ORISSA HIGH COURT: CUTTACK

I.A. No. 150 of 2021

(Arising out of WPC (OAC) No. 1493 of 2018)

Amar Kumar Behera ..... Petitioner

-Versus-

State of Odisha & others ..... Opp. Parties

Advocate(s) appeared in this case :-

For Petitioner	:	M/s. D. Mishra, Advocate
For Opp. Party	:	Mr. H.K. Panigrahi, Addl. Standing Counsel.

CORAM
JUSTICE SASHIKANTA MISHRA

ORDER
25th February, 2022

SASHIKANTA MISHRA, J. The petitioner has filed the I.A. seeking the following relief:

> *"I) Recall/stay the order dated 15.05.2020 under Annexure-1/a.*
> *II) Further direct the Opp.Parties not to make any recovery.*
> *III) Furter directing not to take any coercive action:*

And may pass such other order/orders as deem fit and proper"

2. The brief facts, relevant only for deciding the present application are as follows:

The petitioner had originally filed O.A. No.1493(C) of 2018 before the learned Odisha Administrative Tribunal, Cuttack Bench, Cuttack to declare the conduct of disciplinary proceeding against him as ultra vires under Rule-15 of the OCS (CCA) Rules, 1962 and Article-14 of the Constitution of India as also to declare the enquiry report as null and void. During pendency of the O.A. the second show cause notice was served upon him on 30.06.2018 proposing the punishment of dismissal from service. The petitioner approached the learned Tribunal in S.P. No. 74(C) of 2018 against such action of the authorities. By order dated 09.07.2018, the learned Tribunal, inter alia, passed the following order:

"So far as S.P. No. 74(C)/2018 is concerned, as in the meantime 2nd show cause notice has been served on the applicant on 30.06.2018 proposing dismissal from service, the applicant is directed to file show cause but no final order shall be passed without leave of the Tribunal.

The status quo as on today be maintained."

3. While the matter stood thus, vide order dated 15.05.2020, the opposite party no.1 passed an order finalizing the disciplinary proceeding and imposing the penalty of dismissal from service and for recovery of the allegedly misappropriated amount of Rs.81,02,370 /- from the petitioner. The said order is enclosed as Annexure-1/a to the I.A.

According to the petitioner, the said order is on the face of it, null and void being in direct violation of order dated 09.07.2018 passed by the Tribunal.

4. In the Reply affidavit filed by the opposite party no.1, it has been stated that the order was passed on the basis of the ratio of the decision in ***Asian Resurfacing of Road Agency Pvt. Ltd. and Another vs. Central Bureau of Investigation,*** reported in (2018) 16 SCC 299, wherein the Hon'ble Supreme Court held that in all cases where stay is granted the same will end on expiry of six months from the date of such order unless similar extension is granted by a speaking order. It is further

stated that basing on such decision, the Government of Orissa in G.A. and P.G. Department in its letter dated 29.06.2021 has advised all departments to give due regard to the said ratio.

5. In a rejoinder filed to the reply affidavit, the petitioner has basically taken the stand that the ratio of ***Asian Resurfacing*** (supra) applies only to civil and criminal trials, but not to matters before the Tribunal. It is further stated that the action of the concerned authority is self-contradictory inasmuch as even assuming that the effect of the interim order passed by the Tribunal was valid only for six months, the authorities could have proceeded against the petitioner upon expiry thereof, i.e., in January, 2019 when the Tribunal was functional, but instead they waited for nearly one and half years to take the impugned action. That apart, in its letter addressed to the learned Advocate General enclosed as Annexure-1/d to the rejoinder affidavit, the Government in Law Department had decided to file counter affidavit as also a petition for vacation of order dated 09.07.2018 passed by the learned

Tribunal and for expeditious disposal of the original application. Since the order passed by the Tribunal was a conditional order the same, according to the petitioner could not be automatically held to have been vacated/expired and being in violation thereof, is a nullity. Be it noted here that the Tribunal having been abolished, the case record was transferred to this Court and registered as WPC(OAC) No. 9418 of 2018 on 12.04.2021.

6. Heard Mr. Digambar Mishra, learned counsel for the petitioner and Mr. H.K. Panigrahi, learned Addl. Standing Counsel for the State.

