

(2000) 04 OHC CK 0009
In the Orissa High Court
Case No : O.J.C. No. 10896 of 1998

Sri Justice S.K. Ray

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 05-04-2000

Acts Referred:

Constitution of India, 1950 — Article 310(2), 311, 311(2)
Orissa General Clauses Act, 1937 — Section 5, 5(2)
Orissa Lokpal (Conditions of Service) Rules, 1984 — Rule 7
Orissa Lokpal and Lokayukta Act, 1970 — Section 2(1), 3(1), 5, 5(1), 5(4)
Orissa Lokpal and Lokayuktas (Repeal) Act, 1992 — Section 2, 2(2), 2(3), 5

Citation : (2000) 04 OHC CK 0009

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

Bench : Division Bench

Advocate : G.A.R. Dora, P.K. Ray and Bikram Keshari Mohanty, for the Appellant; S.P. Misra, Additional Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

R.K. Patra, J.—The Petitioner in this writ petition has sought for direction to the opposite parties to grant him the following:

- (i) Compensation for loss of salary for the remainder period his tenure as Lokpal;
- (ii) Pension with effect from 16-7-1992;
- (iii) Refund of the amount of pension deducted from his salary during the period 17-8-1989 to 16-7-1992; and (iv) Payment of encashment value of unutilised leave, which accrued to him during the period from 17-8-1989 to 16-7-1992.

2. A few facts are necessary to recount here for the consideration of the rival contentions of the parties.

The Petitioner is a former Chief Justice of this Court. On 17-8-1989 he was appointed as Lokpal under Sub-section (1) of Section 3 of Orissa Lokpal and Lokayuktas Act, 1970 (herein- after referred to as " the 1970 Act"). While he was

continuing as such, the Orissa Lokpal and Lokayuktas (Repeal) Ordinance, 1992 was promulgated on 16-7-1992 (the Ordinance was duly replaced by the Orissa Lokpal and Lokayuktas (Repeal) Act, 1992 (Orissa Act 33 of 1992) (in brief, "the Repealing Act"). The repeal of 1970 Act had the necessary consequence of abolition of the of the of Lokpal with effect from 16-7-1992 and consequent termination of his appointment as Lokpal. He would have continued to hold the office for a term of five years because Sub-section (1) of Section 5 of the 1970 Act provided that the Lokpal would hold office for a term of five years from the date he entered upon the office.

3. In the backdrop of the aforesaid admitted facts, the claims of the Petitioner have to be considered. Let us now therefore proceed to consider the same in seriatim.

(i) Compensation for loss of salary for the balance period of five years" term:

Learned Counsel for the Petitioner contended that as the Petitioner's appointment was for a term of five years, he had the right to continue as Lokpal for its full term, but the same was sliced off following the abolition of the office and he having been deprived of that right is entitled to be compensated for the loss of salary for the balance period. According to the learned Counsel, compensation is payable with a view to make good the loss of salary which is to be quantified having regard to the injury suffered by him. In this connection, he has referred to Article 310 (2) of the Constitution of India and judgment of the Supreme Court in *Parshotam Lal Dhingra Vs. Union of India (UOI)*, .

May it be stated that Clause (2) of Article no lays down that a contract under which a person is appointed in a civil post under the Constitution may provide for payment of compensation, if before the expiry of the contractual period the post is abolished. But the said provision would not be applicable to the case of member of defence service, member of all India service and member of civil service of the Union or a State. It may be seen that stress in this provision has been laid in respect of appointment of a person made on the basis of a contract against the civil post under the Constitution and such contract may provide for payment of compensation to the incumbent if the post is abolished before the expiration of an agreed period. Admittedly, the Petitioner's appointment was not against a post under the Constitution of India. His appointment was under the provisions of the 1970 Act. There was also no contract that in the event of abolition of the office of the Lokpal before expiry of five years, he would be compensated by way of payment of money. For the reasons mentioned above reference made by the learned Counsel to Article 310 (2) of the Constitution in support of his contention is misconceived.

4. Learned Counsel for the petitioner by adverting to paragraph-12 of the judgment of the Supreme Court in *Dhingra's case (supra)* submitted that this being not a case of removal under Sub-section (1) of Section 6 of the 1970 Act, the Petitioner had the right to hold office for the entire term of five years and

that right is protected under Sub-section (3) of Section 2 of the Repealing Act.

