SUPREME COURT OF INDIA

Central Elec.Supply Utility of Odisha

Vs.

Dhobei

C.A.No.9872 of 2013

(Anil R.Dave and Dipak Misra, JJ.)

01.11.2013

JUDGMENT

Dipak Misra, J.

1. Leave granted in both the special leave petitions.

2. Assailing the judgment and order dated 28.3.2012 passed by the High Court of Orissa, Cuttack in WP(C) No. 23268 of 2011 whereby the Division Bench has quashed the appointment of the respondent No. 5 herein and further directed the present appellant to recover the amount paid to the 5th respondent towards honorarium, in a public interest litigation preferred by the 1st respondent, the present appeals, one by the Central Electricity Supply Utility of Odisha (CESU) and the other by the affected person have been preferred, by special leave. The factual matrix and the bedrock of challenge being similar we shall state the facts which are requisite to understand the controversy. However, the description of the parties shall be in accordance with their rank ascribed to them in the appeal preferred by CESU.

3. The appellant-CESU has been created under Section 22 of the Electricity Act, 2003 (for brevity, "the Act") passed by the Orissa Electricity Regulatory Commission (for short "the Commission"). CESU is a deemed licensee under the Act for the distribution of electricity in the Central Zone of Odisha. It is necessary to state here that on 1.4.1996 Orissa Electricity Reforms Act, 1995 came into force providing for restructuring of the

Electricity Sector in the State of Odisha. Thereafter, Orissa Electricity Reform (Transfer of Undertakings, Assets, Liabilities, Proceedings and Personnel) Scheme Rules, 1996 came into existence and on that base a newly constituted, wholly owned Company of the Government of Orissa, namely, Grid Corporation of Orissa Limited (GRIDCO) was vested with the Transmission, Distribution and Retail Supply functions of the erstwhile Orissa State Electricity Board. On 1.4.1999 by virtue of Orissa Electricity Reform (Transfer of Assets, Liabilities, Proceedings and Personnel of Grid Corporation of Orissa (GRIDCO) to Distributions Companies) Rules, 1998, the distributions and retail Supply functions of GRIDCO were vested with in four newly constituted Distribution Companies out of which one was Central Electricity Supply Company of Orissa Limited (CESCO) which was given the responsibility of Distributions Undertakings of the Central Zone and to carry out them, granted a license for distribution of electricity by the Commission. Be it noted, 51% Shareholding and Management of CESCO vested in a private Company, namely, AES Orissa Distribution Pvt. Ltd. (AESODPL) and the balance 49% was held by GRIDCO. After coming into force of the Act on 10.06.2003 the said arrangement continued as there was nothing inconsistent with the new legislation. On 26.2.2005 as management of AESODPL abandoned the management of CESCO, the license granted in favour of CESCO was revoked by the Commission under Section 19 of the Act w.e.f. 1.04.2005. On 2.04.2005 an Administrator was appointed by the Commission for management and control of CESCO.

4. As the factual matrix would further unfurl on 8.9.2006 the Commission initiated the process for sale of utility of CESCO under Section 20 of the Act. However, as the Utility could not be sold, by order dated 8.9.2006 the Commission created a new Utility, namely, CESU and formulated Central Electricity Supply Utility of Orissa (Operation and Management) Scheme, 2006 (hereinafter referred to as "the Scheme") for Operation and Management of CESU. On 5.5.2007, the Scheme was amended by the Commission. Clause 5 of the Scheme defined the powers and functions of the Chairman, CEO (CEO), Chief Finance Officer (CFO) and Chief Operating Officer (COO). On 31.10 2007, one S.K. Dasgupta was appointed as CEO of CESU with a financial package of Rs. 22 lakhs per annum. On 31.3.2010, respondent No. 5, who had earlier served as Chairman and Managing Director of GRIDCO as well as Member of the Commission from 2001 to 2006 and had forty-five years of experience in the electricity sector was nominated as member as well as Chairman of the Management Board and of CESU without any remuneration. The Chairman was only entitled to sitting fee of Rs. 2000/- per meeting.

5. As the chronology of events would depict, Mr. S. K. Dasgupta resigned from the post of CEO on 8.8.2010 and on 10.8.2010 he was relieved. Keeping in view the smooth functioning of CESU, the Commission decided to entrust the function, duties and responsibilities of CEO to the 5th respondent with immediate effect until further orders or until alternative arrangements were made by the Commission. It was mentioned in the order dated 10.8.2010 that the 5th respondent would enjoy all the perquisites/facilities as was being given to the CEO except the monthly emoluments. It was also observed that the Commission would take a view later on regarding the desirability of giving an honorarium to the Chairman. On 12.11.2010, the Scheme was again amended and a new Clause was

inserted as Clause 4 (ix) and it was 6th Amendment to the Scheme. On that day itself the Commission fixed consolidated honorarium of Rs. 70,000/- per month for the 5th respondent.