7. Mr. Digambar Mishra, learned counsel would argue that firstly, the ratio of ***Asian Resurfacing*** (supra) does not apply to the case at hand and secondly, by contemplating to file an application for vacation of stay and at the same time passing the impugned order reveals a mutually contradictory stand on the part of the Government, which cannot be sustained in the eye of law. It is further argued that the Tribunal was functional till 02.08.2019 and during such time, the Government neither

challenged the interim order in question nor sought leave of the Tribunal or of this Court. Since leave was not obtained before finalizing the disciplinary proceedings, the same is a nullity as the ratio of ***Asian Resurfacing*** (supra) cannot apply to that part of the interim order. It is further contended that despite opportunity being granted by this court vide order dated 24.12.2021 to rectify the mistake, the Government has not done so.

8. Per contra Mr. H.K. Panigrahi, learned Addl. Standing Counsel has supported the impugned order by submitting that the interim order dated 09.07.2018 was not extended beyond 08.08.2018 and therefore, the Government was well within its right to finalize the disciplinary proceeding and as such, there was no need for the Government to seek leave of the Tribunal/Court. Mr. Panigrahi has also relied upon the ratio of ***Asian Resurfacing*** (Supra) and a judgment passed by a Division Bench of this Court on 19.03.2021 in W.P.(C) No. 2863/2021, wherein it was held that any stay order passed by any Court cannot remain effect beyond six

months unless a specific order has been passed by the Tribunal or Court and therefore, directed the parties to follow the directions given by the Hon'ble Supreme Court in the case of ***Asian Resurfacing*** (Supra).

9. Before delving into the merits of the rival contentions noted above, it would be relevant to state at the outset that vide order dated 24.12.2021, this court directed the learned Additional Government Advocate to examine the issue of violation of interim order passed by the Tribunal in the light of the aforesaid Supreme Court judgment in ***Asian Resurfacing*** (Supra) and further to take instructions as to whether the order in question could be revoked by the authority concerned. Since no steps in this regard were taken, by a further order dated 04.12.2022, this Court directed the State to file an affidavit indicating as to what steps have been taken to comply with the order dated 24.12.2021. Pursuant to such order, an affidavit sworn by the Additional Secretary, Forest & Climate Change Department has been filed. In the said affidavit, it is inter alia stated that after passing of

the order dated 24.01.2021 the views of the learned Advocate General were solicited, who advised to obtain the views of Law Department as to whether the order of dismissal of the petitioner dated 15.05.2021 could be revoked or not. It is further stated that accordingly the fact was endorsed to Law Department vide UOI No. 8 dated 01.02.2022 seeking its views which are still awaited and that it is a time consuming process. It is further stated that on receipt of the views of the Law Department appropriate order in the matter shall be passed by the Government. The delay in complying with the order dated 24.12.2021 has also been sought to be explained by taking the ground of increase in Covid-19 cases and the restrictions imposed thereby. The affidavit so filed is intended to be a part of the detailed reply affidavit dated 16.07.2021 filed by opposite party no.1 in the present I.A.

On a reading of the affidavit as above, this Court finds that the same does not answer the specific question posed by the Court and on the other hand, is vague and non-specific in nature evidently intended to by-

pass the pivotal issue at hand.

10. Be that as it may the relevant facts as they stand are not disputed inasmuch as on 09.07.2018 an order to maintain status quo as on that date was passed along with a direction to the petitioner to file reply to the 2nd cause notice with the rider that no final order shall be passed without leave of the Tribunal. The impugned order was passed on 15.05.2020 vide Annexure-1/a to the I.A. A reading of the same shows that though the relevant particulars of the disciplinary proceeding, the findings thereof and the penalties proposed to be imposed have been specifically mentioned along with the fact of submission of representation of the petitioner to the second show cause notice as also the concurrence of the Orissa Public Service Commission to the proposal for imposition of penalty, yet there is not a whisper with regard to the pendency of the O.A. No 1493 of 2018, then pending before the tribunal or to the interim order passed on 09.07.2018.

Secondly, though it is claimed that the said

order was passed by applying the ratio of the decision in ***Asian Resurfacing*** (Supra), such fact has also not been mentioned in the impugned order. That apart, from the letter of Law Department enclosed as Annexure 1/d to the rejoinder affidavit, it transpires that the Government had decided to file counter affidavit along with an application for vacation of order dated 09.07.2018 passed in MP No. 536(C) of 2018. Significantly, the letter bears the date 03.05.2021, by which time, the impugned order had already been issued on 15.05.2020. Yet at another place i.e., in pargraph-3 of the reply affidavit filed by the State to the I.A., the order dated 08.08.2018 has been quoted along with the averment that order dated 09.07.2018 was not in force after 08.08.2018.