Dhingra's case (supra) regarded as locus classicus in the field of service jurisprudence in the matter of rights of the civil servant under Article 311(2) of the Constitution, although was a case of reversion of a government servant to a subordinate post, the contentions raised by the parties covered the entire content of the expression "dismissed", "removed" and "reduced in rank". In paragraph-12 of the judgment on which the learned Counsel for the Petitioner placed reliance, it has been held that in the absence of any special contract, the substantive appointment to a permanent post gives the government servant so appointed a right to hold the post until, under the rules, he attains the age of superannuation or is compulsorily retired, or the post is abolished and his service cannot be terminated except by way of punishment for misconduct, negligence, inefficiency, etc. On careful perusal of the judgment in Dhingra's case it would appear that the observation made in para-12 of the judgment has to be read along with the following conclusion culled in para-25 thereof which reads as follows:

The net result is that it is only in these cases where the Government intends to inflict these three forms of punishments that the Government servant must be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. It follows, therefore, that if the termination of service is sought to be brought about otherwise than by way of punishment, then the Government servant whose service is so terminated cannot claim the protection of Article 311 (2).

As the Petitioner was not a Government servant, applicability of Article 311 (2) of the Constitution to him does not arise. Even the principle cannot be extended, inasmuch as the termination of his appointment has resulted not due to any punishment but due to abolition of the office.

5. The next subsidiary question is the effect of repeal of the 1970 Act.

According to learned Counsel, despite repeal, Petitioner's "right" to hold the office of Lokpal for five years is not affected in view of Section 5 (c) of the Orissa General Clauses Act, 1937 (hereinafter referred to as "the Orissa Act") which reads as follows:

Section 5. Effect of repeal - where any repeals any enactment hitherto made, or hereafter to be made, then, unless a different intention appears, the repeal shall not-

(a) xx xx xx

(b) xx xx xx

(c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under any enactment so repealed; or

xx xx xx

In order to appreciate the Petitioner's contention, it is appropriate to examine Section 2 of the Repealing Act which is extracted hereunder:

Section 2(1) The Orissa Lokpal and Lokayuktas Act, 1970 is hereby repealed.

(2) On such repeal, no investigation, proceeding or remedy in relation to any right, privilege, obligation, liability, penalty, forfeiture or punishment pending under the Act so repealed shall be continued or enforced.

(3) Save as otherwise provided in Sub-section (2), the provisions of Section 5 of the Orissa General Clauses Act, 1937 shall apply to such repeal.

The saving section (Section 2 of the Repealing Act) has to be considered as a whole. Sub-section (2) thereof in unequivocal term declares that on repeal of the 1970 Act, no investigation, proceeding or remedy in relation to any right, privilege, etc. pending under the 1970 Act shall be continued or enforced. That means, all matters like; investigation, proceeding or remedy pending with the Lokpal on 16-7-1992 (date of enforcement of the Repealing Act) shall not be continued or enforced. If all such matters shall not be continued, or enforced, the continuance of the office of Lokpal is wholly redundant. At this stage, let us see what does Section 5(c) of the Orissa Act provide. Section 5 of the Orissa Act ordinarily applies when there is no saving clause in the Repealing statute or unless a different intention appear. The language and content of Sub-section (2) of section-2 of the Repealing Act evidences an intention to the contrary, as indicated above. In view of this, in our considered opinion, the right, if any, of the Petitioner to hold the office of the Lokpal for a term of five years is not preserved.

6. The contention of the Petitioner can also be considered from another angle. The right which the petitioner asserts is a right to continue in the office. It can be without any hesitation held that the appointment/employment of the Petitioner as Lokpal is a matter of status and not of contract. That being so, the abolition of the office is inherent or implied in the employment. As a consequence, upon the abolition of the office, severance from it automatically follows. The right to hold the office acquired by an incumbent attached to the office itself and it cannot exist or survive independently of the office. If the office ceases to exist due to its abolition, the right to hold office must ipso facto come to an end. The present is a case where the office of Lokpal has come to be abolished by a legislative enactment. With such abolition the Petitioner's right to hold the post automatically ceased.

The question on similar facts came up for consideration before the Judicial Committee of the Privy Council in *B.C. Reilly v. The King* 1934 Appeal Cases 176. In that case, Reilly was appointed as a member of the Federal Appeal Board established by a statute of Canada for a fixed term of years. During the currency of the appointment the Parliament of Canada abolished the office by repealing the provision which established the Federal Appeal Board and his services were terminated without providing any compensation. Lord Atkin speaking for the Judicial Committee observed as follows:

But the present case appears to their Lordships to be determined by the elementary proposition that if further performance of a contract becomes impossible by legislation having that effect the contract is discharged. In the Present case the office held by the Appellant was abolished by statute; hence forward it was illegal for the executive to continue him in that office or pay him any salary; add impossible for him to exercise his office. The jurisdiction of the Federal Appeal Board was gone. The position, therefore, seems to be this. So far as the rights and obligations of the Crown and the holder of the office rested on statute, the office was abolished and there was no statutory provision made for holders of the office so abolished. So far as the rights and obligations rested on contract, further performance of the contract had been made by statute impossible, and the contract was discharged. It is perhaps unnecessary to add that discharged means put an end to and does not mean broken....

