(1998) 04 OHC CK 0015

In the Orissa High Court

Case No : Original Jurisdiction Case No. 8748 of 1995

Santanu Kumar Dash APPELLANT

Vs

Chairman-cum-Managing Director, Orissa State Co-operative Milk Producer Federation Ltd. and Others RESPONDENT

Date of Decision : 17-04-1998

Acts Referred:
Constitution of India, 1950 — Article 12, 226, 227

Citation : (1999) 1 OLR 284

Hon'ble Judges : R.K. Patra, J;Pradipta Ray, J

Bench : Division Bench

Advocate : S. Mishra, D.N. Lenka and P.K. Rout, for the Appellant; B.K. Sahoo and K.C. Sahoo for O.P. No. 1, for the Respondent

Final Decision : Allowed

Judgement

R.K. Patra, J.—In this application under Articles 226 and 227 of the Constitution of India, the petitioner prays for a direction to the opposite parties to regularise his service and grant service benefits which are admissible to his counter-parts who are in regular employment.

2. The case of the petitioner is that he was initially appointed as a Marketing Assistant under the opposite party No. 1 - Orissa State Co-operative Milk Producers Federation Ltd., (in brief, ''the OMFED'') on a monthly consolidated pay. As his services were terminated on 10.9.1986 without assigning any reasons, he raised industrial dispute and at the conciliation stage, the OMFED assured to take him back to service provided he withdrew the industrial dispute. The petitioner in good faith withdrew the complaint. After some time, the petitioner was appointed for 45 days only and thereafter the appointment was made from time to time with breaks. The OMFED bore grudge against him because of the fact that he earlier raised industrial dispute and was bent upon to punish him. On 28.7.1988 certain charges were framed and he was asked to submit his explanation. Without conducting any enquiry, his services were

terminated with effect from 3.10.1988. The petitioner being aggrieved by the termination of service raised industrial dispute and the State Government made reference to the Presiding Officer, Labour Court, Bhubaneswar vide I.D.Case No. 37 of 1990. The Labour Court in its award dated 13.7.1991 held that the refusal of employment to the petitioner with effect from 3.10.1988 by the OMFED is neither legal nor justified. It accordingly directed the first party to reinstate the petitioner with effect from 3.10.1988 (vide Annexure-1). Pursuant to the said award, the petitioner was reinstated as per the order dated 18.9.1991 (Annexure-2). While the matter stood thus, the OMFED regularised the services of some ad hoc employees like A.K.Samal, D.K.Mishra and P.K.Swain who were juniors to the petitioner. As the petitioner was not regularised, he made representations on 13.9.1991 and 30.9.1991 but no decision was taken on them for which he had to file OJ.C.No. 6177 of 1991. This Court by order dated 22.6.1992 directed the OMFED to consider the representations within eight weeks of the date of receipt of the order. The OMFED on 17.8.1992 passed orders on the representations holding that the petitioner as Junior Marketing Assistant would be paid a consolidated wage of Rs. 950/- per month with effect from 1.7.1992 (Annexure-4 series). The aforesaid order is not an order regularising his service as Junior Marketing Assistant. Being aggrieved by such order, he filed another writ application i.e. O.J.C. No. 8594 of 1992 which was disposed of on 18.2.1993 at the admission stage with an observation that the dispute could be effectively adjudicated by the Industrial Tribunal. The petitioner accordingly, raised the dispute before the District Labour Officer-opp. party No. 3. He also approached his Union to take up the issue but it (Union) declined to come to his rescue. The District Labour Officer did not further proceed in the matter.

3. According to the petitioner, he has been working under the OMFED since 1986 and as such, he is entitled to be regularised in service.

4. The OMFED has filed counter affidavit contending, inter alia, that it is a co-operative society registered under the Co-operative Societies Act, 1962, and, as such, is not amenable to the writ jurisdiction, it being not a ''State'' within the meaning of Article 12 of the Constitution. It has been further pleaded that the present grievance of the petitioner was raised by him in O.J.C. No. 8594 of 1992 which was disposed of against him and, as such, the present writ application is hit by the principle of res judicata. Regarding regularisation, the OMFED has stated that A.K.Samal, D.K.Mishra and P.K.Swain were not regularised automatically. They were selected by Selection Committee and were given appointment in the regular posts of Junior Assistant and Junior Marketing Assistant. The petitioner appeared before the Selection Committee but was placed at serial No. 16 of the merit list and the aforesaid three persons were given appointment in the regular posts on the basis of availability of vacancies. The further stand of the OMFED is that regularisation of the post is always subject to availability of vacancy and line question of regularisation would arise subject to availability of vacancy and subject to the condition that the petitioner

comes o-ut successful in the selection test.

