
(2010) 05 OHC CK 0044
In the Orissa High Court

Smt. Jyotiprabha Nayak

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 07-05-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Orissa Education Act, 1969 — Section 3

Citation : (2010) 110 CLT 612 : (2010) 2 ILR (Ori) 736 : (2010) 2 OLR 269

Hon'ble Judges : B.N. Mahapatra, J;A.S. Naidu, J

Bench : Division Bench

Final Decision : Allowed

Judgement

B.N. Mahapatra, J.—Prayers of the petitioner in this writ petition are to set aside the order of reinstatement passed in favour of opp.party No. 6, to direct the opp.party No. 6 to refund the amount of arrear salary drawn by him for the period he was not in service and to allow the petitioner to discharge the duties of the Head of the Department of the Discipline of Logic and Philosophy.

2. This case has a chequered history. According to the petitioner, she was appointed as a Lecturer in Logic and Philosophy on regular basis in D.R. College, Nayapalli, Bhubaneswar on 06.12.1993 under Annexure-1. Prior to this, she was working in the same post on adhoc basis in that College since July, 1993. The opp.party No. 6 who had been serving as Lecturer in the same subject in the said College was terminated by the Governing Body on 15.05.1993 under Annexure-2. Being aggrieved by the order of termination, Opposite Party No. 6 had filed appeal before the Director of Higher Education, Orissa. Opposite party No. 6 also challenged the said order of termination before this Court in O.J.C. No. 4958 of 1993. This Court on 23.08.1993 disposed of the said writ petition by directing the Director, Higher Education (O.P. No. 2) to dispose of the appeal, if pending, preferably within a period of three months from the date of receipt of that order. The said appeal was dismissed by the D.P.I. as per Annexure-3. Being dissatisfied with the said dismissal order, opp.party No. 6 filed another writ

petition bearing O.J.C. No. 5157 of 1994 before this Court. The said writ petition was dismissed on 05.03.1999 vide Annexure-4. While the matter stood thus, on 06.12.2000, opp.party No. 6 started working as a Lecturer in Logic and Philosophy and some days thereafter he worked as Head of the Department of the said discipline. The petitioner came to know from the Principal of the College that he was directed by the Deputy Director (Scholarship) and Special Officer to allow opp.party No. 6 to work in the College. Despite several requests, the petitioner was not supplied with the order of reinstatement of opp.party No. 6 against the said post. Hence, this writ petition.

3. Mr. M.R. Mishra, learned Counsel appearing for the petitioner submitted that the order dated 05.03.1999 passed by this Court in O.J.C. No. 5157 of 1994 has attained its finality being not challenged either by opp.party No. 6 or any other opp.party. Petitioner is the senior most Lecturer in the Discipline and had also functioned as Head of the Department in the particular discipline. Since the petitioner was neither made a party to the appeal filed before the Director, Higher Education nor to the writ petition filed before this Court, she could not be able to know the actual position of the matter. It is submitted that fraud has been practiced in the matter at different levels in order to secure the job to opp.party No. 6. Illegal financial benefits have been given to opp.party No. 6. There is no such order by any authority directing reinstatement of opp.party No. 6 in service. Even if there is any such order, the same might be passed without any jurisdiction. Since the services of opp.party No. 6 had been terminated and the order of termination was made final, his reinstatement in the former post he held is illegal. The petitioner being the senior most Lecturer in the Department was allowed to function as Head of the Department. The D.R. College has become an aided educational institution with effect from 01.06.1994 within the meaning of Section 3(b) of Orissa Education Act, 1969. Allowing opp.party No. 6 to continue to work as lecturer in the said post by suppressing the legitimate claim of the petitioner is discriminatory and without any authority of law.

4. Mr. K. Patnaik, learned Counsel appearing on behalf of opposite party No. 6 vehemently contended that the petitioner has no locus standi to file the present writ petition challenging the reinstatement of opposite party No. 6 and his assignment of H.O.D. in Logic and Philosophy of the College. The petitioner was appointed by an authorized person without any interview. Her appointment has not been approved by a legally constituted Governing Body and therefore she is not entitled to any relief. The College being an unaided one, the Director is the appropriate authority to redress the grievance of the petitioner. One Bhagyadhar Jagdeb a self-styled Secretary of the Governing Body terminated the services of opposite party No. 6 and appointed the petitioner. Pursuant to the direction of this Court in OJC No. 1372/90 an inquiry was conducted by the competent authority, which reveals that Sri Jagdeb was not the Secretary of the College at the relevant time. Thereafter considering the submission of opposite party No. 6 the authority had directed reinstatement of opposite party No. 6 after hearing the parties. Opposite party No. 6 was appointed in 1984 by the Governing Body

and being the senior most in the Department became the H.O.D. of Logic and Philosophy in the College. The petitioner was appointed as Lecturer in Logic in July, 1993 on ad hoc basis and consequently got regular appointment on 6.12.1993 vide Annexure-1. However, the letter of the Principal to the Director, Higher Education, for the purpose of grant-in-aid discloses that the petitioner was appointed on 1.11.1994, which is contrary to Annexure-1. The opposite party No. 6 was not getting anything from the college towards his dues for the period from 1993 to 2000. The earlier order of the Director holding that the order of termination of opposite party No. 6 was just which was confirmed by this Court in OJC No. 5157/94 disposed of on 5.3.1999 is based on presumption that the services of opposite party No. 6 were terminated by an authority approved by the Governing Body. Subsequently, when it came to the notice of the authority that the Secretary who terminated the services of opposite party No. 6 was not the approved Secretary, the order of termination was recalled and opposite party No. 6 was reinstated by the authority vide order dated 3.5.2000, which was accepted by the Governing Body.

