

(1999) 02 OHC CK 0024
In the Orissa High Court
Case No : O.J.C. No. 11170 of 1997

Prakash Kumar Debata

APPELLANT

Vs

Executive Engineer (Gridco) and Others

RESPONDENT

Date of Decision : 03-02-1999

Acts Referred:

Orissa Civil Services (Rehabilitation Assistance) Rules, 1990 — Rule 11

Citation : (1999) 87 CLT 573 : (1999) 3 LLJ 1429

Hon'ble Judges : S. Chatterji, Acting C.J.; D.M. Patnaik, J

Bench : Division Bench

Advocate : J.C. Mohanty, for the Appellant; B.K. Patnaik and Prasanjit Sinha, for the Respondent

Final Decision : Allowed

Judgement

D.M. Patnaik, J.—The petitioner is aggrieved by the refusal of the Grid Corporation authorities (for short, "the Gridco") giving him the appointment under the Rehabilitation Assistance Scheme against the post held by his father late Narayana Debata who, while in service died of an accident on May 18, 1996. He was serving as a "Helper" under Opp. Party No. 1, Executive Engineer, Jagatsinghpur Electrical Division. The refusal is on the ground that though earlier there was such scheme under the erstwhile Orissa State Electricity Board ("OSEB", for short), yet the same is no more available because of the repeal of the Orissa State Electricity Board Service (Rehabilitation Assistance) Regulation 1992, by notification of the said Board dated March 27, 1996. However, the authorities have a scheme to grant compensation of one lakh rupees in lieu of such appointment.

2. Mr. J. C. Mohanty, learned counsel for the petitioner, strenuously urged that notwithstanding the repeal of the Regulation the petitioner is entitled to be rehabilitated since the Gridco is a public sector undertaking under the State of Orissa and by virtue of Clause (iv) of Rule 11 of the Orissa Civil Services Rehabilitation Assistance Rules, 1990 (for short, "the Rehabilitation Assistance

Rules") the scheme is also applicable to the employees of the public sector undertakings under the State Government. According to Mr. Mohanty, the Gridco authorities cannot plead a case contrary to the above provisions.

Mr. B. K. Patnaik, learned counsel for the opposite parties, however, submitted that unless there is a scheme, it cannot extend such a benefit to the petitioner. Further, the Gridco being a separate legal entity, it is not bound to follow the rules applicable to the Government.

We may examine the correctness of the respective contentions.

3. There is no doubt that the Gridco is a statutory authority and is an instrumentality of the State and bound by the directives and policies of the Government for dealing in matters relating to electricity. By notification dated April 1, 1996 the State Government made a Scheme transferring the assets, properties, liabilities, proceedings and personnel of the Orissa State Electricity Board to the Gridco effective from April 1, 1996, the date of the notification. Under Sub-rule (4) of Rule 6 of the Orissa Electricity Reform (Transfer of Undertakings, Assets, Liabilities, Proceedings and Personnel) Scheme Rules, 1996, it is stated that by such transfer, the personnel shall form a part of the services of the Gridco in the post, scale of pay and seniority in accordance with the schedules specified therein. Thus, there can be no dispute with regard to the fact that deceased Narayana Debata on the date of his death had become the employee under the Gridco. This fact is also admitted by the opposite parties.

4. For the proper appreciation of the case Rule 11 of the Orissa Rehabilitation Assistance Rules is quoted in extenso:--

"(11) Application of the Rules to others--The facilities provided under these rules shall mutatis mutandis be applicable to the families of:--

(i) Non-Government Primary School teachers,

(ii) Teaching and Non-teaching Staff of Aided Educational Institutions under the Education Department.

(iii) The work-charged employees of the State Government, and

(iv) The employees of the public sector undertakings under the State Government."

5. Thus, it prescribes that the facilities" under the Rules shall also be available to the employees of the public sector undertakings under the State Government who could also avail the benefit of the Rules. While it is the contention of the learned counsel for the petitioner that this provision is mandatory, Mr. Patnaik learned counsel for the Gridco contended that the same is directory. To accept either of the contentions we may profitably advert for the present to the law relating to the interpretation of Statutes to find out as to when a provision of Statute/Rule can be said to be either "mandatory" or "directory". It may be noted that the Rehabilitation Assistance Rules having been framed by the

Governors under Article 309 of the Constitution do have the statutory force.