The petitioner has filed rejoinder wherein he has asserted that the OMFED is a ''State'' for the following reasons. The State Government holds share capital with the OMFED to the tune of Rs. 55 lakhs as on 31.3.1994 which constitutes 94.32% of the total paid-up share capital as per the 13th Annual Report of the Federation for the year 1993-94. The State Government has also provided Rs. 71.50 lakhs towards grant-in-aid for milk procurement and marketing enhancement programme. The contribution to the society from the Government is substantial and it has deep and pervasive control over the OMFED. In the Body constituted for managing the affairs of the OMFED, high ranking Government officials have been taken. The OMFED also renders public service.

5. From the aforesaid pleadings, the following three questions arise for consideration :

(i) Whether the OMFED is a ''State'' within the meaning of Article 12 of the Constitution ?

(ii) Whether the order passed by this Court in OJC NO. 8594 of 1992 dated 18.2.1993 operates as res judicata to the present writ application ?

(iii) Whether the petitioner is entitled to be regularised as Junior Marketing Assistant ?

6. Let us now consider the aforesaid questions in seriatim.

Question No. (i)

In Dr. Bisnhu Charan Swain-v. Chairman/Managing Director, Orissa State Co-operative Milk Producers Federation Ltd. 77 (1994) CLT 799, question arose as to whether OMFED is a ''State'' within the meaning of Article 12 of the Constitution of India so as to be amenable to the writ jurisdiction. In paragraphs 6 and 7 of the judgment, the Bench observed as follows :

"The Bye-laws of the opposite party federation as under Annexure- 1 does not indicate as to whether the Federation was receiving any fund from the Government or Government happened to be the controlling authority in its financial matters.The Bye-laws also do not indicate any sort of control over the affairs of the Society. There is no other materials placed before this Court to examine whether the Society is a ''State'' or can be said to be an instrumentality of the State. In the absence of any material, we are unable to hold that the Federation can be said to be a ''State'' under Article 12 of the Constitution or an instrumentality of the State.

Even though in para 3 of the writ petition the petitioner claims that the State is a share holder there is no material to show as to what is the extent of the share of the State Government and the manner of control which really would be one of the guiding factors to judge it either way. Merely because it is an- apex society with other co-operative societies affiliated to it, it cannot be said that the opposite party-Federation is a ''State''. The petitioner''s case in para 5 that the Federation is fully owned and fully controlled by the Government of Orissa is not supported by any material on record.

Therefore, our conclusion is, the Orissa State Co-operative Milk Producers Federation Ltd. is not a State and, therefore, no writ would lie. The present writ application is, therefore, liable to be dismissed on that score alone."

7. In the aforesaid case, no materials were placed before the Court on behalf of the writ petitioner to substantiate the plea that OMFED is a ''State'' within the meaning of Article 12 of the Constitution. Shri Mishra contended that because of absence of materials the Court was not in a posMdn -to examine whether OMFED is a ''State''. According to the learned counsel the following factors upon which he now relies were not brought to the notice of the Court while deciding the case of Dr. Bishnu Charan Swain (supra) would clearly go to show that OMFED is a''State''. They are :

(i) The State Government holds share capital to the tune of Rs. 55 lakhs as on 31.3.1994 which constituted 94.32 % of the total paid-up share capital as per the 13th Annual Report of the OMFED for the year 1993-94.

(ii) State Government provided to the OMFED a sum of Rs. 71.50 lakhs as grant-in-aid for milk procurement and marketing enhancement programme.

(iii) The final authority of management of OMFED vests in the Board of Directors consisting of members nominated by the State Government.

(iv) the OMFED is engaged in collection, selling and distribution of milk and milk products in the State with monopoly status created in its favour by the State Government.

(v) Bye-law 22.1 of the OMFED which deals with constitution of the Board of Directors, provides, inter alia, that the Registrar, Co-operative Societies, one nominee of the State Government (Animal Husbandry Department) will be members of the Board.

(vi) Bye-law 22.2 provides that notwithstanding any other provisions contained in the Bye-law, the first set of Board of Directors including its Chairman shall be nominated by the State Government in consultation with the financing agency for the first three years which may be further extended for a maximum period of another two years if the State Government and financing agency so desire. Provided further that it shall be open to the State Government to designate one of those nominated Directors as Managing Director.

