

(1995) 03 OHC CK 0031
In the Orissa High Court
Case No : O.J.C. No. 1937 of 1986

Sarat Kumar Mohanty

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 16-03-1995

Acts Referred:

Constitution of India, 1950 — Article 14, 235

Citation : AIR 1995 Ori 35 : (1995) 1 OLR 597

Hon'ble Judges : S. Chatterji, J; R.K. Patra, J

Bench : Division Bench

Advocate : Jayant Das, for the Appellant; D. Das, Additional Government Advocate, for the Respondent

Judgement

S. Chatterji, J.—The present writ petition has a chequered background indeed. The writ petitioner, who was a promotee District and Sessions Judge and a member of the Judicial Service of the State has sought for the reliefs as indicated below :

- (i) To treat the period of leave from 16-5-1971 to 17-1-1974 as on duty;
- (ii) To allow the petitioner to retire as District Judge on 30-6-1978(A.N.);
- (iii) To allow the petitioner all the financial and service benefits in the rank of District Judge as in normal course;
- (iv) To allow the petitioner the benefit of promotion with necessary financial benefits to the selection grade post from the date his junior in the gradation list was promoted because of the proceeding pending then against the petitioner;
- (v) To allow the petitioner interest at the rate of 12% per annum from the date of initiation of the proceeding till the date he is allowed and till when actually he draws the amount claimed by him;
- (vi) To allow him the benefit of addition of 5 years of service to his total length of service as per Annexure-15; and

(vii) To grant any other relief to the petitioner as may be deemed just and proper.

It is stated in detail that in a disciplinary proceeding initiated by the High Court, the petitioner was charged on 12-12-1969 while he was posted at Jeypore, as District and Sessions Judge, Koraput. The enquiry was held and it was closed in December, 1970. While the petitioner was at Malkangiri on Session Circuit, he was intimated that he was to make over charge of his office to the A.D.M. (J) at Jeypore on 16-5-1971(F W) to proceed on leave for three months, to intimate the High Court by telegram if he was to take leave for that period, the leave application might follow and the petitioner was to retire from service. Several correspondences followed between the petitioner and the respondent-authorities and ultimately the petitioner received a communication as to the contents of charges, copy where of is Annexure-5/A at page 75 of the writ application indicating inter alia that whereas on receipt of Court's letter No. 7078 (2) dated 17-8-1973 the petitioner came to know the prior orders of the Court rejecting his applications, even assuming that he did not previously receive letter No. 4921 dated 6-7-73, which he was expected to have received in the normal course and he was also clearly informed in the letter dated 17-8-73 of the High Court's order directing him to report forthwith whether he was willing to join duty indicating that in the alternative it was open to him to opt to retire from service voluntarily, if he was so advised that the Court would take action on his unauthorised absence from duty with effect from 3-1-73 after receiving his reply. It is stated that he had furnished in his letter dated 23-8-73 a reply which did not indicate anything whether he was willing to join or he wished to opt to retire voluntarily and thus he had evaded to furnish the report specifically calling upon him in the aforesaid letter No. 7078 (2) dated 17-8-1973. It is contended inter alia that under such confusing circumstances, the petitioner had to take such step as if for voluntary retirement under duress.

2. The matter proceeded further for a length of time and since the point of law was settled in the case of Baradakanta Mishra decided by the Supreme Court as reported in Baradakanta Mishra Vs. High Court of Orissa and Another, and the said judgment being delivered on 6th May, 1976, certain controversy as to the word "control" as used in Article 235 of the Constitution of India was set at rest. The ratio of the decision of the Supreme Court has clearly indicated that the word "control" as used in Article 235 includes disciplinary control over District Judge and Judges inferior to the post of District Judge. The word "control" includes something in addition to the mere superintendence of this Court. The "control" is over the conduct and discipline of Judges and the High Court alone can make enquiries into indisciplined conduct. The High Court of course cannot terminate the services or impose any punishment on District Judge by way of removal or reduction. The control over District Judge is that disciplinary proceedings are to be commenced by the High Court. If as a result of any disciplinary proceeding any District Judge is to be removed from service or any punishment is to be imposed, that will be in accordance with the conditions of

service. The High Court within the power and control vested under Article 235 can hold disciplinary proceedings against a District Judge and can recommend imposition of punishment of reduction in rank on him.

