
(2015) 11 OHC CK 0033
In the Orissa High Court
Case No : W.P.(C) No. 24470 of 2012

Saraswati Senapati

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 04-11-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13

Citation : (2015) 11 OHC CK 0033

Hon'ble Judges : S.N. Prasad, J.

Bench : Single Bench

Final Decision : Dismissed

Judgement

S.N. Prasad, J.—Heard learned counsel for the petitioner, Mr. Amit Patnaik, learned Additional Government Advocate appearing for the opposite party-State and Mr. D. Lenka, learned counsel for the opposite party No. 4.

2. This writ petition is against the order of termination dated 24.11.2012(Annexure-1).

3. Brief facts of the case is that the petitioner was selected for the post of Anganwadi Worker for Ward No. 7, Tanlasahi Anganwadi Centre within the urban jurisdiction of Athagarh Notified Area Council pursuant to the advertisement No. 995 dated 2.12.2009, letter of appointment was issued on 8.1.2010. After being appointed petitioner was sent to undergo Job Course training under the Orissa State Council for Child Welfare at Anganwadi Workers Training Center, Bhubaneswar. While the petitioner was working order of termination has been passed by the Sub-Collector, Athagarh in pursuance of the order passed in Anganwadi Appeal No. 11 of 2010 dated 2.8.2010. Contention of the petitioner is that the order dated 2.8.2010 was an ex parte order hence petitioner filed application for setting aside ex parte order dated 2.8.2010, Sub-Collector on 13.9.2010 passed an order of stay of operation of the order dated 2.8.2010, posted the case for final hearing. During operation of the order dated 13.9.2010,

by which order passed in Anganwadi Appeal No. 11 of 2010 dated 2.8.2010 was stayed, petitioner was directed to reply on the maintainability of the petition. It is the further case of the petitioner that she was appointed being eligible on all accounts but since the petitioner has not been provided adequate opportunity of being heard, order was passed by the Sub-Collector dated 2.8.2010, based upon which order of termination dated 24.11.2012 has been passed.

4. Accordingly, petitioner has filed this writ petition praying therein as to why the Sub-Collector not complying with the natural justice has passed the order of termination under Annexure-1 and showing no cause or insufficient case make the Rule absolute and further be pleased to quash the said impugned order under Annexure-1.

5. It has been contended by learned counsel for the petitioner that by referring to the guideline that the Sub-Collector has got no jurisdiction to adjudicate the appeal rather power has been conferred in pursuance to the guideline dated 2.5.2007 subsequently been modified on 2.3.2010 having been given power to entertain the appeal upon the Additional District Magistrate, hence order passed by the Sub-Collector is without any jurisdiction.

6. State-opposite party has appeared and the C.D.P.O., opposite party No. 3 has filed counter affidavit and one additional affidavit taking stand therein that although the petitioner was engaged in pursuance to the advertisement dated 2.12.2009 in which 11 numbers of candidates had applied for Tanlasahi Ward No. 7, out of which three candidates were found eligible with regard to the documents and affidavit submitted by them, one candidate remained absent on the date of verification and rest of the two candidates are Saraswati Senapati, the petitioner and Supriya Nayak, opposite party No. 4. Opposite party No. 4 secured the highest marks but she could not produced the relevant affidavit with regard to the residence certificate and as such the second person was not given engagement.

7. Opposite party No. 4 filed appeal before the Sub-Collector, Athagarh ventilating her grievance that she should have been engaged as she had secured highest marks in the selection process. In the said appeal although notice had been issued but the petitioner had not appeared but subsequently appeared but not filed any reply, hence order has been passed on merit by which the Sub-Collector has pass order allowing the appeal of the opposite party No. 4 and setting aside the entire selection process vide order dated 2.8.2010.

8. Against the order dated 2.8.2010 petitioner has filed one application for modification of the order dated 2.8.2010 and in terms of the said order the Sub-Collector on 13.9.2010 in Misc.(Anganwadi) Appeal No. 11 of 2010 while fixing the case to adjudicate upon maintainability of the petition and by way of interim measure operation of the order dated 2.8.2010 was stayed.