6. After these developments, the respondent No. 1 and another filed a public interest litigation, WP (C) No. 23268 of 2011, on 26.8.2011 praying for issue of writ of "quo warranto" for quashing of the order of the Commission entrusting the functions of CEO of the CESU to the 5th respondent. It was contended before the High Court that CESU was a Government owned company and it had become a rehabilitation centre for retired persons and deadwoods at the cost of public money; that the Orissa State Electricity Board vide Office Order dated 30.8.1961 had adopted the service conditions of Government servants and GRIDCO vide its Office Order dated 25.4.1996 had adopted the regulations relating to service and allied matters for the employees of the Board transferred to GRIDCO; that asking the Chairman of the Board of Management of CESU to remain in-charge as CEO was contrary to the Scheme as amended upto 2010 vide notification dated 12.11.2010; that the appointment of the 5th respondent was contrary to Regulation 13(1)(2)(3) of GRIDCO Officers' Service Regulations which provide for appointment to grades above E- 9 shall be on a contract basis initially for a period of three years and renewable thereafter for such period(s) as the Board for the Committee of the Board may prescribe until the Officer attains the age of superannuation as provided in these Regulations; and that the third respondent was appointed contrary to law and, therefore, his appointment should be quashed and the salary drawn by him should be recovered.

7. The aforesaid contentions were resisted by the Commission contending, inter alia, that the Commission had not appointed the 5th respondent as CEO of CESU but had assigned the functions, duties and responsibilities till an alternative arrangement was made by the Commission and the said arrangement was purely ad hoc in nature; that CESCO Officers' Service Regulations had been adopted by CESU but not that of GRIDCO Officers' Service Regulations; that the 5th respondent was the Chairman of CESU in view of his bright engineering career and vast experience in the distribution sector and there has been no violation of any of the provisions of Orissa Service Code and Pension Rules; that the said temporary arrangement had been made by the Commission only for the interest of utility and larger interest of the public and consumers and CESU; that the Commission had given the 5th respondent a consolidated honorarium of Rs.70,000/- per month whereas his predecessor CEO was getting a total salary of Rs.1,67,284/-; and that the Commission asking the 5th respondent to remain in- charge as CEO was not violative of any rules or regulations.

8. A counter affidavit was filed by the CESU and the 5th respondent contending that a Public Interest Litigation of the present nature was not maintainable and in any case the Commission's handing over the charge of as CEO to the 5th respondent would not be found fault with.

9. The High Court referred to the maintainability of the writ petition and came to hold that as the post of the CEO, CESU, had not been filled in accordance with the Service Regulations of GRIDCO, the challenge to the effect that the Chairman being higher in rank than the CEO could not have been asked to discharge the function of CEO and granting honorarium of Rs.70,000/- in addition to his usual perquisites, a writ of quo warranto would lie. Thereafter, the High Court proceeded to scrutinize the order passed by the Commission asking the 5th respondent to discharge the functions of CEO as a temporary measure and opined that it has to be construed as an appointment and the person concerned was not suitable to hold the post as the service regulations do not provide for the same. The High Court referred to clause 4(iv) and clause 5 of the Scheme and the impugned order dated 12.11.2010 whereby the 5th respondent, Mr. Jena, was given Rs.70,000/- per month as a consolidated honorarium in addition to the usual perquisites being enjoyed by the CEO like telephone, vehicle, travelling allowances excluding the house rent and opined ascribing certain reasons that the said appointment was illegal and, accordingly, quashed the same. The High Court further directed for recovery of the amount from the 5th respondent. It is also apt to note here that the High Court directed that the Commission shall immediately take steps to fill up the post of CEO within a period of two months from the date of receipt of the copy of the judgment and the Chairman shall not be allowed to function till filling up of the post of CEO and some other responsible officer of CESU shall act as in-charge CEO.

10. At this stage, we think it apposite to summarise the principal reasons which have been ascribed by the High Court while setting aside the order whereby the 5th respondent was asked to function as CEO and given the consolidated honorarium:

> i) The Commission has acted illegally and arbitrarily in appointing the Chairman as the CEO, who is also one of the Members of the Board Management of CESU.
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> ii) On reading of all the relevant clauses it is very clear that the Chairman of the CESU is required to supervise the smooth functioning of the CESU and CEO is to act under the control of the Chairman. That being the position and the opp. party no. 3, who is a retired officer and the Chairman of CESU could not have been appointed as CEO.
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> iii) If the post of CEO in the organization falls vacant in view of the urgency of either temporary appointment can be made or in charge arrangement can be made for temporary period, but the same power could not have been conferred upon the Chairman as the Chairman is required to supervise and control the function of officers of the Board as well as in the Organization and, therefore, his appointment as CEO by way of an alternative arrangement is contrary to Clause 5 of the Scheme.
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> iv) It is not legally correct on the part of the Commission to appoint the Chairman as the CEO, which is contrary to the service regulations and the 5th respondent should not have been allowed to function as the CEO having regard to the nature

of powers and functions required to be discharged by the Chairman, for CEO is under the control and supervision of the Chairman. As the 5th respondent cannot supervise his own work there is violation of principles of natural justice as he cannot find out his own defects and discharge his responsibilities.

v) The Commission has acted in violation of service regulations and hence, it is case of abuse of power. That apart, propriety demanded that the 5th respondent should not have entrusted with the additional charge of CEO.

vi) The appointment being contrary to the guidelines framed by CESU, the 5th respondent becomes an usurper to the public office and hence, his appointment deserved to be quashed.