3. It is stated that after the judgment in the case of Baradakanta Mishra as reported in Baradakanta Mishra Vs. High Court of Orissa and Another, . the confusion Was rest and ultimately the High Court in its administrative Jurisdiction concluded the departmental proceedings pending against the petitioner and made a recommendation to the State Government that the absence of the petitioner from duty may be considered as on duty from 1971 to 1974 and the date of retirement of the petitioner might be reconfirmed to 30-6-1978, which was the actual date of superannuation and such reliefs might be granted to the petitioner. Since the State Government was not complying with such recommendations, the petitioner moved the writ Court and ultimately the matter was referred to the full Bench formulating the following question:

"Whether the State Government has power to pas an order at variance with the recommendations of the High Court in relation to the matter concerning conditions of service of a Member of the Orissa Superior Judicial Service ?"

The said question was referred from pending O.J.C No. 1937 of 1986 and Was decided on 20-1-1993, The Full Bench has recorded that on receipt of the directions of the High Court on 11-5-1971 as already observed above, the petitioner took some steps 6n 12-5-1971, one of which was to apply for leave for three months from 21-6-1971 to 20-9-1971, The Full Bench has further recorded that the High Court came to a tentative conclusion to award the punishment of reduction in rank and again called upon the petitioner to have his say on the proposed punishment. The petitioner submitted his show cause on 10-9-1971. Final order of reduction in rank was passed on 17-12-1971, which was made effective from 21-12-1971. An appeal Was preferred by the petitioner as permitted by Rule 22 (2) of the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 with an advance copy to the Home Department.

4. The petitioner received the charges on 22-9-1973 in the second departmental proceeding, while staying at New Delhi calling upon him to indicate whether he was willing to join duty or in the alternative he was asked to opt to retire from service voluntarily. It is contended that in view of this communication, the petitioner opted to retire by sending a letter dated 2-11-1973 and the same came to be accepted by the Home Department's Notification dated 9-1-1974, which is quoted hereunder;

"In pursuance of the proviso to Sub-rule (a) of Rule 71 of the Orissa Service Code, the Governor of Orissa is pleased to allow Sri Sarat Kumar Mohanty, a permanent member of the Senior Branch of the Orissa Superior Judicial Service, to retire from service on his own notice of option with effect from the 10th January, 1974".

This date of acceptance which was mentioned in the aforementioned notification as

10-1-1974 was subsequently varied to 18-1-1974. This change came to be made because in the notification of 9-1-1974, the petitioner was a member of the Senior Branch of the Orissa Superior Judicial Service but he having been reduced in the meantime, another - notification was issued allowing him to retire as a member of the Junior Branch of the Orissa Superior Judicial Service with effect from 18-1-1974, and the said notification is dated 11-1-1974.

5. The Full Bench has also recorded that calm prevailed till the decision of the apex Court in the High Court of Punjab and Haryana v. State of Harayana (Civil Appeal Nos. 852 and 1503 of 1974) was rendered on 24-1-1975, whereafter the petitioner made a representation stating that the High Court was not competent to impose punishment is reduction in rank. As the order of reduction has been passed by the High Court itself, the petitioner submitted his representation to the Chief Minister of Orissa on 18-2-1975 stating, inter alia, not to treat his offer of compulsory retirement as a voluntary act and to allow him to join duty. The order of reduction came to be set aside subsequently by the Governor arid notified on 14-1-1980.

6. The Full Bench further recorded that as, however, the petitioner had represented on 18-2-1975 to recall his voluntary retirement offer, this Court for the first time on 5-9-1980, recommended to the Government to grant two reliefs to the petitioner, namely

(i) to treat the period of his leave from 16-5-1971 to 17-1-1974 as on duty and to give him consequential financial benefits; and

(ii) to allow him to retire with effect from 30-6-1978 (on which date the petitioner would have retired in normal course) with all service benefits.