5. In the rejoinder filed by the petitioner it is stated that neither opposite party No. 4, Ex-Deputy Director, Scholarship, Higher Education nor opposite party No. 5, Principal, D.R. College, Nayappali is the appointing authority or the authority to terminate the services of the Lecturers of the College in question. Opposite Party No. 1, the State of Orissa represented through its Commissioner-cum-Secretary, Higher Education and opposite party No. 2, Director of Higher Education, Orissa, are not the authorities to regulate the functions of the Governing Body inasmuch as functions of the Governing Body are regulated by the Rules prescribed for the purpose. It is wrong to say that the petitioner has no locus standi to file the case. The petitioner was appointed by the Governing Body not by any unauthorized person as alleged. The petitioner was initially appointed as Lecturer in the College in the question in Logic and Philosophy on ad hoc basis in the month of July 1993. Subsequently she was appointed to a regular post on 6.12.1993 having been selected by a Selection Committee, constituted for the purpose. It forcefully argued that the vacancy against which the petitioner was appointed was also advertised in the local daily "Dharitri" on 7.7.1993. The selection and appointment of the petitioner were approved by the Governing Body. Shri Bhagyadhar Jagdev was the Secretary of the College when the petitioner got appointed. The Governing Body of the College with its Secretary Sri Bhagyadhar Jagdev got approval by the Director on 7.10.1993. The appeal of the opposite party No. 6 was heard by the Director and was dismissed on contest by the Director on 22.3.1994 wherein the very question of the non-approval/approval of the Secretaryship of the said Sri Bhagyadhar Jagdev was pleaded by the present opposite party No. 6. The order of termination of the services of opposite party No. 6 on 15.5.1993 having been upheld by this Court, it is no longer open for opposite party No. 6 to plead that his services were terminated by an unauthorized person. The plea that opposite party No. 6 was reinstated by the authority is wrong and vague since he does not specify as to by which

authority and by which order he was reinstated in service. In a similar order in the case of one Sri P.K. Das, the Deputy Director had submitted a report on 18.11.2003 reporting inter alia that the concerned person had suppressed the fact of filing of the appeal earlier by him and dismissal of the same by the D.P.I. and losing the case before the High Court. Thus, by suppressing the fact and misleading the authority, he had obtained the order of reinstatement. The petitioner having been appointed in place of opposite party No. 6, the petitioner ought to have been given due opportunity of hearing to protect his service interest before such reinstatement order was passed.

6. In reply to the rejoinder, opposite party No. 6 stated that the Governing Body of the College (opposite party No. 3) was superseded at the relevant time and opposite party No. 4 got appointed as Special Officer and powers of the Governing Body were vested in him. Opposite Party No. 4 passed the order of reinstatement of opposite party No. 6. The petitioner did not possess the qualification for the post of Lecturer in logic as prescribed in the advertisement under Annexure-5 on the date of advertisement, i.e. 7.7.1993. The termination of opposite party No. 6 by Shri Jagdev was without any authority of law. The judgment of the Hon"ble Court passed on 5.3.1999 under Annexure-4 was the point at issue in Civil Review No. 37/99 wherein notice was issued to the parties fixing the matter after vacation. The petitioner was never appointed against the vacancy created by the illegal dismissal of opposite party No. 6. Had she been appointed against the vacancy caused consequent upon the dismissal of opposite party No. 6, upon reinstatement of opposite party No. 6, she would not have been allowed to continue. Therefore, her continuance in the College clearly indicates that she was never appointed against the vacancy caused due to termination of opposite party No. 6. Hence, the petitioner was not at all needed to be noticed before the order of reinstatement of opposite party No. 6 was passed. It is also replied that the so called Secretary Bhagyadhar Jagdev was never elected or appointed by the Governing Body to officiate as Secretary of the College.