9. Opposite party No. 4 in the meanwhile has also filed an application before the Sub-Collector for modification of the order dated 2.8.2010 to the effect that last

part of the order by which it was directed to go for fresh selection may be modified and that the petition was filed on the basis of the order passed by this Court in the case of Smt. Sukanti Jena v. State of Odisha and others reported in , 2013(I) OLR 391 , when the Sub-Collector has not taken any decision opposite party No. 4 had preferred writ petition bearing W.P.(C) No. 16767 of 2012 in which vide order dated 21.9.2012, this Court had directed to dispose of the application. Accordingly the Sub-Collector has passed final order on 17.12.2012 holding the petitioner filed by the petitioner under Order 9 Rule 13 C.P.C. as not maintainable and the order dated 2.8.2010 has been modified by recalling that part of the order by which fresh selection was directed to be taken by directing the authorities to engage opposite party No. 4 with further direction upon the authorities to look into as to why the petitioner has not yet been disengaged in the light of the order dated 2.8.2010.

10. It has been submitted by learned counsel for the opposite party-State that the order of termination has been passed on 24.11.2012 which was in compliance with the order passed by this Court in W.P.(C) No. 16767 of 2012 dated 21.9.2012. It has further been contended that the petitioner has not challenged in this writ petition either order dated 2.8.2010 or the order dated 17.12.2012 even not filed any review against the order passed in W.P.(C) No. 16767 of 2012 which was preferred by the opposite party No. 4 in which direction was passed to forthwith disengage the petitioner.

11. Opposite party No. 4 has put her appearance and contested her case through learned Advocate who on the basis of the statement made in the counter affidavit has submitted that the petitioner has rightly been terminated because of the reason that her engagement was challenged in Misc. Appeal No. 11 of 2010 before the Sub-Collector, the Sub-Collector after taking into consideration the fact that the opposite party No. 4 has secured higher marks than the petitioner, merely on technicality name of Tanlasahi has not been mentioned in the affidavit, although residential certificate was produced, she was not considered to be eligible candidate and this was complained before the Sub-Collector, Sub-Collector has passed a very conscious decision allowing the appeal although initially direction as passed to go for fresh selection but subsequently it was modified with a direction to engage opposite party No. 4.

12. It has been contended that application for modification has been filed by the opposite party No. 4 for getting the order modified having been passed by the Sub-Collector dated 2.8.2010 in Misc. Appeal No. 11 of 2010 to the effect that direction was passed by the Sub-Collector to go for fresh selection but taking the help of order passed in the case of Smt. Sukanti Jena v. State of Odisha and others modification application was filed but when modification application has not been decided by the Sub-Collector opposite party No. 4 had approached this Court vide W.P.(C) No. 16767 of 2012 wherein vide order dated 21.9.2012 this Court has modified the part of the said order and directed the authorities to engage opposite party No. 4, this Court has also directed the Sub-Collector to

look into the matter as to how the petitioner was allowed to continue her duty in spite of the order dated 2.8.2010 and accordingly petitioner was disengaged vide order dated 24.11.2012.

13. It has been contended that the petitioner has not challenged at all the order dated 2.8.2010 passed in Misc. Appeal No. 11 of 2010 as well as the order dated 17.12.2012 passed in pursuance to the order passed by this Court in W.P.(C) No. 16767 of 2012. It has been further contended that if the petitioner has not challenged the order by which his application filed under Order 9 Rule 13 C.P.C. has been treated to be not maintainable by the Sub-Collector in his order dated 17.12.2012.

14. It has been contended by learned counsel for the opposite party No. 4 that since the Sub-Collector has given specific finding regarding disengagement of the petitioner, although petitioner has filed an application for recalling the order but subsequently that petitioner has also been rejected and the said order having not been assailed by the petitioner, order passed by the Sub-Collector attained its finality. It has also been contended in this writ petition that the order dated 2.8.2010 and the order dated 17.12.2012 has not been challenged by the petitioner.