The Government vide Annexure-11 dated 10-8-1981 did not feel persuaded to accept the period of absence from duty from 16-5-1971 to 21-12-1971 as on duty and from 21-12-1971 till the date of his normalretirement, i.e., 18-1-1974 to be treated as on leave. The recommendation of this Court to withdraw the voluntary retirement order was not conceded. The only other relevant communication is dated 3-11 -1981, which is a letter from the Registrar of this Court to the Government asking it to act in accordance with its earlier recommendation. This not having been done, the present application was filed in 1986.

7. In the background of the aforesaid facts, the reference was made by the Division Bench to the Full Bench. The Full Bench considered all the points of law and ultimately concluded that the Court was not really called upon to recommend the acceptance of the offer both of "voluntary retirement as would appear from the materials on record. The Full Bench was Of the view that the question of High Court recommending for withdrawal of the order of retirement did not really arise. Indeed in view of the legal position mentioned above, the High Court's recommendation had no legal backing. The finding was made that the recommendation made by the High Court in the administrative side was not

conclusive and such recommendation per se was not binding on the State.

8. The Full Bench further recorded that in so far as recommendation to treat the period of leave from 16-5-1971 to 17-1-19 as on duty and to give the petitioner consequential financial benefits is concerned, it was conceded by Shri S.K. Das, learned counsel appearing for the State that this portion is found to be binding as it was a matter absolutely related to the condition of service of the petitioner during the period of his service. This position was accepted by the Full Bench.

9. The present writ petition seeking the reliefs as indicated above, is strongly opposed by Mr. Das, (earned counsel for the State. It is very much clear according to him, that once the petitioner has retired voluntarily, he cannot ask for recalling the order of voluntary retirement and cannot ask for any relief for treating the period from 1971 to 1974 as on service and for any other relief declaring that the petitioner should have retired on 30th June, 1978.

10. Mr. J. Das, learned counsel appearing for the petitioner has painstakingly taken this Court through the pleadings of the parties and materials on record. The decision of "the Full Court in the administrative side had followed the case of Baradakanta Mishra Vs. High Court of Orissa and Another, .

11. Patiently we have heard the learned counsel for both the parties. We have considered the materials on record diligently and tried to understand the points raised by the earned counsel for the respective parties in proper perspective. On perusal of the materials on record and on appreciating the points of law, we are of the view that the point of dispute so far as the binding nature of the recommendation of the Full Court dated 5th September 1980 is concerned, has no legal binding force as envisaged under Article 235 of the Constitution of India This recommendation can well be treated as a communication by the High Court by assessing all the facts and circumstances with regard to the background for the petitioner to tender voluntary retirement. The State Government, as it appears, considered the case of the petitioner and only denied to give the second relief as he had already retired in 1974 and even after June, 1978, he could not be allowed to be reinstated, whereas on the same facts and circumstances *pari materia*, the case of another judicial officer, namely Sri N. Purohit, necessary reliefs had been granted. Mr. Das has contended that apart from the question of the legal and binding force with regard to the High Court's recommendation within the scope and ambit of Article 235, the refusal or rejection of the State Government to grant reliefs to the petitioner ought to have been considered on the touch-stone of Article 14 of the Constitution of India. If on similar facts and circumstances the State Government had considered to give relief to Sri Purohit, it ought not to have refused the relief to the petitioner. Voluntary retirement was under confused state of circumstances, and the person should be permitted to superannuate on the actual date of retirement being 30-6-1978. This aspect was not the subject matter of the reference to the Full Bench and this Court is to consider this aspect only. He has argued further that even if the petitioner had retired from service on superannuation automatically on 30th June, 1978, the

State Government ought not to have refused to grant the reliefs to him even notionally in accordance with law. This aspect has been lost sight of by the State Government and has not been considered in its proper perspective.