(vii) Notification No. 20400 dated 31.7.1997 of the Government in the G.A.Department placing the services of the then Collector, Puri at the disposal of Fisheries and Animal Resources Department for appointment as Managing Director, OMFED, Bhubaneswar and further declaring that the post of Managing Director, OMFED is equivalent in status and responsibility to the post of

Additional Secretary to the Government provided in the I.A.S. Cadre of the State.

8. It may be stated that a Full Bench of this Court in Satrughana Rout Vs. Managing Director, Tribal Development Co-operative Corporation of Orissa Ltd. and Others, had the occasion to consider whether the Tribal Development Co-operative Corporation (T.D.C.C.) a society registered under the Orissa Co-operative Societies Act is a ''State'' within the meaning of Article 12 of the Constitution of India. Hansaria, C.J. speaking for the Full Bench, after considering all the decisions governing the field rendered by the apex Court, culled the following six tests to be determinative to hold whether an instrumentality or body can be regarded as ''State'' :

"1. If the entire share capital of the Corporation is held by Government it would go a long way towards indicating that the Corporation is an instrumentality or agency of Government.

2. Existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality.

3. Enjoyment of monopoly status conferred by the State.

4. If the functions of the Corporation are of public importance and closely related to Government functions.

5. If a department of Government is transferred to a Corporation, it would be a strong factor to infer the Corporation being an instrumentality of agency of Government.

6. If the financial assistance of the State is so much as to meet almost entire expenditure of the Corporation, it would afford some indication of the Corporation being impregnated with governmental character.

The Court found that the State Government holds share capital in the TDCC and State has deep and pervasive control over it. By applying aforesaid tests, the Court held that T.D.C.C. is a State. Now coming to OMFED, it would appear that the State Government has pervasive control over OMFED in the appointment of Managing Director ;,nd induction of its officers as their nominees into the Board of Directors. It has been given practically monopoly status in collection, selling and distribution of milk and. milk products in the State. The total paid-up share capital, as it is evident from the 13th Annual Report at Annexure-8; constitutes 94.32%. For the aforesaid reasons, ve are inclined to hold that OMFED is a ''State" within the meaning of Article 12 of the Constitution and, as such, it is amenable to, (he writ jurisdiction of this Court. The judgment rendered by a Bench of this Court in Dr. B.C.Swain (supra) OMFED is not a State has no precedential value inasmuch as the Court has clearly given a finding that it came to such a finding because of absence of materials produced by the writ petitioner. On the basis of materials now placed before us. we have come to hold that OMFED is a State within the meaning of Article 12 of the Constitution. This is, therefore, not a case where we have differed from the view expressed by an earlier Bench.

9. Question No. (ii) :

It is true that when the petitioner earlier approached this Court in OJC No. 8594 of 1992 for the self-same relief without examining the merit of the case, this Court took the view that the petitioner could approach the Industrial Tribunal for redress of his grievance and disposed of the case accordingly by order dated 18.2.1993. Since the Court did not express its opinion on the merit of the claim of the petitioner, we are not inclined to hold that the said decision would operate as resjudi cata in the present writ application.

10. Question No. (iii) :

Having cleared the preliminary hurdles, let us examine whether the petitioner is entitled to be regularised in the post of Junior Marketing Assistant. It is an admitted case that since March, 1986, the petitioner had been working as Junior Marketing Assistant with certain breaks and as per order of the Labour Court dated 12.7.1991 he has been reinstated in the post since 8.8.1991 and is continuing till now. His continuance in the service indicates that there exists work for him. The petitioner is now aged about 40 years, as is evident from his affidavit, and there is no chance of seeking employment under the State Government or in any other State Government undertaking as he would be over-aged by now. Besides this, he attended the interview and his position was 16 in thernerit list but he could not be appointed because of non-availability of vacancies. For all the aforesaid reasons, his case merits regularisation. In the previous selection list, if there is no other person above the petitioner awaiting regular appointment, the opposite parties will pass appropriate orders regularising his service within a period of four months of receipt of writ from this Court. If it is not possible to regularise him within the stipulated time, the opposite parties shall go on paying him regular scale of pay admissible to the post of Junior Marketing Assistant immediately after expiry of four months stipulated above till he is regularised in service.

11. In the result, the writ application is allowed. There would be no order as to costs.

Pradipta Ray, J.

12. I agree.