11. We have heard Mr. P.P. Rao, learned senior counsel for Central Electricity Supply Utility of Odisha, Mr. M.G. Ramachandran, learned counsel for Bijay Chandra Jena, Respondent No. 1 in person assisted by Mr. Aparajit Ninawe, learned counsel, and Mr. Rutwik Panda, learned counsel for respondent No. 4 in both the appeals.

12. Calling in question the defensibility of the judgment Mr. Rao, learned senior counsel, has advanced the following contentions: -

a) In relation to a service matter a public interest litigation is not maintainable except as far as it relates to a writ of quo warranto and in the case at hand, the High Court has failed to understand the implications of the writ of quo warranto and has not only entertained the PIL in the garb of a writ of quo warranto but further proceeded to direct recovery of the amount paid to the Chairman of the Commission while functioning as a CEO which is beyond the scope of a PIL.

b) A writ of quo warranto cannot be issued unless there is violation of statutory provisions and in the case at hand, in the absence of any statutory provision, and regard being had to the amendment of the Scheme made on 12.11.2010 wherein sub-clause (ix) has been incorporated in clause 4 enabling the Commission to allow the Chairman to discharge the functions and responsibilities of both the posts, the arrangement could not have been unsettled by the High Court.

c) The High Court has failed to appreciate that the appointing authority has the inherent power to make an interim arrangement when the post falls vacant pending selection and appointment of another eligible and suitable candidate to the post and in similar analogy giving additional charge of the post to a superior officer is not contrary to the public policy or against the interest of the institution.

d) The High Court has fundamentally misconstrued the provisions under the Act, Regulations and the Scheme and has erroneously opined that the Chairman, who was holding the additional charge, had usurped the position despite being eligible, qualified and experienced.

e) The conclusion that the Chairman, who was age barred for holding the post of CEO, should have been treated to be disqualified to hold the post, is both fallacious on facts and erroneous in law. There is no statutory provision prescribing the age. That apart, the policy decision and the advertisement do not curtail the power/authority of the Commission to make any appropriate temporary arrangement, more so, when it is so permissible under the Scheme.

13. Mr. Ramachandran, learned counsel, while reiterating the submissions made by Mr. P.P. Rao, further submitted that when the Chairman had performed the duties of the CEO, there was no justification to direct for recovery of the sum, for it is unknown to service jurisprudence and in certain circumstances amounts to beggary which is enshrined under Article 23 of the Constitution of India. The learned counsel would contend that Mr. Jena who has earned his reputation in his own field, despite the said order, had intimated CESU that he would not function and he is not functioning in praesenti.

14. Mr. Sahoo, appering in person and Mr. Aparajit Ninawe, learned counsel, who assisted him, submitted that the verdict of the High Court is absolutely flawless and relying on the additional affidavit it has been put forth that the post of CEO in CESU is a selection post which should have been filled up through a public advertisement as per the procedure of selection and, therefore, Mr. Jena could not have been allowed to hold two posts, namely, the Chairman of CESU as well as the CEO. It is further contended that there is a policy decision for filling up of posts for senior positions in CESU and that being the position, appointment of Mr. Jena is vitiated. The said policy decision has been emphatically placed reliance upon to highlight the factum of age which was 55 years in 2007. It is also asserted in the affidavit that the age limit has been enhanced to 60 years in the year 2012 but by the time Mr. Jena was asked to take over the charge he was more than 69 years and, hence, he was ineligible to hold the post.

15. Before we advert to the aforesaid submissions and the legal substantiality of the order passed by the High Court, we may refer to certain authorities that throw light on the duty of the Court while dealing with a writ of quo warranto. In *The University of Mysore vs. C.D. Govinda Rao and another*[1], Gajendrakadkar, J. (as his Lordship then was) speaking for the Constitution Bench, has stated thus:-

> "Broadly stated, the quo warranto proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty; if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of quo warranto ousts him from that office. In other words, the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right. It would thus

be seen that if these proceedings are adopted subject to the conditions recognized in that behalf, they tend to protect the public from usurpers of public office; in some cases, persons not entitled to public office may be allowed to occupy them and to continue to hold them as a result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the courts to issue writ of quo warranto is properly invoked, the usurper can be ousted and the person entitle to the post allowed to occupy it. It is thus clear that before a citizen can claim a writ of quo warranto, he must satisfy the court, inter alia, that the office in question is a public office and is held by usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not." [Emphasis supplied]

16. In High Court of *Gujarat and another vs. Gujarat Kishan Mazdoor Panchayat and others*[2]. S.B. Sinha, J., in his concurring opinion, while adverting to the concept of exercise of jurisdiction by the High Court in relation to a writ of quo warranto, has expressed thus: -