15. Learned counsel for the State as well as for the opposite party No. 4 submits, so far as contention of the petitioner regarding jurisdiction of the Sub-Collector in adjudicating appeal is concerned, that the same has never been raised before the authorities rather petitioner has filed application to the jurisdiction of the Sub-Collector but not contended anything regarding jurisdiction, hence it is settled principle of law that once the parties have submitted to the jurisdiction, point of jurisdiction cannot be raised at the subsequent stage. He further submits that in view of condition No. 13 of the advertisement, the Sub-Collector has been delegated with the power of appeal.

16. It has further been contended by the opposite parties that even assuming that Sub-Collector has exceeded his jurisdiction but the situation will not be changed so far as merit of the case is concerned because of the reason that the petitioner has not disputed the fact that the opposite party No. 4 has secured higher marks than the petitioner and only on the ground of not referring name of Tanlasahi in the affidavit in support of residence but although the Sub-Collector has given finding that there is no confusion or ambiguity because the centre in question is the sole centre under Ward No. 7 which includes only Tanlasahi and if in Ward No. 7 there would have been two to three centers then only it can be said that there is confusion regarding residence, hence even if the matter will be remitted before the Additional District Magistrate the situation will not be changed but on technical ground the matter cannot be remitted back before the authority if there is no miscarriage of justice or no prejudice has been caused in adjudicating the merit of the case.

17. Having heard learned counsel for the parties and on perusal of the materials

on record, the fact which is not in dispute in this case is that the petitioner along with other candidates had participated in the selection process for engagement of Anganwadi Worker for Tanlasahi Anganwadi Centre which includes Ward No. 7 in pursuance to the advertisement dated 2.12.2009. Only two candidates remained in the test.

18. Petitioner has secured lesser marks than the opposite party No. 4 but the selection committee on the basis of the ground that the opposite party No. 4 has not referred name of the area where the centre is situated i.e. Tanlasahi in the affidavit, hence her candidature was not considered which led the opposite party No. 4 to prefer an appeal before the Sub-Collector. The Sub-Collector has issued notice on 22.2.2010 but service report was returned undelivered. Again fresh notice was issued through registered post, petitioner appeared on 15.5.2010, thereafter on several dates she did not appear hence matter has been heard finally in absence of the petitioner. Order was passed by the Sub-Collector on 2.8.2010 after hearing opposite party No. 4 and the C.D.P.O. and on perusal of the record the Sub-Collector has come to conclusion that the appellant, i.e. the opposite party No. 4 has submitted an affidavit before the C.D.P.O. in support of her residence stating therein that she is permanent resident of Upper Sahi Ward No. 7 of Athagarh NAC. She secured 66.13% marks in HSC examination and passed +2 CHSC examination for which her total marks is 71.1%. Against this the respondent No. 2, the petitioner, who is selected as Anganwadi Worker for the above centre only secured marks 62.1 which is less than the appellant.

19. It has further been found by the Sub-Collector that the opposite party No. 4 is permanent residence of Upper Sahi(Tanlasahi) under NAC Ward No. 7, from which it is clear that both the petitioner and the opposite party No. 4 are residing permanently in Upper Sahi(Tansasahi) under Ward No. 7 which is coming under Tanlasahi Centre but only because opposite party No. 4 in her affidavit did not mention a single word Tanlasahi she has been deprived from consideration of her candidature.

20. It has further been found by the Sub-Collector that from the advertisement published by the CDPO vide No. 995 dated 2.12.2009 there is a single AWC for ward No. 7 covering Tahlasahi, whereas some part of Tanlasahi is also covering Anganwadi Centre for Ward No. 8 and an advertisement for the whole ward No. 7 is part of Tanlasahi, hence the Sub-Collector has come to conclusion that the selection committee would not have been any confusion at the time because advertisement for the whole Ward No. 7 is part of Tanlasahi and when in the affidavit opposite party No. 4 has mentioned regarding permanent residence in Upper Sahi Ward No. 7 which will be impliedly inclusive of Tanlasahi but without physical verification of this aspect of the matter and merely on technical ground candidature of the opposite party No. 4 was rejected.

