

HIGH COURT OF ORISSA: CUTTACK

WP(C) No.9524 of 2018

A.F.R.

In the matter of an application under Article 226 of the Constitution of India.

Lata Naik Petitioner

Versus

State of Odisha & others Opp. Parties

For Petitioner ... Mr. Sameer Kumar Das, Adv.

For Opp. Parties ... Mr. Bikram Senapati, AGA

PRESENT:

THE HONOURABLE DR. JUSTICE A.K.RATH

Date of hearing: 21.08.2018 : Date of judgment: 21.08.2018

Dr. A.K.Rath, J Justice R.C. Patnaik (as he then was) in Narayan Sahoo and others v. State of Orissa and others, 1989 (II) OLR 394 while classifying the litigants proclaimed:

"By and large, common man is not litigation-minded nor he is averse to litigation. Litigation is not his pursuit, his hobby. Sometimes, however, he inherits litigation and willy-nilly pursues it. Often, however, a litigation is thrust on him..."

2. The petitioner belongs to the last category. The petitioner is functioning as Lecturer in Botany in Dalmia Degree College, Rajgangpur in the district of Sundargarh.

3. The brief facts of the case are that the Government of Odisha, in its Department of Higher Education, in exercise of the

power conferred by sub-section (4) of Section 7-C of the Odisha Education Act, 1969, has issued the order dated 22nd October, 2017 to regulate payment of Grant-in-Aid to Non-Government Educational Institutions (Non-Government Colleges, Junior Colleges and Higher Secondary Schools), namely, the Odisha (Aided Colleges, Aided Junior Colleges and Aided Higher Secondary Schools) Grant-in-Aid Order, 2017 ('Grant-in-Aid Order, 2017'). Clause-3 thereof deals with entitlement of the employees. On the same day i.e. on 22.10.2017 another order was issued by the Government, vide Annexure-4, prescribing the following terms and conditions;

"The employees of Non-Government Aided Colleges who are governed under the provisions of Grant-in-Aid Order 2008, Grant-in-Aid Order 2009 or Grant-in-Aid Order, 2009 (for Upashastri & Shastri Colleges) as on 31st December, 2017 and who are willing for the negotiated settlement may follow the modalities in the Annexure-A."

Annexure-A of the Modalities provides that the employee has to submit an affidavit in non-judicial stamp paper of value Rs.10/- with due notarization to the effect that he has no court case pending in any legal forum/have withdrawn the said case (as in Annexure-B). The format for affidavit, Annexure-B, stipulates that the employee has to swear an affidavit stating that he is desirous of availing the benefit of negotiated settlement offered by the Government as per the Grant-in-Aid Order, 2017; he has no court case pending before any legal forum to avail Grant-in-Aid as per Grant-in-Aid Order, 1994 or under any special provisions of any Act and Rules made for the purpose; that he has withdrawn the case bearing no.GIA/WPC/SLP or any other (specify) before the learned Tribunal/High Court/Supreme Court. Added to it, if at any

subsequent stage anything is found incorrect/false in connection with the incumbent concerned, the benefit of Grant-in-Aid as per the Grant-in-Aid Order, 2017 shall be withdrawn. He/She shall also be liable to refund the amount received by him/her within a stipulated time and in case of failure to refund, the same shall be recovered as per the provisions of Odisha Public Demands Recovery Act, 1962.

4. The grievance of the petitioner is that the terms and conditions embodied in the order dated 22.10.2017 more particularly clause-2 of Modalities, format for affidavit requiring the employee that he has no Court case pending before any legal forum to avail Grant-in-Aid as per Grant-in-Aid Order, 1994 or under any special provisions of any Act and Rules made for the purpose or that he has withdrawn the case bearing no. GIA/W.P.C./SLP or any other (specify) before the learned Tribunal/High Court/Apex Court and the declaration that if at any subsequent stage anything is found incorrect/false in connection with the incumbent concerned, the benefit of Grant-in-Aid as per the Grant-in-Aid Order, 2017 shall be withdrawn. He/She shall also be liable to refund the amount received by him/her within a stipulated time and in case of failure to refund, the same shall be recovered as per the provisions of Odisha Public Demands Recovery Act, 1962, are anathema to the ethos and philosophy embodied in the Constitution. The same are violative of Articles 14 and 21 of the Constitution.