"22. The High Court in exercise of its writ jurisdiction in a matter of this nature is required to determine at the outset as to whether a case has been made out for issuance of a writ of certiorari or a write of quo warranto. The jurisdiction of the High Court to issue a writ of quo warranto is a limited one. While issuing such a writ, the Court merely makes a public declaration but will not consider the respective impact of the candidates or other factors which may be relevant for issuance of a writ of certiorari. (See *R.K. Jain vs. Union of India*[3], SCC para 74)

23. A writ of quo warranto can only be issued when the appointment is contrary to the statutory rules. (See *Mor Modern Coop. Transport Society Ltd. vs. Financial Commr. & Secy. To Govt. of Haryana*[4]. [Underlining is ours]

17. In *Centre for PIL and Another v. Union of India and Another*[5], a three-Judge Bench, after referring to the decision in R.K. Jain (supra), has ruled thus: -

"64. Even in R.K. Jain case, this Court observed vide para 73 that judicial review is concerned with whether the incumbent possessed qualifications for the appointment and the manner in which the appointment came to be made or whether the procedure adopted was fair, just and reasonable. We reiterate that the Government is not accountable to the courts for the choice made but the Government is accountable to the courts in respect of the lawfulness/legality of its decision when impugned under the judicial review jurisdiction."

18. From the aforesaid exposition of law it is clear as noon day that the jurisdiction of the High Court while issuing a writ of quo warranto is a limited one and can only be issued when the person holding the public office lacks the eligibility criteria or when the

appointment is contrary to the statutory rules. That apart, the concept of locus standi which is strictly applicable to service jurisprudence for the purpose of canvassing the legality or correctness of the action should not be allowed to have any entry, for such allowance is likely to exceed the limits of quo warranto which is impermissible. The basic purpose of a writ of quo warranto is to confer jurisdiction on the constitutional courts to see that a public office is not held by usurper without any legal authority. While dealing with the writ of quo warranto another aspect has to be kept in view. Sometimes a contention is raised pertaining to doctrine of delay and laches in filing a writ of quo warranto. There is a difference pertaining to personal interest or individual interest on one hand and an interest by a citizen as a relator to the court on the other. The principle of doctrine of delay and laches should not be allowed any play because the person holds the public office as a usurper and such continuance is to be prevented by the court. The Court is required to see that the larger public interest and the basic concept pertaining to good governance are not thrown to the winds.

19. Mr. P.P. Rao, learned senior counsel, has commended us to the decision in *Hari Bansh Lal v. Sahodar Prasad Mahto and others*[6], where the learned Judges referred to the principles laid down in *Duryodhan Sahu (Dr.) v. Jitendra Kumar Mishra*[7]. *Ashok Kumar Pandey vs. State of W.B.*[8], *B. Singh (Dr.) v. Union of India*[9], *Dattaraj Nathuji Thaware vs. State of Maharashtra*[10] and *Gurpal Singh v. State of Punjab*[11] and expressed the view thus: -

> "The above principles make it clear that except for a writ of quo warranto, public interest litigation is not maintainable in service matters."

20. Ordinarily, after so stating we would have proceeded to scan the anatomy of the Act, the Rules, the concept of the Scheme under the Act and other facets but we have thought it imperative to revisit certain authorities pertaining to public interest litigation, its abuses and the way sometimes the courts perceive the entire spectrum. It is an ingenious and adroit innovation of the judge-made law within the constitutional parameters and serves as a weapon for certain purposes. It is regarded as a weapon to mitigate grievances of the poor and the marginalized sections of the society and to check the abuse of power at the hands of the Executive and further to see that the necessitous law and order situation, which is the duty of the State, is properly sustained, the people in impecuniosities do not die of hunger, national economy is not jeopardized; rule of law is not imperiled; human rights are not endangered, and probity, transparency and integrity in the governance remain in a constant state of stability. The use of the said weapon has to be done with care, caution and circumspection. We have a reason to say so, as in the case at hand there has been a fallacious perception not only as regards the merits of the case but also there is an erroneous approach in issuance of direction pertaining to recovery of the sum from the holder of the post. We shall dwell upon the same at a later stage.

21. As advised at present, we may refer to certain authorities in the field in this regard. In

Bandhua Mukti Morcha vs. Union of India and others[12], Bhagwati, J., (as his Lordship then was) had observed thus: -

> "When the Court entertains public interest litigation, it does not do so in a caviling spirit or in a confrontational mood or with a view to tilting at executive authority or seeking to usurp it, but its attempt is only to ensure observance of social and economic rescue programme, legislative as well as executive, framed for the benefit of the have-nots and the handicapped and to protect them against violation of their basic human rights, which is also the constitutional obligation of the executive. The Court is thus merely assisting in the realization of the constitutional objectives."