21. Petitioner has filed application for recall of the order dated 2.8.2010 before the Sub-Collector, Sub-Collector on 13.9.2010 had issued notice to the petitioner fixing 25.9.2010 for hearing on the maintainability of the petition and by way of

interim measure, order dated 2.8.2010 was stayed till the next date. Case was directed to be listed on 25.9.2010.

22. The opposite party No. 4 has filed another application on 18.10.2010 for modification of the order dated 2.8.2010 to the effect that the Sub-Collector should not have passed direction for making fresh selection in view of the settled position as has been order by this Court in the case of Smt. Sukanti Jena v. State of Odisha and others(supra), when the Sub-Collector has not taken any decision, opposite party No. 4 had preferred W.P.(C) No. 16767 of 2012 in this Court and this Court vide order dated 21.9.2012 has passed the following order:

"In view of the same, the writ petition is disposed of with a direction to opposite party No. 1-Sub-Collector, Athagarh to pass necessary order on the petition dated 18.10.2010(Annexure-5) filed by the petitioner seeking modification of the impugned order under Annexure-2 passed in Misc.(Anganwadi) Appeal No. 11 of 2010 within a period of two weeks from the date of production of certified copy of this order. Before parting with the order, this Court expresses that continuance of Saraswati Senapati as Anganwadi Worker is contrary to and against the impugned order passed under Annexure-4. Hence the Sub-Collector, Athagarh is directed to take necessary action against the C.D.P.O., Athagarh as to how Saraswati Senapati has been allowed to continue as Anganwadi Worker in Tanlasahi Anganwadi Centre despite passing of the order under Annexure-4."

23. In pursuance to the order passed by this Court in W.P.(C) No. 16767 of 2012 dated 21.9.2012, the matter was heard by the Sub-Collector on 17.12.2012, on the said date both the petitioner and the opposite party No. 4 had appeared and moved applications and argued the case. The Sub-Collector has rejected the application filed by the petitioner under Order 9 Rule 13 C.P.C..

24. After the order passed by this Court in W.P.(C) No. 16767 of 2012 the authorities have acted upon the same and passed order of termination against the petitioner on 24.11.2012 which is impugned in this writ petition.

25. After going into the entirety of the facts and circumstances of the case, it is apparent that the petitioner who has challenged the order dated 24.11.2012 will be said to have been terminated in pursuance to the order dated 2.8.2010. The petitioner has challenged the order of termination only in this writ petition and the order of the Sub-Collector dated 2.8.2010 has not been challenged even after order having been passed by the Sub-Collector dated 17.12.2012 and even in this writ petition as would be evident from the prayer of the petitioner.

26. Sole contention in assailing the order of termination which has been raised in this writ petition is that without applying principles of natural justice, order of termination dated 24.11.2012 has been passed, same has got no substance due to the following reasons.

"(i) Order of engagement of the petitioner has been challenged by the opposite party No. 4 before the Sub-Collector giving rise to Misc.(Anganwadi) Appeal No.

11 of 2010 in which notice was issued on 22.2.2010, notice returned undelivered, again fresh notice issued through registered post was sufficient, petitioner appeared only on 15.5.2010 and thereafter not chosen to appear nor filed counter and as such the Sub-Collector has passed order dated 2.8.2010 cancelling the entire selection process.

Petitioner has although filed application under Annexure-6 for recalling the order dated 2.8.2010 but the same has also been rejected vide order dated 17.12.2012.

Petitioner although continued in service but however for other ground writ petition has been filed by the opposite party No. 4 for modification of the order dated 2.8.2010 being W.P.(C) No. 16767 of 2012 in which this Court has passed order specifically directing upon the authorities to look in to the facts under what authority petitioner is continuing as Anganwadi Worker, said order was passed on 21.9.2012, petitioner was terminated on 24.11.2012.