From the foregoing narration it is clear that the Government has taken prevaricating pleas in the matter, which are also self-contradictory and hence, prima facie, not acceptable. Firstly, if it is held that the interim order dated 09.07.2018 was not in force after 08.08.2018 since nothing was stated in such order regarding

extension of the order dated 09.07.2018, then the question of applicability of the ratio of the decision in ***Asian Resurfacing*** (Supra) becomes redundant. Secondly, if the impugned order was issued on the basis of the ***Asian Resurfacing*** (Supra) then the inordinate delay of nearly one and half years in issuing such order ought to have been satisfactorily explained. It is stated at the cost of repetition that if according to the Government, the ratio of ***Asian Resurfacing*** (Supra) is applicable, then it was at liberty to take action soon after expiry of the period of six months from 09.07.2018, i.e., after 09.01.2019. Since the 2nd show cause notice had already been issued to which the petitioner had submitted his reply, what was the reason for keeping the matter in limbo till 15.05.2020? Moreover, as already stated, the impugned order does not contain any reference whatsoever to the purported application of the ratio of ***Asian Resurfacing*** (Supra).

Thirdly, if the Government had already issued the order of dismissal, as according to it, there was no interim order in operation, then for what reason was the

decision taken to file a petition for vacation thereof? All these questions remain unanswered which strongly persuade the Court to hold that the action of the Government cannot be countenanced in law. Even examined from a different angle, it is seen that the argument that there was no interim order beyond 08.08.2018 is untenable for the reason that on the said date the petition filed by the petitioner for amendment of the O.A. was allowed and nothing was said with regard to the order of status quo passed on 09.07.2018. Non-reference to the order dated 09.07.2018 in the order dated 08.08.2018 is sought to be projected as automatic expiration of the order of status quo. This is a fallacious argument because on 09.07.2018, it was directed to maintain status quo as on that date and not till the next date. As said earlier, on 08.08.2018, the matter was taken up for a different purpose and not for extension or vacation of the interim order passed on 09.07.2018. In any event, the order of status quo was not specifically vacated. For the above reason therefore, it cannot be said that the order of status quo granted on 09.07.2018 did not

subsist beyond 08.08.2018.

11. Coming to the next plea taken by the Government that a decision was taken to file counter affidavit and petition for vacation for stay is, on the face of it, self-contradictory, because by such time, the impugned order had already been passed. If according to the Government, there was no stay (status quo) then where was the occasion for filing a petition for its vacation?

12. Coming to the final and most important argument put forth on behalf of the Government that the ratio of ***Asian Resurfacing*** (supra) squarely applies to the facts of the case, it is observed that order dated 09.07.2018 had two parts, namely, restraining the authorities from passing any final order without leave of the Tribunal and to maintain status quo as on that date. Even assuming that the ratio of ***Asian Resurfacing*** (supra) is applicable then the same would obviously relate to the direction to maintain status quo only. But in so far as the other direction is concerned that no final order shall be passed without leave of the Tribunal, the same

can by no stretch of imagination be said to be covered under the ratio of ***Asian Resurfacing*** (supra). If the ratio is applied, it would mean that the Government was free to pass final order, but in so far as the direction to obtain leave of the Tribunal is concerned, it cannot be said that it was permissible for the Government to issue the final order without obtaining leave of the Tribunal. Since the lis pertains to the legality as well as propriety of the disciplinary proceeding, the direction to obtain leave before finalizing the same was issued with the obvious intent of safeguarding the right of the petitioner to putforth his grievance to be adjudicated upon in accordance with law. Unfortunately, by issuing the impugned order, the Government has sought to frustrate and defeat the very purpose of the original application/writ petition pending before the Tribunal/this Court. It is well settled that the Government being a model employer cannot be seen to take steps to second-guess its opponent in litigation like a private litigant. It is stated at the cost of repetition that if according to the Government there was no more restraint upon it to pass the final order,

it should have apprised the Tribunal/this Court appropriately and sought leave instead of passing a penal order on the technical ground of non-subsistence of the interim order. The purported expiry of the interim order did not give a licence to the Government to act in a manner contrary to intent of the Tribunal which, the Government being a model employer is expected to respect and abide by.

The principle that the State is a model employer and it is required to act fairly giving due regard and respect to the rules framed by it, has been time and again emphasized by the Apex Court in several decisions. In this context, it would be profitable to refer to the decision of the Apex Court in the case of ***Bhupendra Nath Hazarika and another vs. State of Assam and Others,*** reported in (2013) 2 SCC 516, paragraphs 61 to 65 of which being relevant are quoted herein below.