22. In *Dr. D.C. Wadhwa and others v. State of Bihar and others*[13], the Constitution Bench, while entertaining a petition under Article 32 of the Constitution on behalf of the petitioner therein, observed that it is the right of every citizen to insist that he should be governed by laws made in accordance with the Constitution and not laws made by the executive in violation of the constitutional provisions. It has also been stated therein that the rule of law constitutes the core of our Constitution and it is the essence of rule of law that the exercise of the power by the State whether it be the legislature or the executive or any other authority should be within the constitutional limitation and if any practice is adopted by the executive which is in flagrant violation of the constitutional limitations, a member of the public would have sufficient interest to challenge such practice and it would be the constitutional duty of the Court to entertain the writ petition.

23. In *Neetu v. State of Punjab and others*[14], the Court has opined that it is shocking to note that Courts are flooded with large number of so called public interest litigations where even a minuscule percentage can legitimately be called as public interest litigation. Commenting on entertaining public interest litigations without being careful of the parameters by the High Courts the learned Judges observed as follows: -

> "Though the parameters of public interest litigation have been indicated by this Court in large number of cases, yet unmindful of the real intentions and objectives. High Courts are entertaining such petitions and wasting valuable judicial time which, as noted above, could be otherwise utilized for disposal of genuine cases." Thereafter, giving a note on caution, the Court stated: -
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> "Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens."

24. In *State of Uttaranchal vs. Balwant Singh Chaufal and others*[15], this Court adverted to

the growth of public interest litigations in this country, and the view expressed in various PILs and the criticism advanced and eventually conceptualized the development which is extracted below: -

"We deem it appropriate to broadly divide the public interest litigation in three phases:

> • Phase I. – It deals with cases of this Court where directions and orders were passed primarily to protect fundamental rights under Article 21 of the marginalized groups and sections of the society who because of extreme poverty, illiteracy and ignorance cannot approach this Court or the High Courts.
> • Phase II. – It deals with the cases relating to protection, preservation or ecology, environment, forests, marine life, wildlife, mountains, rivers, historical monuments etc. etc.
> • Phase III. – It deals with the directions issued by the Courts in maintaining the probity, transparency and integrity in governance."

25. In *Bholanath Mukherjee and others vs. Ramakrishna Mission Vivekananda Centenary College and others*[16], it has been laid down that public interest litigation would not be maintainable in service law cases.

26. In *Duryodhan Sahu* (supra), a three-Judge, Bench posed a question whether the administrative tribunals constituted under the Administrative Tribunals Act, 1985 can entertain a public interest litigation. A post of lecturer was created in a Government Medical College recognized by the Medical Council of India and the State Government requested the Public Service Commission to recommend a suitable candidate from the reserved list. At that stage, a third party described himself as the Secretary of a particular Surakhya Committee, filed an original application for quashing the Government order creating the post of the teacher. A grievance was also put forth that the post was not advertised. The tribunal restrained the appointment of the beneficiary, the appellant before this Court. The learned Judges opined that the administrative tribunal constituted under the said Act cannot entertain a public interest litigation at the instance of a total stranger. While so stating the three-Judge Bench opined that as the prayer was for quashment of the creation of post itself and preventing the authorities and for preventing the Government from appointing any candidate as Lecturer, the prayer would not come in the sphere of quo warranto.

27. Thus, from the aforesaid authorities it is quite vivid that the public interest litigation was initially evolved as a tool to take care of the fundamental rights under Article 21 of the Constitution of the marginalized sections of the society who because of their poverty and illiteracy could not approach the court. In quintessence it was initially evolved to benefit the have-nots and the handicapped for protection of their basic human rights and to see that the authorities carry out their constitutional obligations towards the marginalized sections of people who cannot stand up on their own and come to court to put forth their grievances. Thereafter, there has been various phases as has been stated in

Balwant Singh Chaufal (supra). It is also perceptible that court has taken note of the fact how the public interest litigations have been misutilized to vindicate vested interests for the propagated public interest. In fact, as has been seen, even the people who are in service for their seniority and promotion have preferred public interest litigations. It has also come to the notice of this Court that some persons, who describe themselves as pro bono publico, have approached the court challenging grant of promotion, fixation of seniority, etc. in respect of third parties.

28. Regard being had to the aforesaid enunciation of law relating to two spheres, namely, issue of a writ of quo warranto and the directions which are justified to be issued in a public interest litigation in the said context, we shall proceed to scrutinize the legal substantiality of the judgment of the High Court.

29. At this stage, it is necessary to understand the Scheme framed by the State Commission as per the provisions of Section 22 of the Act. As stated earlier, CESU was constituted by an order dated 8.9.2006 passed by the Commission. The Scheme was amended from time to time vide notifications dated 13.10.2006, 5.5.2007, 31.10.2007, 6.9.2008, 2.8.2010, 12.11.2010, 5.9.2011, 31.3.2012 and 17.9.2012. As per the Scheme a CEO is to be appointed on the basis of a regular advertisement published in the newspaper and the advertisement prescribes the qualification and other criteria to be satisfied by an applicant aspirant to the post of CEO. The service conditions of the CEO are decided by the State Commission taking into consideration the situation prevalent as per the resolution and orders passed by the State Commission from time to time and the said selection, is to be made in a transparent manner. It is the stand of the appellant that Mr. Jena was not appointed as CEO in accordance with the procedure. It is to be noted that he was functioning as the Chairman of CESU. Sub-clause (iv) of clause 4 of the amended Scheme dated 31.10.2007 may be reproduced with profit: -

> "The CEO, CFO, COO and CCO should not hold any other posts/office during their tenure in the CESU. The terms of office, emoluments and conditions of service of CEO, CFO, COO and CCO shall be such as to be decided by the Commission by order issued under this Scheme. The Commission may extend their tenure for a further period, as it thinks fit."