5. A counter affidavit has been filed by the opposite parties stating therein that the State Government, in exercise of powers conferred by sub-section (4) of Sec. 7-C of the Orissa Education Act, 1969 (Odisha Act of 15 of 1969) introduced Grant-in-aid

Order, 2017 to regulate the payment of Grant-in-aid to the non Government educational institutions (non Government colleges, Junior Colleges and Higher Secondary Schools) making it effective from 1st January 2018. The Grant-in-Aid order was made applicable to the employees who are governed under the provisions of the Grant-in-Aid Order, 2008, Grant-in-Aid Order, 2009 and Grant-in-Aid Order, 2009 (for non Government Upasastri and Sastri Colleges). The employees covered under the Grant-in-Aid Order, 2017 shall receive the salary components in the following manner;

- I. For the employees receiving grant-in-aid as per GIA Order, 2009 are to receive Grant-in-aid in terms of GIA Order, 2017 = initial pay + grade pay as per ORSP Rule 2018 + 136% DA with 5 increments.
- II. For the employees receiving grant-in-aid as per GIA Order, 2008 are to receive Grant-in-aid in terms of GIA Order, 2017 = initial pay + grade pay as per ORSP Rule, 2008 + 136% DA with 2 increments.
- III. For the employees receiving Grant-in-Aid as per GIA Order, 2009 (for Upasastri and Sastri courses) are to receive Grant-in-aid in terms of GIA Order, 2017 = initial pay + grade pay as per ORSP Rule, 2008 + 136% DA with 2 increments.

Further to be governed under GIA Order, 2017, another Government order dated 22.10.2017 has been published in the extraordinary Gazette of the State Government vide SRO No.512/2017 which carries the modalities to be fulfilled by the employee concerned to be governed under Grant-in-Aid Order, 2017. The modalities have to be fulfilled by the employee concerned. The desirous employees to avail the benefit may follow the modalities and furnish information. It is further stated that the gazette notification bringing out Grant-in-Aid Order, 2017 is intended to benefit the employees as per Grant-in-Aid Order, 2009 and 2008 by covering them under direct payment pay fold scheme.

The same is never intended to discriminate any person/employee. It is further stated that the apex Court has upheld the rights of the individual employees of the non-Govt. aided colleges who do not want to comply with the conditions mentioned in the Grant-in-Aid Order, 2017 and are desirous of pursuing their independent rights. Nobody will be forced or coerced to accept the conditions. The benefits of Grant-in-Aid Order, 2017 would be given to those employees who comply with the conditions as observed by the apex Court. The others, who choose to await the outcome of their cases in the appropriate court of law will continue to draw their normal emoluments as per the terms of the valid GIA Orders applicable. As and when appropriate court order is received in such individual cases, the Government will implement such orders or prefer appeal by exploring legal opportunities available.

6. Heard Mr. Sameer Kumar Das, learned counsel for the petitioner and Mr. Bikram Senapati, learned Addl. Government Advocate.

7. Learned counsel for the petitioner submits that sub-section (4) of Section 7-C of the Odisha Education Act, 1969 contains a non-obstante clause. It provides that notwithstanding anything contained in any law, rule executive order or any judgment, decree or order of any Court, no grant-in-aid shall be paid and no payment towards salary costs or any other expense shall be made to any private educational institution or for any post or to any person employed in any such institution after the commencement of the Odisha Education (Amendment) Act, 1994, except in accordance with an order or rule made under the Odisha Education Act, 1969. Grant-in-Aid where admissible under the said rule or order, as the case may be, shall be payable from such date

as may be specified in that rule or order or from such date as may be determined by the State Government. In exercise of power conferred by sub-section (4) of Section 7-C of the Odisha Education Act, 1969, the State Government promulgated the Odisha Education (Payment of Grant-in-aid to the High School and Upper Primary Schools) Order, 1994 for the teaching and non-teaching of the schools and colleges. Subsequently another Grant-in-Aid Order was issued in the year 2008 for the school and colleges. Some of the employees filed applications under Section 24-B of the Orissa Education Act before the learned State Education Tribunal for payment of grant-in-aid pursuant to Grant-in-Aid Order, 1994. At this juncture the impugned Grant-in-Aid Order, 2017 has been issued by the Government of Odisha. According to the learned counsel for the petitioner, access to justice is the fundamental right enshrined under Articles 14 and 21 of the Constitution of India. By the executive instruction, the fundamental rights of the petitioner cannot be curtailed to approach the portals of the court. Reliance is placed on the decisions of the apex Court in the case of *Imtiyaz Ahmad v. State of Uttar Pradesh and others*, AIR 2012 SC 642 and *Anita Kushwaha v. Pushap Sudan*, AIR 2016 SC 3506.