12. Mr. Das, the learned counsel for the State, has submitted that the stand of the Government was very consistent. The petitioner under certain circumstances had to place on record the voluntary retirement. Certain notifications were issued which are not found to be inconsistent in law. Fresh notifications were also issued by making clear the position of the petitioner vis-a-vis the State Government. It has been made clear by this Court that State Government has granted all reasonable reliefs in terms of the communication by the High Court, even the recommendation of the Full Court as communicated by the Registrar of the Court that the petitioner was longer in service up to 1974. This aspect is very much clear from the ultimate concession given on behalf of the State in terms of Sri S.K. Das's submission recorded by the Full Bench. We are no longer called upon to give effect to this aspect any further. This aspect at least is a closed chapter. We are to consider the present writ petition with a very limited scope inasmuch as whether the recommendation of the Full Court having no legal backing, should be taken in account to depict the true State of affairs and to appreciate the peculiar circumstances under which the petitioner was persuaded to retire voluntarily. If this aspect is highlighted there may be a different conclusion to hold that the petitioner had to opt to voluntary retirement under certain painful circumstances and under certain pressures, for which it was to be considered as not a voluntary act free from any duress. If this aspect is true, this Court has to appreciate that the State Government will have to reconsider the recommendation of the High Court as a real background to lift the veil as to factually the petitioner is entitled to get the limited reliefs on the second aspect as to the period from 1974 till 30-6-1978, notionally at least.

13. Having heard the learned counsel for the respective parties in depth and having considered the background of the case as also the facts and circumstances, we are of the view that certainly the State Government should consider similar cases on the scale of equality. If the State Government had taken a sympathetic view in the case of Sri Purohit, there cannot be a different view in respect of the case of the petitioner Sri Mohanty only on the ground that the petitioner had since been superannuated on the date of consideration after the communication of the High Court. In the event; Sri Mohanty has already been superannuated, he cannot ask to be reinstated nor can he ask for back wages, but there is no bar to reckon his date of retirement by referring the date as on 30th June, 1979. In the case of D.S. Nakara and Others Vs. Union of India (UOI), the Supreme Court has rightly observed that with the expanding horizons of socio-economic justice, the Socialist Republic and Welfare State which the country endeavours to set up and the fact that the old men who retired when emoluments were comparatively low are exposed to vagaries of continuously rising prices, the falling values of the rupees consequent upon inflationary inouts, by introducing an arbitrary eligibility criteria, "being in service and retiring

subsequent to the specified date" for being eligible for the liberalised pension scheme and thereby dividing a homogeneous class, the classification being not based on any discernible rational principle and being wholly unrelated to the objects sought to be achieved by grant of liberalised pension scheme of "being in service on the specified date and retiring subsequent to that date" in the memoranda, violates Article 14 and is unconstitutional and liable to be struck down. We believe that in the present case, the petitioner should have been satisfied if he had been treated as a member of Orissa Superior Judicial Service till the date of his actual retirement. The State Government should give such reliefs notionally and his date of retirement should be reckoned as on 30th June, 1978 enabling him to obtain such retirement benefits, and notionally this period can be extended for this limited purpose only. We find sufficient force in the submission of Mr. J. Das seeking such limited reliefs only before this Court. He does not press for either back wages or other financial-benefit between the period of 1974 to 1978 while the petitioner had actually not worked. Considering all the aspects we are of the view that the State Government should not have rejected the petitioner's representation on this limited aspect and the second part of the High Court's recommendation although that may not be having any binding force in law as envisaged under Article 235 of the Constitution of India, should have been taken notice in the light of discussion as made above.

14. Taking a lenient and liberal view of the matter and considering all the equitable aspects of the case and considering the age of the petitioner, who has already reached 75 years, as also other factors that he was a Judicial Officer of the State discharging his duties, and that he was having great anxiety by pursuing the litigation for a large number of years, and the points of law and as to scope of jurisdiction of High Court and State Government over the control of service condition of the State Judiciary was in a debatable stage and ultimately set at rest by the apex Court, the writ petition is disposed of by issuing an appropriate writ to command the opposite parties/State Authorities to reconsider the matter in the light of the recommendation of the High Court with regard to the second part of the reliefs in a limited way and to grant such relief to the petitioner by reckoning his date of retirement as 30th June, 1978 for obtaining retirement benefit and such ancillary financial aids and to grant such reliefs as to the pensionary benefits including such consequential benefits by way of amendment, if any, made in the meantime. It is further made clear that the petitioner will not be entitled to ask for any back wages from 1974 to 1978 as conceded or to ask for any other financial benefits on this ground except to increase all pensioner benefits raised time to time meanwhile and other incidental benefit closely relating thereto in the manner as law demands. All such benefits shall be given on reconsideration of the issue as indicated above within four months from the date of communication of this order.

The writ application is accordingly disposed of.

R.K. Patra, J.

15. I agree.