29. Clause 5(ii) of 2007 Scheme enumerated the powers and functions of the CEO. Clause 5 was amended and thereafter on 12.11.2010 further amendment was brought in. The amendment, inter alia, substituted clause 4(iv). The following was added to the existing clause 4 as clause 4(ix): -

> "Whenever needed, the power, functions and responsibilities of Chairman and CEO can be discharged by one person, designated as Chairman-cum-CEO."

30. At this stage, it may be noted with profit that the Commission vide letter dated 29.12.2007 had communicated to the CESU about the terms and conditions for appointment of CEO. It reads as follows: -

> "1. Chief Executive Officer:
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> The Scale of Pay of the Chief Executive Officers is fixed at Rs.18,400-500-22,400/-. The Basic Pay of Shri Dasgupta joining in the post of Chief Executive Officer is fixed at Rs.22,400/- per month. Besides above, he is entitled to Dearness Pay and DA at the current rate allowed by the State Government. The cost to the Company per month includes the House Rent Allowances, Medical Allowances, Books, Periodical and Telephone Allowances, Attendant's Allowances, LTC and personal Pay. Besides above, as Chief Executive Officer would be entitled to Leave Salary Contribution, Contributory Provident Fund, Service Gratuity as applicable to the post, which are included in the cost to Company?
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> The Chief Executive Officer is entitled to Conveyance Allowance of Rs.20,000/- per month for vehicle hired/owned by him along with the driver's pay + reimbursement of the cost of fuel for official duty beyond the local duty Or He is entitled to a vehicle provided by the CESU along with five liters of fuel per day for personal use. The option is to be exercised by the incumbent.
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> The personal Pay includes the Management Allowances allowed to the post of Chief Executive Officer which is the monthly pay out of Medi-claim Insurance Premium and the Life Insurance Premium. As such all Medical Expenses shall be borne by him. The Personal Pay shall be linked to the performance of the Chief Executive Officer.
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> As negotiated at the time of interview the appointment of Shri Swapan Dasgupta as CEO in CESU is initially for a period of four years on Contract Basis, which can be extended for one year depending on the necessity of the organization, performance and usefulness of the officer and the cost to company shall be limited to 10% over and above his present entitled in CESC, Kolkata.
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> The Contract can be terminated on either side by three months notice or by payment/deposit of three months' emoluments in lieu of notice."

31. When Mr. Swapan Dasgupta was appointed as CEO, the conditions of appointment were – annual package of Rs.22 lakhs with certain perquisites. After Mr. Dasgupta submitted his letter dated 9.8.2010 requesting the Commission to relieve him from the post of CEO, the Commission decided to relieve him with effect from that date. Thereafter on 10.8.2010 the Commission passed the following order: -

> "At present, Shri B.C. Jena, Chairman, CESU Management Board is closely

monitoring the overall functioning of CESU as per para 5 of the FIFTH Amendment to the Central Electricity Supply Utility of Orissa (Operation and Management) Scheme, 2006 notified by the Commission vide Notification No. CESU(O&M)/4590 dtd. 03.8.2010. It has been stipulated that the Chairman shall guide, advise and have overall superintendence and control over the CEO, CFO, COO, CCO, CPIO, Sr. G.M. (HR) and CVO for smooth and efficient functioning of the CESU. Since it will take quite some time for the selection of a CEO to make alternative arrangement, the Commission shall have now decided that the function, duties and responsibilities of CEO, CESU shall be discharged by Shri B.C. Jena, Chairman, CESU Management Board until further orders or until alternative arrangement is made by the Commission. This order will be effective from 10.8.2010.

Shri Jena will enjoy all the perquisites/ facilities as was being given to the CEO except the monthly emoluments. The Commission would take a view later on regarding the desirability of giving an honorarium to the Chairman, CESU Management Board for enabling him to discharge his duties and responsibilities as a CEO over and above the responsibilities of Chairman and his other current assignments, if any."

32. We may also note with profit that a policy decision had been taken for preparing an advertisement for appointment of the CEO at the time of Sengupta's appointment. It provided for filling up of senior positions for CESU. It stipulated that the tenure of appointment would be for a period of three years and extendable thereafter depending upon the performance and the maximum age limit of the candidate shall not exceed 55 years as on 1.9.2007. The qualification that was required was that the CEO shall be a person with drive and initiative and shall be in overall charge of engineering, finance, commerce, corporate/regulatory affairs and general management. He should at least possess a degree in electrical engineering. An added qualification of MBA/CA/FICWA from a reputed University was desirable. It was also stipulated that service experience of about 15-20 years of which at least 5 years was a must for top managerial position.