7. Facts which have not been disputed are that the services of opposite party No. 6 serving as Lecturer in Logic and Philosophy in D.R. College, Nayapalli was terminated on 15.5.1993. Opposite Party No. 6 approached this Court in O.J.C. No. 4958/93 challenging the order of termination. On 23.8.1993, this Court disposed of the said writ application directing the Director, Higher Education, to dispose of his appeal. On 22.3.1994, the Director, Higher Education, upheld the order of termination and dismissed the appeal filed by opposite party No. 6. Again opposite Party No. 6 challenged the order of the Director, Higher Education, before this Court in OJC No. 5157/94. This Court vide its judgment dated 5.3.1999 dismissed the writ petition and upheld the order of the Director as well as the order of termination of opposite party No. 6. On 05.04.1999, opposite party No. 6 preferred a petition for review of the judgment dated 05.03.1999 of this Court passed in OJC No. 5157/1994, which has been numbered as Civil Review No. 37/99. While the matter stood thus, the Director,

Higher Education on the review application filed before him by opposite party No. 6 reviewed the order dated 22.3.1994 and passed the order of reinstatement in favour of opposite party No. 6 in the former post he held with service continuity vide Memo No. 24963 dated 4.5.2000. In compliance with the said order of the Director, Higher Education, the Deputy Director, Scholarship and Special Officer, D.R. College, Nayapalli, Bhubaneswar reinstated opposite party No. 6, Shri Akshya Kumar Mahapatra with effect from 6.5.2000 in the post formerly he held.

8. Now the question that falls for consideration in this writ petition is as to whether the order of reinstatement dated 4.5.2000 passed by the Director, Higher Education, on the review petition filed by opposite party No. 6 and consequently the order of Deputy Director (Scholarship) and Special Officer, D.R. College, Nayapalli dated 6.5.2000 by which opposite party No. 6 has been reinstated in his former post with effect from 6.5.2000 are sustainable under law.

9. As stated above, the termination of the services of opposite party No. 6 upheld by the Director, Higher Education and the order of the Director has been confirmed by this Court in O.J.C. No. 5157/94. Thus, once the order of termination of the services of opposite party No. 6 was merged into the order of the High Court, the order of the Director has lost its identity.

The Constitution Bench decision of the apex Court in *Collector of Customs, Calcutta Vs. East India Commercial Co. Ltd.*, , observed as follows:

The question therefore turns on whether the order of the original authority becomes merged in the order of the appellate authority even where the appellate authority merely dismisses the appeal without any modification of the order of the original authority. It is obvious that when an appeal is made, the appellate authority can do one of three things, namely, (i) it may reverse the order under appeal, (ii) it may modify that order, and (iii) it may merely dismiss the appeal and thus confirm the order without any modification. It is not disputed that in the first two cases where the order of the original authority is either reversed or modified it is the order of the appellate authority which is the operative order and if the High Court has no jurisdiction to issue a writ to the appellate authority it cannot issue a writ to the original authority. The question therefore, is whether there is any difference between these two cases and the third case where the appellate authority dismisses the appeal and thus confirms the order of the original authority. It seems to us that on principle it is difficult to draw a distinction between the first two kinds of orders passed by the appellate authority and the third kind of order passed by it. In all these three cases after the appellate authority has disposed of the appeal, the operative order is the order of the appellate authority whether it has reversed the original order or modified it or confirmed it. In law, the appellate order of confirmation is quite as efficacious as an operative order as an appellate order of reversal or modification

The apex Court in *Somnath Sahu Vs. The State of Orissa and Others*, , held that in the case of a service dispute that the original order merged into the appellate

order of the State Government and it is the appellate decision which subsisted and became operative in law and was capable of enforcement.

Thus, the issue of termination of services of opposite party No. 6 has attained its finality by the order of this Court passed in O.J.C. No. 5157 of 1994.

Moreover, the Director has become functus officio after the appeal was disposed of and he has no competence to entertain the review application and change the order passed by him earlier. See Krishna Ashram Educational Trust and another Vs. District Judge, Allahabad and others,

Above being the position of law, the order of the Director dated 4.5.2000 and the consequential order of the Deputy Director (Scholarship) and Special Officer dated 6.5.2000 are not sustainable under law.

10. Another important aspect of the case is that the order of review passed by the Director in absence of any power of review is also not maintainable. Unless the power of review is expressly conferred upon the Director under the Statute, he cannot confer power of review upon himself to review his own order.

In Patel Chunibhai Dajibhai etc. Vs. Narayanrao Khanderao Jambekar and Another, , the Hon'ble Supreme Court had held that in absence of any power of review, the Tribunal could not have subsequently reconsidered its previous decision and the subsequent order re-opening the matter was illegal, ultra-vires and without jurisdiction.

in Harbhajan Singh Vs. Karam Singh and Others, , the Apex Court has held that in absence of any provision in the Act granting express power of review, it is manifest that review could not be made and the order in review was ultra-vires, illegal and without jurisdiction and the High Court has rightly quashed it by the grant of writ under Article 226 of the Constitution.

In Patel Narshi Thakershi and Others Vs. Shri Pradyumansinghji Arjunsinghji, the apex Court held that the power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication and in absence of any provision in the Act, review of an earlier order is impermissible.

This Court in Jayaram Bhuyan Vs. State of Orissa and Others, held that the Director of Higher Education has no power of review.

In view of the above, the order of review passed by the Director is not sustainable in law.

11. For the foregoing reasons, the order of the Director, Higher Education, passed vide Memo No. 24963 dated 4.5.2000 and the Deputy Director (Scholarship) and Special Officer dated 6.5.2000 being not in conformity with law are hereby set aside.

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