of fact that the Petitioner has not produced any material or document to indicate that he had exercised such option within the stipulated time. The Petitioner only produces Annexure-8 in support of his claim to have exercised option, but Annexure-8 never discloses it to have been given by the Petitioner within seven days of issuance of Annexure-6 which was in fact issued according to the Petitioner on 03.01.1996, but in Annexure-8 the date "12.12.2001" has been super scribed under the signature of the Petitioner. Further, Annexure-8 does not reveal to have been given before 10.01.1996, even if it is to be considered that the option was invited from the Petitioner on 03.01.1996. It is, therefore, clear that the Petitioner could not establish to have exercised valid option to express his intention to come over to GWS&I. It is also admitted by the Petitioner to have applied for VRS, but contends that since he was not relieved of the duty, the VRS could not be said to have been completed, however, the application for VRS by the petitioner itself is indicative of his desire not to continue in service which supports the plea of OP that the petitioner had not given option to come to the Directorate of GWS&I. On the other hand, Annexure-3 clarifies that if the senior most employees do not exercise the option, the junior most shall have to join in the directorate and, therefore, when the Petitioner has not proved to have exercised option and junior to him must have been asked to join, otherwise the junior most has to be retrrenched or reverted and, therefore, such post might have been filled up. In the circumstance, especially when the Petitioner has failed to exercise the option or proved to have exercised option and his service being remained in Corporation, but the corporation, by virtue of the State Cabinet decision having abolished the post of tracers in the process of restructuring, the Petitioner cannot claim as a matter of right for his absorption in any other department inasmuch as the situation itself speaks in volume against the petitioner for not being able to have exercised valid option within stipulated time and he has no vested right to claim for absorption in any other department. Further, the petitioner having not accepted the VRS despite applying for it and having continued in the service

by way of an interim order, this Court in the aforesaid backdrop and situation cannot direct the OP No.1 to accept the option exercised by the Petitioner subsequently and allow him to join in the directorate of GWS&I.

8. Adverting to the claim of the Petitioner to protect his service in the same status in the same department and to direct the Opposite Parties to adjust or absorb him in the directorate of GWS&I w.e.f 11.10.2007 as allowed to two co-employees tracers Smt. Manorama Mishra and Smt. Bishnupriya Mishra, it appears that neither the Petitioner has proved to have exercised any option to come over to GWS&I nor has produced any material as to how these two co-employees have been absorbed subsequently. It appears that OP No.2 in his reply affidavit has made it clear that after careful consideration of five representations received from the surplus tracers of OLIC Ltd. and the information provided by OLIC Ltd. regarding the list of tracers continuing in OLIC Ltd. without availing VRS, the senior most two applicants namely Smt. Manorama Mishra and Smt. Bishnupriya Mishra were allowed to be absorbed in the directorate of GWS&I against the vacant post of tracers. In the context, two things emerges, firstly; the Petitioner has not proved to have exercised his option to come over to the GWS&I at the earliest and he had applied for VRS, but on the other hand, it is not clarified as to whether these two Petitioners had not given option when it was called for, however, had the two employees given their option prior to the Petitioner, such appointments could not be considered discriminatory or violative of Articles 14 & 16 of the Constitution of India. Be that as it may, for a moment accepting, but not admitting the claim of the petitioner for the appointments of these two co-employees in GWS&I to be discriminatory and in violation of Articles 14 of the Constitution of India, suffice it to say that this Court cannot put a stamp of approval on the illegalities committed by the Department while appointing these two employees. A litigant coming to the Court cannot claim negative discrimination/equality seeking direction from the Court to the Department to act in violation of the law or statutory Rules. It is a settled proposition of law that Article 14 of the Constitution of India does not envisage negative equality. In this context, this Court considers it useful to refer to the decision in *R. Muthukuma Vrs. The Chairman and Managing Director TANGEDCO*; (2022) SCC Online SC 151, wherein at Paragraph-28, the Apex Court has held as under:-

"28. A principles, axiomatic in this Country's constitutional lore is that there is no negative equality. In other words, if there has been a benefit or advantage conferred on one or a set of people, without legal basis or justification, that benefit cannot multiply, or being relied upon as a principle of parity or equality.

In *Basawaraj Vrs. Special Land Acquisition officer*; (2013) 14 SCC 81, the Apex Court at Paragraph-8 has held that it is settled legal position that Article 14 of the Constitution of India is not meant to perpetuate illegality or fraud, even by extending the wrong decision made in other cases. The said provision does not envisage negative equality but has only a positive aspect. Thus, if some other

similarly situated persons have been granted some relief/ benefit in advertently or by mistake, such an order does not confer any legal right on others to get the same relief as well. If a wrong is committed in earlier case, it cannot be perpetuated.”

9. From a careful conspectus of discussions made hereinabove and taking into consideration the principles that has been referred to in the decisions noted above and considering the prayer as advanced by the Petitioner who has already superannuated in the meanwhile, this Court does not consider it proper to accede to the prayer of the Petitioner to direct the OPs to absorb him in GWS&I or any other department and the Petitioner having not been able to establish to have exercised the option at the time of creation of GWS&I, he cannot subsequently directed to be absorbed in said department or any other department and further the abolition to the post being the policy decision of Government, this Court does not consider it proper to interfere with such decision of the Government.

Accordingly, the claim of the Petitioner in this Writ petition being not within the legal frame work, the Writ Petition merits no consideration.

10. In the result, the Writ Petition stands dismissed on contest, but in the circumstance, there is no order as to costs.

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