The aforesaid opinion of the Judicial Committee clearly answers to the contention raised on behalf of the Petitioner.

It would also be profitable to refer to the following judgements of the Supreme Court in *M. Ramanatha Pillai Vs. The State of Kerala and Another*, and *S.S. Dhanoa Vs. Union of India and others*, . In Pillai's case the question came up for decision before the Constitution Bench of the Supreme Court was as to the effect of abolition of post and consequential termination of service. In para-36 of the judgment it was observed as follows:

The abolition of post may have the consequence of termination of service of a Government servant. Such termination is not dismissal or removal within the meaning of Article 311 of the Constitution. The opportunity of showing cause against the proposed penalty of dismissal or removal does not therefore arise in the case of abolition of post. The abolition of post is not a Personal penalty against the Government servant. The abolition of post is an executive policy decision. Whether after abolition of the post the Government servant who was holding the post would or could be offered any employment under the state would therefore be a matter of policy decision of the Government because the abolition of post does not confer on the person holding the abolished post any right to hold the post.

Dhanoa's case (supra) was of termination of service of Election Commissioner on abolition of post. In that case, the grievance of the Petitioner was with regard to material loss on account of cutting short of his tenure. In para-25 of the judgment it was observed as follows:

...The first part relates to the material loss on account of the cutting short of the tenure of the Petitioner. Such loss is not unknown in a service career and is one of the exigencies of employment. The creation and abolition of the post is the prerogative of the Executive, and in the present case of the President....

The power to create the posts is unfettered. So also is the power to reduce or abolish them. If therefore, the President, finding that there was no work for the

Election Commissioners or that the Election Commission could not function, decide the abolish the posts, that was an exigency of the office hold by the Petitioner....

Judging from this angle also, the claim of compensation on the ground of loss of salary for the remainder period is not tenable.

(ii) Pension with effect from 16-7-1992 This claim was to be considered keeping in view Rule 7 of the Orissa Lokpal (Conditions of Service) Rules, 1984 dealing with grant of pension which is extracted hereunder:

7. Pension-The Lokpal shall, on ceasing to hold office as such, be paid a pension for life at the rate of one thousand and four hundred rupees only per annum for each completed year of service as the Lokpal or proportionately for a part thereof;

Provided that-(i) the maximum amount of such pension shall not exceed seven thousand rupees only per annum.

(ii) in computing the proportionate pension for a part of the year, only six monthly period of completed service shall be taken into account and (iii) such pension along with other pensions that any pension is already getting shall not exceed two thousand three hundred and thirty three rupees only per month.

A bare perusal of the aforesaid Rule would show that on ceasing to hold the office the Lokpal would be paid a pension for life at the rate of one thousand and four hundred rupees only per year for each completed year of service as the Lokpal or proportionately for a part thereof. This is subject to the other three conditions mentioned in the proviso. The third condition of the proviso is relevant for our purpose which provides that such pension along with other pensions any person is already getting shall not exceed Rs 2,333/- per month. In other words, if the Petitioner is already getting "other pensions" of more than Rs. 2,333/- per month, he would not get any pension under Rule 7. It is not in dispute that the Petitioner was getting pension of Rs. 4,072/- per month as the retired Chief Justice of the High Court at the relevant time and it being more than Rs. 2,333/-, further pension is not admissible. Besides this, in view of our finding earlier recorded that with the abolition of the office of Lokpal with effect from 16-7-1992 his right to hold the office beyond that date no more survives, question of payment of pension for life therefore does not arise.

(iii) Refund of the amount of pension deducted from the salary drawn for the period from 17-8-1989 to 16-7-1992.

Sub-section (4) of Section 5 of the 1970 Act provided that Lokpal would be paid such salary as specified in the Second Schedule. The Second Schedule of the 1970 Act dealt with the salary payable to the Lokpal which is extracted hereunder:

There shall be paid to the Lokpal.....in respect of time spent on actual service,

salary at the following rates per mansum, that is to say-

Lokpal 4000 rupees.....

Provided that if the Lokpal at the time of his appointment is in receipt of pension (other than disability or bound pension) in respect of any previous service under the Government of India or any of its predecessor Government, or a Government of State or any of its predecessor Government his salary in respect of service as the Lokpal shall be reduced--(a) by the amount of that pension; and

(b)...