8. Per contra, learned Addl. Government Advocate submits that the Government of Odisha have not compelled the petitioners to withdraw the case pending before the learned Tribunal nor the impugned order has deprived the petitioners from claiming grant-in-aid. It is open to the petitioners to pursue the litigation. Nobody is forced or coerced to accept the conditions enumerated in Grant-in-Aid Order, 2017. The apex Court have upheld the rights of the individual employees who do not want to comply with the

conditions mentioned in the Grant-in-Aid Order, 2017 and are desirous of pursuing their independent rights. The others, who choose to await the outcome of their cases in the appropriate court of law will continue to draw their normal emoluments as per the terms of the Grant-in-Aid Orders applicable. He further submits that the matter has been set at rest by the apex Court in the case of State of Odisha and others v. Managing Committee of Gadadhar Pradhan High School & another (M.A No.64 of 2017 in C.A No(s).2466/2017). He further submits that the apex Court has observed that those, who want to benefit by this order have to comply with the conditions mentioned therein and those, who still want to question it and want to agitate their independent rights are free to do so in accordance with law, before the appropriate forum. In view of the same, the apprehension of the petitioners is unjustified. The modalities have been prescribed after the direction of the apex Court. He further submits that an employee cannot claim grant-in-aid as a matter of right. To buttress the submission, he places reliance on the decision of this Court in the case of Laxmidhar Pati and others v. State of Orissa and others, 1996 (1) OLR (FB) 152.

9. Access to justice is a facet of the right guaranteed under Article 14 of the Constitution, which guarantees equality before law and equal protection of law to not only citizens, but also non citizens. Access to justice is a facet of right to life guaranteed under Article 21 of the Constitution as well.

10. In Imtiyaz Ahmad (supra), the apex Court held that a person's access to justice is a guaranteed fundamental right under the Constitution and particularly Article 21. Denial of this right undermines public confidence in the justice delivery system and

incentivises people to look for short-cuts and other fora where they feel that justice will be done quicker. In the long run, this also weakens the justice delivery system and poses a threat to Rule of Law. Access to justice must not be understood in a purely quantitative dimension. Access to justice in an egalitarian democracy must be understood to mean qualitative access to justice as well. Access to justice is, therefore, much more than improving an individual's access to courts, or guaranteeing representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and inequitable.

11. In Anita Kushwaha (supra), the apex Court held that access to justice is and has been recognised as a part and parcel of right to life in India and in all civilized societies around the globe. The right is so basic and inalienable that no system of governance can possibly ignore its significance, leave alone afford to deny the same to its citizens. The Magna Carta, the Universal Declaration of Rights, the International Covenant on Civil and Political Rights, 1966, the ancient Roman Jurisprudential maxim of 'Ubi Jus Ibi Remedium', the development of fundamental principles of common law by judicial pronouncements of the Courts over centuries past have all contributed to the acceptance of access to justice as a basic and inalienable human right which all civilized societies and systems recognize and enforce. Given the fact that pronouncements mentioned above have interpreted and understood the word "life" appearing in Article 21 of the Constitution on a broad spectrum of rights considered incidental and/or integral to the right to life, there is no real reason why access to justice should be considered to be falling outside the class and category of the said rights, which already stands