6. It is the settled law that whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed (see *Lachmi Narain and Others Vs. Union of India (UOI) and Others*,). In order to judge the nature and scope of a particular statute or rule, whether it is mandatory or directory the purpose for which the provision is made and its nature and the intention of the legislature in making the provision, serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other have all to be taken into account (extracted from page 654, Chapter XIX-N 3, INTERPRETATION OF STATUTES by VINDRA 7th Edition). At page 675 of the above book the author has stated :

"In *corpUS JURIS*, Vol.59, pp. 1076-1078; *Jharia Water Board Vs. Jagdamba Loan Co. Ltd. and Others*, the law on the subject was stated thus:

Statutes which confer upon a public body or offer power to act for the sake of justice, or which clothe a public body or officer with the power to perform acts which concern the public interest or the rights of individuals, are generally regarded as mandatory, although the language is permissive merely since they are construed as imposing duties rather than conferring privileges. On the other hand where statutes are purely enabling in character, simply making that legal and possible which otherwise there would be no authority to do, and no public interest in private rights are involved, they will be construed as permissive.

7. Thus it is clear that statutes which confer upon a public body or officer power to act for the sake of justice and which clothe a public body or an officer with the power to perform acts which concern the public interest or the right of] individuals are regarded as mandatory, though the statute at times may be couched in a language which on the face of it may indicate to be permissive in nature.

8. In the present case, going through Rule 11 we do not find even on a bare reading of the Rules, that the language employed shows any grain of permissive nature of the rule, rather it predicates that the provisions shall be applicable to the public sector undertaking under the State *mutatis mutandis* which means, subject to any alteration.

There cannot be any doubt that the purpose and the intent of the Rehabilitation Assistance Rules framed by the Governor under Article 309 of the Constitution is to do social justice to the poor and indigent families. The law laid down that life also includes livelihood by various decisions of the Apex Court and also our Court has broadened the horizon of the protection of life and liberty from; deprivation without due process of law which protection of life and personal liberty under Article 21 of the Constitution has assumed the character of the fundamental rights. The State and its instrumentalities and their respective functionaries are bound to respect and follow this law of the land subject to only legal constraints.

9. Rehabilitation Assistance Schemes in organisations all over India have been widely accepted as a measure to ameliorate the miseries and sufferings of a needy family by way of providing them a minimum sustenance for the maintenance of the family. This is a piece of delegated legislation for the welfare of the particular kind of people living in poverty. The public officers are bound under law to perform their duty, failing which their inaction would invite a mandate in that regard from the Court of law.

Law has been laid down by the Constitution Bench of the apex Court in the case of *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, that it is obligatory for the State to provide to those needy persons with livelihood and according to the decisions that is the mandate of Article 21 of the Constitution. In para 32 of the judgment, CHANDRACHUD, C. J. observed as follows:--

".....Upon that assumption, the question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by Article 21 is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life Deprive a person of his right to livelihood and you shall have deprived him of his life It is the most precious liberty because, it sustains and enables a man to live and the right to life is a precious freedom. "Life" as observed by FIELD, J. in *Munn v. Illinois* (1877)94 US 113, means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed. This observation was quoted with approval by this Court in *Kharak Singh Vs. The State of U.P. and Others*, ."

In para 33 of the said judgment it is also stated as follows:

"Article 39(a) of the Constitution, which is a directive principle of State policy, provides that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to and adequate means of livelihood. Article 41, which is another Directive Principle provides, inter alia, that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work in cases of unemployment and of undeserved want. Article 37 provides that the Directive Principles, though not enforceable by any Court, are nevertheless fundamental in the governance of the

country. The principles contained in Articles 39(a) and 41 must be regarded as equally fundamental in the understanding the interpretation of the meaning and content of fundamental rights. If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person who is deprived of his right to livelihood except according to just and fair, procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21."

10. In the counter the opposite party-Gridco has taken the stand that the 1992 Scheme has been repealed by notification dated March 27, 1996 of the Orissa State Electricity Board. We cannot by our order direct revival of the repealed scheme and its provisions. But inaction/refusal on the part of the Gridco not to allow the Rehabilitation Assistance prescribed by the State would amount to an arbitrary act. The Apex Court in para 40 of the judgment in the case referred to has laid down that:

"Just as a mala fide act has no existence in the eye of law, even so, unreasonableness vitiates law and procedure alike.....Any action taken by a public authority which is invested with statutory powers has, therefore, to be tested by the application of two standards; the action must be within the scope of authority conferred by law and secondly, it must be reasonable. If any action, within the scope of the authority conferred by law, is found to be unreasonable, it must mean that the procedure established by law under which that action is taken is itself unreasonable. The substance of the law cannot be divorced from the procedure which it prescribes for, how reasonable the law is, depends upon how fair is the procedure prescribed by it."