(c)...

By Orissa Act 8 of 1990, (i. e. the Orissa Lokpal and Lokayuktas Amendment Act, 1990) the aforesaid Second Schedule of the 1970 Act was substituted with retrospective effect from 1-8-1989. The Second Schedule, as substituted, reads as follows:

There shall be paid to the Lokpal and the Lokayuktas in respect of time spent on actual service, salary at the following rates per monsum, that is to say.

Lokpal...9,000 rupees

Lokayukta... 8,000 rupees

Provided that if the Lokpal or a Lokayukta at the time of his appointment is in receipt of, or has become entitled to, receive a pension (other than a disability or wound pension from the Government of India or from the Government of a State, his salary in respect of service as the Lokpal or, as the case may be, a Lokayukta shall be reduced

(a) by the amount of that pension; and

(b) if he has, before such appointment, received in lieu of a portion of the aforementioned pension the commuted value thereof, by the amount of that portion of the pension:

(Emphasis added)

The contention of opposite parties that since the Petitioner was getting pension of Rs. 4072/- per month as retired Chief Justice of the High Court his salary as Lokpal has to be fixed as per the amended provision which was made with retrospective effect. In substance their case is that in view of the amended provision, the Petitioner was entitled to salary of Rs. 9000/- minus Rs. 4072/- = Rs. 4928/- as Lokpal. Therefore, deduction of his pension from the salary of Lokpal is valid in law.

On a conjoint reading of the aforesaid two Schedules it would appear that "the expression "in respect of any previous service under the Government of India.... or any of its predecessor Government" appearing in the Second Schedule of the

1970 Act has been entitled and in its place the expression "from the Government of India or from the Government of a State" has been substituted. Law is now well settled that the relationship between the Government and the High Court Judges is not of master and servant and they could not be said to be holding a post under the Union/State. A retired High Court Judge, therefore, could not be said to be a person holding a pensionable post under the Union or a State. As already indicated, under the pre-amendment Schedule, the salary of Lokpal was liable to be reduced if he was in receipt of pension in respect of any previous service under the Government. The Petitioner as Chief Justice was not in service under the Government of India and was not holding permissible post. As such question of reduction of his salary in respect of service as Lokpal by the amount of pension received by him as retired Chief Justice did not arise. He was, however, in receipt of pension from the Government of India. In view of the substitution of the expression as per the amendment which reads "if the Lokpal is in receipt of.... pension from the Government of India, or any Government of any State, his salary as Lokpal get reduced by the amount of pension. He has thus been affected by the amended provision. The question is whether such amendment made with retrospective effect can be made applicable to the case at hand. Its answer lies in the second proviso to Sub-section (5) of Section 5 of the 1970 Act which provided that allowance and other conditions of service of Lokpal shall not be varied to his disadvantage after his appointment. The amendment to the Second Schedule made by Orissa Act 8 of 1980 is definitely to the Petitioner's disadvantage inasmuch as by such amendment his salary as Lokpal got reduced by the amount of pension which he was receiving as retired Chief Justice. For the reasons aforesaid the amended Schedule has to be read down to make it applicable prospectively. We are, therefore, of the opinion that the Petitioner's salary in respect of his service as Lokpal is not liable to be reduced by the amount of pension which he was getting as the retired Chief Justice. The opposite parties have acted illegally in deducting his pension from the salary of the Lokpal. They are hereby directed to refund the illegal deduction within two months of receipt of writ from this Court.

(iv) Payment of encashment value of unutilised leave which accrued to him during the period from 17-8-1989 to 16-7-1992.

Learned Counsel appearing for the opposite parties could not point out any legal bar to disentitle the Petitioner from getting this payment. In the counter affidavit, the opposite parties have admitted that the Petitioner has got 78 days of leave on full allowances to his credit for the duration of his tenure as Lokpal from 17-8-1989 to 16-7-1992. Their objection that since the Petitioner had already availed himself of 240 days" leave encashment benefit prior to his appointment as Lokpal and, as such, he is not entitled to any further leave encashment benefit as he has already exhausted the maximum benefit of 240 days has to be stated to be rejected. Leave encashment benefit which the Petitioner availed himself prior to his appointment as Lokpal has nothing to do with the entitlement to unutilised leave salary during his tenure as Lokpal. In

view of the aforesaid, the opposite parties are directed to pass necessary orders on this count in favour of the Petitioner within the time indicated above.

8. In the result, the writ petition is allowed in part. No costs.

P.K. Patra, J.

9. I agree.

Writ petition partly allowed.