recognized as being a part and parcel of the Article 21 of the Constitution of India. If "life" implies not only life in the physical sense but a bundle of rights that makes life worth living, there is no juristic or other basis for holding that denial of "access to justice" will not affect the quality of human life so as to take access to justice out of the purview of right to life guaranteed under Article 21. Access to justice is a facet of right to life guaranteed under Article 21 of the Constitution. Access to justice may as well be the facet of the right guaranteed under Article 14 of the Constitution, which guarantees equality before law and equal protection of laws to not only citizens but non-citizens also. Equality before law and equal protection of laws is not limited in its application to the realm of executive action that enforces the law. It is as much available in relation to proceedings before Courts and tribunal and adjudicatory fora where law is applied and justice administered. The Citizen's inability to access courts or any other adjudicatory mechanism provided for determination of rights and obligations is bound to result in denial of the guarantee contained in Article 14 both in relation to equality before law as well as equal protection of laws. Absence of any adjudicatory mechanism or the inadequacy of such mechanism, needless to say, is bound to prevent those looking for enforcement of their right to equality before laws and equal protection of the laws from seeking redress and thereby negate the guarantee of equality before laws or equal protection of laws and reduce it to a mere teasing illusion. Article 21 of the Constitution apart, access to justice can be said to be part of the guarantee contained in Article 14 as well.

12. The ratio in the decisions cited supra apply proprio vigore to the facts of the case.

13. By the impugned order, the Government have created a distinction between the employees who are willing to avail the benefits and others to pursue the litigation in the court of law. The Government is the ideal employer. As held by the apex Court access to justice is the fundamental right enshrined under Article 14 and 21 of the Constitution. The said right cannot be cabined, cribbed or confined by the impugned order.

14. The decision cited by the learned counsel for the State in the case of State of Odisha and others v. Managing Committee of Gadadhar Pradhan (M.A No.64 of 2017 in C.A No(s).2466/2017) is distinguishable. The order does not reveal that the issue in question was raised and decided by the apex Court. The same is not a binding precedent.

15. In the State of Orissa v. Sudhansu Sekhar Misra, AIR 1968 SC 647, the Constitution Bench of the Apex Court held that a decision is only an authority for what it actually decides. The essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. It is not a profitable task to extract a sentence here and there from a judgment and to build upon it.

16. In Laxmidhar Pati and others v. State of Orissa and others, 1996 (I) OLR (FB) 152, the Full Bench of this Court held that there is no absolute right to claim Grant-in-Aid and the financial capacity, the economic potentiality and other development works of Government have to be considered in interpreting Article 41 of the Constitution of India. The Court sounded a word of caution that the Government is a free-lancer in ordering release of grant-in-aid arbitrarily and denying fair-play and by encouraging favouritism. Its decision/order in the matter of

grant/refusal of grant-in-aid must be based on sound principles and should not be whimsical or arbitrary. There is no quarrel over the proposition of law.

17. In Aruna Kumar Swain and another v. State of Orissa and others, 2014 (Supp.I) OLR (FB) 729, the Full Bench of this Court held as follows:

"Thus, if a case falls under the order covered by Section 7-C(4), it will create an enforceable right and the Court is bound to enforce the same under Article 226 of the Constitution. An enforceable right cannot be defeated on the ground of financial incapacity. There is no restriction on this Court under Article 226 to pass appropriate orders for enforcing fundamental or legal right."

18. The logical sequitur of the analysis made above is that the modalities prescribed in clause-2 under Annexure-A, clause-3 of the affidavit under Annexure-B as well as clause-3 of the declaration under Annexure-C so far as withdrawal of cases pending before different fora are arbitrary and violative of Articles 14 and 21 of the Constitution of India.

19. The writ petition is allowed. There shall be no order as to costs.

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DR. A.K.RATH, J

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (C) No(s). 31841/2018

(Arising out of impugned final judgment and order dated 21-08-2018 in WP(C) No. 9524/2018 passed by the High Court Of Orissa At Cuttack)

THE STATE OF ODISHA & ORS.

Petitioner(s)

VERSUS

LATA NAIK

Respondent(s)

(FOR ADMISSION)

Date : 10-12-2018 This petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ARUN MISHRA
HON'BLE MR. JUSTICE VINEET SARAN

For Petitioner(s) Mr. Sibor Sankar Mishra, AOR

For Respondent(s)

UPON hearing the counsel the Court made the following
O R D E R

Since this Court has not commented earlier on the legality of the order issued in it, the order passed by this Court does not come to the rescue of the State of Odisha.

We are satisfied with the legality of the order. Therefore, no case for interference is made out and the special leave petition is dismissed.

Pending application(s), if any, shall stand disposed of.

(NARENDRA PRASAD)
COURT MASTER(VIDYA NEGI)
COURT MASTER