33. Mr. Sahoo has brought on record an advertisement for filling up the post for the period 2007-08. The advertisement dated 26.5.2012 has also been brought on record. True it is, it is after the judgment of the High Court and it reads as follows:-

"The Chief Executive Officer shall be a person with initiative a drive. He will be in overall charge of engineering, finance, commerce, corporate/ regulatory affairs and general management of the utility. This is a Board level position and he should at least possess a professional degree in Engineering or Management or Accountancy or Law from a reputed University. He should have at least 10 years experience in senior level managerial position in a large organization."

34. It also stipulates that the tenure of appointment would be for a period of two years and

extendable thereafter depending upon the performance of the candidate and the requirement of the organization and the applicant should not be more than 60 years of age as on 1.4.2012.

35. In this backdrop it is to be seen whether the action of the authority requiring the Chairman to remain in-charge of the CEO or to function as CEO comes within the scope and ambit of writ of quo warranto. We have already stated the principles relating to exercise of jurisdiction of the court to issue a writ of quo warranto. When a writ of quo warranto is filed, it is the obligation of the relator to satisfy the court that the office in question is a public office and is held by the usurper without the legal authority. It is the duty of the court to see whether the appointment has been made contrary to the statutory rules. Issue of institutional integrity has also to be taken into consideration when a post is filled up and that is where the manner in which the appointment came to be made or whether the procedure adopted was fair, just and reasonable are required to be seen. On a perusal of the reasons adopted by the High Court it is perceptible that it has paved a different path. It has given emphasis on the role of the Commission, the functionism of CESU, the control of the Chairman on the CEO, the violation of the principles of natural justice, the nature of appointment, the abuse of power by the Commission and the violation of the regulations in such appointment. In our opinion, most of the reasons that have been given by the High Court are totally unrelatable to the sphere of issue of writ of quo warranto. We are only required to see whether the Commission had the authority to make any temporary arrangement and whether the 5th respondent was eligible for the said purpose. To understand the said facet, we have to refer to certain provisions of the Act which encapsulate the basic map of the functions of the licensees and the utility service. Section 19 of the Act deals with revocation of licence of a licensee. Section 20 provides for sale of utilities of licensees. It prescribes the procedure and the arrangements to be made by the Commission. Till the licence is sold, the Commission has been authorized to make interim arrangements. It has been conferred the power to appoint Administrator of the utility. Section 22 takes care of the situation where no purchase takes place, that is to say, when the utility is not sold in the manner provided under Section 20 or Section 24. We think it necessary to reproduce Section 22 of the Act: - "22. Provisions where no purchase takes place. – (1) If the utility is not sold in the manner provided under section 20 or section 24, the Appropriate Commission may, to protect the interest of the consumers or in the public interest, issue such directions or formulate such Scheme as it may deem necessary for operation of the utility.

> (2) Where no directions are issued or Scheme is formulated by the Appropriate Commission under sub-section (1), the licensee referred to in section 20 or section 24 may dispose of the utility in such manner as it may deem fit.

Provided that, if the licensee does not dispose of the utility, within a period of six months from the date of revocation, under section 20 or section 24, the Appropriate Commission may cause the works of the licensee in, under, over, along or across any street or public land to be removed and every such street or public land to be reinstated, and recover the cost of such removal and reinstatement from the licensee." From the aforesaid provision,

it is limpid that the Commission has been conferred power to formulate a Scheme or issue directions in the public interest so that operation of the utility service is not put to hazard.

36. In the case at hand, as has been stated earlier, the utility service came into existence after formulation of a Scheme. The Scheme has been amended from time to time. The High Court has referred to clause 4(iv) and clause 5 of the Scheme. We think it appropriate to reproduce clause 4(iv) and clause 5 of the Scheme as reproduced by the High Court: -

> "(iv) The CEO, CFO and COO should not hold any other posts/office during their tenure in the CESU. The terms of office, emoluments and conditions of service of CEO, CFO and COO shall be such as to be decided by the Commission by order issued under this Scheme. The Commission may extend their tenure for a further period, as it thinks fit." xxx xxx xxx Clause 5 :
>
> "(i) Chairman
>
> (a) He shall preside over all Board Meetings.
>
> (b) He shall guide, advice and have overall superintendence and control over the CEO, CFO and COO for smooth and efficient functioning of the CESU.
>
> (c) He shall decide all the matters referred to him by the Board.
>
> (d) He shall discharge all other duties assigned by the Commission under the Scheme.
>
> (ii) Chief Executive Officer (CEO) Subject to overall supervision, control and delegation of power by the Management Board and directions of the Commission –
>
> (a) He shall act as Chief Executive and Chief Spokesman of the CESU.
>
> (b) He shall manage the day-to-day affairs and management of CESU and shall represent the CESU before the Commission and other Authorities.
>
> (c) He shall carry out and implement the orders and directions issued by the Commission to the CESU.
>
> (d) He shall carry out and implement the resolutions/decisions taken by the Management Board.
>
> (e) In consultation with the Management Board, he shall design and implement the organizational structure and management of the CESU.
>
> (f) In the name and on behalf of the CESU, he shall enter into contract with all

external agencies and take loans from funding/financial institutions.