> *"**61.** Before parting with the case, we are compelled to reiterate the oft stated principle that the State is a model employer and it is required to act fairly giving due regard and respect to the rules framed by it. But in the present case, the State has atrophied the rules. Hence, the need for hammering the concept.*

62. *Almost a quarter century back, this Court in* ***Balram Gupta v. Union of India*** *[1987 Supp SCC 228 : 1988 SCC (L&S) 126 : (1987) 5 ATC 246] had observed thus : (SCC p. 236, para 13)*

> *"13. … As a model employer the Government must conduct itself with high probity and candour with its employees."*

In ***State of Haryana v. Piara Singh*** *[(1992) 4 SCC 118 : 1992 SCC (L&S) 825 : (1992) 21 ATC 403] the Court had clearly stated : (SCC p. 134, para 21)*

> *"21. … The main concern of the court in such matters is to ensure the rule of law and to see that the Executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16."*

63. *In* ***State of Karnataka v. Umadevi*** *(3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] (SCC p. 18, para 6) the Constitution Bench, while discussing the role of State in recruitment procedure, stated that if rules have been made under Article 309 of the Constitution, then the Government can make appointments only in accordance with the rules, for the State is meant to be a model employer.*

64. *In* ***Mehar Chand Polytechnic v. Anu Lamba*** *[(2006) 7 SCC 161 : 2006 SCC (L&S) 1580] (SCC p. 166, para 16) the Court observed that public employment is a facet of right to equality envisaged under Article 16 of the Constitution of India and that the recruitment rules are framed with a view to give equal opportunity to all the citizens of India entitled for being considered for recruitment in the vacant posts.*

65. *We have stated the role of the State as a model employer with the fond hope that in future a deliberate disregard is not taken recourse to and deviancy of such magnitude is not adopted to frustrate the claims of the employees. It should always be borne in mind that legitimate aspirations of the employees are not guillotined and a situation is not created where hopes end in despair. Hope for everyone is gloriously precious and a model employer should not convert it to be deceitful and treacherous by playing a game of chess with their seniority. A sense of calm sensibility and concerned sincerity should be reflected in every step. An atmosphere of trust has to prevail and when the employees are absolutely sure that their trust shall*

> *not be betrayed and they shall be treated with dignified fairness then only the concept of good governance can be concretised. We say no more."*

As has already been discussed hereinbefore, the action of the Government in the instant case is definitely unbecoming of its role as a model employer.

13. It is also well settled that when the Court intends a particular state of affairs to exist while it is in seisin of a lis, that state of affairs is not only required to be maintained but is presumed to exist till the Court orders otherwise. The above view was taken by the Apex Court in the case of ***Surjit Singh & Ors. vs. Harbans Singh & Ors***, reported in 1995 (6) SCC 50.

14. In the case of ***All Bengal Excise Licensees Associations vs. Raghabendra Singh,*** reported in (2007) 11 SCC 374, the Apex Court held that:

> *" a party to the litigation cannot be allowed to take an unfair advantage by committing breach of an interim order and escape the consequences thereof .....the wrong perpetrated by respondent contemnors in utter disregard of the order of the High Court should not be permitted to hold good."*

15. In view of the facts narrated above, this Court is persuaded to hold that the Government has acted in utter disregard of the Tribunal/this Court by issuing the impugned order without obtaining leave and therefore, such conduct cannot be sustained in the eye of law.

16. This brings the Court to the question as to what relief can be granted to the petitioner in the facts and circumstances of the case.

In the case of ***Manohar Lal (dead) by LRs vs. Ugrasen (dead) by LRs & Ors***, reported in (2010) 11 SCC 557, the Apex Court relying upon its earlier decision in the case of ***Gurunath Manohar Pavaskar & Ors vs. Nagesh Siddappa Navalgund & Ors*** , reported in (2007) 13 SCC 565 held that any order passed by any authority in spite of the knowledge of the interim order of the Court is of no consequence as it remains a nullity and therefore the parties are to be brought back to the same position as if the order had not been violated. In other words, in such cases, restoration of the *status quo ante* is the appropriate relief to be granted.

As has already been held hereinbefore, the Government by issuing the impugned order without obtaining leave of the Tribunal despite clear orders to do so must therefore be held to have acted in violation thereof for which the impugned order has to be treated as a nullity in the eye of law and is therefore, held as such. Consequently, the impugned order is set aside and the parties are restored to the position as existing prior to issuance of the impugned order. Further, the opposite party authorities are restrained from passing any final order in the disciplinary proceeding till finalization of the writ petition.

17. The I.A. is disposed of accordingly.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack
The 25th February, 2021/ A.K. Rana