Thus the order of termination is in consequence of the order passed by the Sub-Collector dated 2.8.2010, in which opportunity was provided, petitioner has put her appearance but not chosen to file counter affidavit, hence it cannot be said that the order of termination is without providing opportunity of being heard to the petitioner because of the reason that the order of termination is consequence of the order of the Sub-Collector who has passed order dated 2.8.2010 in Misc. (Anganwadi) Appeal No. 11 of 2010, hence ground regarding non-compliance of natural justice as has been raised by the petitioner, is not tenable.

(ii) So far as the ground taken by learned counsel for the petitioner that the order passed by the Sub-Collector is without any jurisdiction and in order to substantiate this the guideline dated 2.5.2007 in which procedure has been provided for appeal upon the Sub-Collector for hearing complaints regarding selection of Anganwadi Workers for tribal and rural projects and upon the Additional District Magistrate for urban projects. This has further been modified vide guideline dated 2.3.2010 and the A.D.M. has been given power of the appellate authority for all the projects for trial, rural and urban."

27. Learned counsel for the petitioner submits that since the order was passed by the Sub-Collector is without any jurisdiction hence order passed by him cannot be said to be sustainable in the eye of law.

28. There is no dispute before the authorities who are conferred with the power to adjudicate is supposed to take decision but this contention of the learned counsel for the petitioner cannot not be accepted due to the following reasons.

"(a) The petitioner after being noticed appeared before the Sub-Collector not raised this point rather submitted jurisdiction by putting his appearance and not filing any petitioner therein.

(b) Petitioner has also filed recall petition which has been annexed as Annexure-6 but no specific word has been made either in the said petition

regarding jurisdiction.

(c) Petitioner had appeared again before the Sub-Collector while finally adjudicating application of the petitioner as contained in Annexure-6 and the petition filed by the opposite party No. 4 dated 18.10.2010 contested and defended the petition but not said anything regarding jurisdiction.

(d) Petitioner has also not disputed even in the writ petition that the opposite party No. 4 has secured higher marks than her.

(e) It has also not been disputed that advertisement for engagement of Anganwadi Worker was published for Ward No. 7 Tanlasahi Anganwadi Centre and as per the submission made by the opposite party No. 4 who has not mentioned Tanlasahi in the affidavit but stated that she is residing in Upper Sahi Ward No. 7.

(f) It has also not been disputed that in the advertisement that the whole Ward No. 7 is part of Tanlasahi Anganwadi Centre."

29. Hence, merely by not referring name of Tanlasahi candidature and suitability of the candidature cannot be rejected and taking into consideration this aspect of the matter the Sub-Collector has directed to engage opposite party No. 4, meaning thereby even if the matter would be remitted before the authority having jurisdiction factual situation would not change. If there would be chance of any change of factual aspect, certainly the matter could have been sent before the authority, but from perusal of the pleadings and the admitted position in this case, merely for the purpose of sending before the authority will be of no fruitful purpose rather it will be said to be useless theory.

30. But even ignoring the useless theory, the petitioner cannot be granted relief due to the reasons:

"(i) The petitioner has not challenged the order dated 2.8.2010 passed by the Sub-Collector in this writ petition or any other forum at any time earlier.

(ii) The advertisement contains a condition in clause No. 13 of the advertisement conferring power of appeal upon the Sub-Collector and the said clause contained therein has not been questioned by the petitioner.

(iii) It is settled that if any adverse order is being passed in consequence of order passed by Court of Law/Quasi-judicial authority or administrative authority, unless and until that order will go consequential order cannot be questioned but here the petitioner has never challenged either the order dated 2.8.2010 or 17.12.2012 passed by the Sub-Collector before any higher forum or the order of this Court in W.P.(C) No. 16767 of 2012, hence order passed by the Sub-Collector in Misc. Appeal No. 11 of 2010 attained its finality, which ultimately resulted into order of termination."

31. In view of the reasons stated herein above, I find no reason to interfere with the order of termination.

32. Accordingly, the writ petition is dismissed being devoid of merit.