11. The action of the Gridco, an instrumentality of the State, in refusing rehabilitation assistance to the petitioner as per the State Rules is arbitrary and therefore not sustainable and secondly, offering rupees one lakh as compensation to the family in lieu of appointment in the very nature of the action shows unreasonableness, since there is no basis or method in calculating such amount as compensation. That apart, awarding compensation would never further the purpose for which the State has framed the Rehabilitation Assistance Rules, nor it will improve the indigent economic condition of the family for all times to come. That apart, the concept of compensation is foreign to the Rules framed by the State Government for rehabilitation assistance. There is no question of the Gridco innovating its own idea of granting certain amount of compensation without the directions from the State and without justifying the logic for fixing such compensation. This cannot be a solace for the family to save them from destitution.

12. Before the Orissa State Electricity Board brought out their own Rehabilitation Assistance Scheme they were guided by the rules framed by the State

Government in that regard. This was done obviously because the Board was a statutory authority under the control of the State and was to abide by its directions. The Gridco is a statutory creation and has taken up the function of the O.S.E.B. by virtue of the provisions of the Orissa Electricity Reforms Act, 1995. Though presently they claim not to have any such scheme for giving employment to the dependent of a deceased employee that hardly matters, since they are bound to follow the rule framed by the State Government as indicated above. The rules do not give them option to adopt or not. The provision is mandatory. The framing of a scheme by the Gridco itself however may be supplementary to the rules framed by the State Government and the same may be framed to work out convenient to the State Rules, but any such scheme cannot be in any way inconsistent with the rules framed by the State Government as long the State Rules remain in force.

13. A stand has been taken by the Gridco in the counter-affidavit that there is no vacancy for appointment of the petitioner.

This seems curious because such appointments are sought by the dependants of the deceased employee normally against the post held by the deceased. Therefore, question of absence of vacancy would not arise unless the person seeking employment is not found eligible or suitable to hold that post and in that case alone a post, compatible with the eligibility criteria possessed by the applicant may be found out.

Very often such stand of "absence of vacancy" taken by the authorities is brought to our notice. This stand is taken by the organisations with a view to avoid the rigours of the rules for such appointments. This only works out to the utter disadvantage of the family for whose benefit the scheme is framed since in this manner they are treated with apathy as if they are alien to the organisation and their requests are turned down as if they beg mercy for such appointment even though it is the constitutional right of the beneficiaries and constitutional/statutory obligations on the public functionaries to give such appointment of course subject to various conditions under the Rule Schemes prescribed, so long such scheme/rules under the authority of the government remain in force.

14. Another stand is sometimes taken by the authority that the applicant is not found suitable on being tested by a competitive test.

We reiterate here what we stated in the case of Smt. Sabi Bewa Vs. Grid Corporation of Orissa Limited and Others,) that person seeking employment under the rehabilitation assistance schemes under no circumstance shall be subjected to any competitive test to judge his suitability though such suitability should be judged only to the extent of finding out whether one is eligible for the post and capable to discharge the nature of work attached to the post.

15. Some instances of the appointing authorities rejecting the request for such appointment on the ground of overage also has been brought to our notice.

No one should be denied this appointment merely because he is over aged. The Government in the Rules have made provisions vesting power with the appointing authority to relax the age on being satisfied in that regard. This does not mean that whenever a person is found to be overage, his case should be mechanically thrown out. Before rejecting the request, the authority must be satisfied that the case does not deserve any relaxation for laches or grossly time barred cases or for any other compelling reasons which reasons cannot be catalogued since cases may differ from one another. But in any case, such refusal should be supported by reasons or else it will be just a travesty of social justice system to deny the benefit in a deserving case by merely saying that the case does not deserve relaxation. Relaxation should be a rule rather than exception. Provision for relaxation in the rules should be liberally applied so that the action of the authorities would be attuned to the constitutional mandate as discussed above.

16. With this observation we allow the writ petition. The opposite party Gridco is hereby directed to consider the case of the petitioner for his appointment against the post of "Helper" held by his late father as observed, but in case the post so held by his father has been filled up by any reason whatsoever, his adjustment against any other post may also be considered. This should be done within a period of three months from the date of communication of the order. Requisites shall be filed within three days.

S. Chatterji, Actg. C. J.

17. I agree.