(g) On behalf of the CESU, he shall discharge all its statutory/regulatory requirement and obligations.

(h) Any other function as may be assigned by the Commission or the Management Board from time to time under the Scheme.

(i) The CEO shall report to the Chairman."

37. After reproducing the same the High Court has opined thus: -

"On reading of all the aforesaid relevant clauses it is very clear that the Chairman of the CESU is required to supervise the smooth functioning of the CESU and Chief Executive Officer is to act under the control of the Chairman. That being the position and the opp. party no. 3, who is a retired officer and the Chairman of CESU could not have been appointed as Chief Executive Officer. If the post of Chief Executive Officer in the Organization falls vacant in view of the urgency of either temporary appointment can be made or in charge arrangement can be made for temporary period, but the same power could not have been conferred upon the Chairman as the Chairman is required to supervise and control the function of Officers of the Board as well as in the Organization, therefore his appointment as Chief Executive Officer as an alternative arrangement is contrary to Clause 5 of the Scheme referred to supra. The powers and functions of the Chief Executive Officer have been extracted above. Further, as could be seen from the impugned order, the appointment in question is styled as temporary in nature. If the post falls vacant, it is the duty of the Commission to see that the post is filled up by following the service regulations."

38. Thereafter, the High Court has referred to the resolution dated 12.11.2010 by which the Commission had allowed Mr. Jena to continue as Chairman-cum-CEO to discharge the duties and responsibilities until further orders and was extended the benefit of consolidated honorarium of Rs.70,000/- per month in addition to the usual perquisites as enjoyed by the CEO. After so stating, the High Court has proceeded to express thus: -

"24. The contention urged on behalf of opp. party no. 2- Secretary, OERC is that only temporary arrangement has been made fixing a monthly honorarium of Rs.70,000/- which is payable to the Chief Executive Officer. It is unknown to the service jurisprudence that an employee/officer who is put in charge of another office or post in addition to his own duty is to be granted honorarium. The same is totally impermissible in law. On reading Annexures-3 & 5, we are of the view that it is not legally correct on the part of the Commission to appoint the Chairman as the Chief Executive Officer, which is contrary to the service regulations. opp. party no. 3 should not have been placed on temporary arrangement as the Chief

Executive Officer having regard to the nature of powers and functions required to be discharged by the Chairman who has been put in charge of the Chief Executive Officer who is under the control and supervision of the Chairman. He cannot supervise his own work which is the violation of principle of natural justice. He cannot find out his own defect and discharge his responsibilities.

25. Therefore, we are of the view that the Commission has acted illegally and in violation of service regulations placing the opp. party no.3 in the post of Chief Executive Officer and further granting him honorarium w.e.f. 11.08.2010 vide letter dated 12.11.2010 under Annexure-5, which is a clear case of abuse of power of the Commission and the said appointment order is without authority of law and opp. party no.3 should not have been entrusted with the duties, functions and responsibilities of the CEO while functioning as Chairman of CESU. Therefore, we are of the view that both Annexures-3 & 5 are liable to be quashed and the same are accordingly quashed and a writ of quo warranto is issued forthwith as the opp. party no.3 is not competent to hold the post of Chief Executive Officer of CESU."

39. We have reproduced the order in extenso because we are of the considered opinion that the reasons are flawed. The Commission has the power under the Scheme to give additional charge of CEO to the Chairman. The Scheme is framed by the Commission. The whole thing is controlled by the language used in the Scheme. The High Court, instead of appreciating the eligibility of the 5th respondent, has adverted to the concept of internal administration of CESU, that is, CEO is required to report to the Chairman and if the Chairman remains in charge, his actions may go without scrutiny. The assumption in this regard is not correct. The Board has the overall power of supervision and management. That apart, the power is vested with the Commission to do so under the Scheme. The High Court has also referred to certain provisions about the regulations. Needless to emphasize, the said regulations operate in a different field altogether and have nothing to do with any appointments under the Scheme. The only thing which has been highlighted by the 1st respondent is that it was accepted by the High Court that he was a retired officer and was appointed as Chairman and further was asked to remain in charge of CEO and was given some honorarium, which is impermissible. In fact, what is submitted is that he becomes an appointee in respect of two posts which the law does not countenance. The said submission suffers from a fundamental fallacy. The Chairman of CESU is a honorary post. He was getting sitting fees for attending the meetings. He was not even given a fixed honorarium. Therefore, to conclude that he was holding two posts and drawing salary for both the posts is factually incorrect.

40. The whole thing has to be scrutinized from the point of view of power. Suitability or eligibility of a candidate for appointment to a post is within the domain of the appointing authority. The only thing that can be scrutinized by the Court is whether the appointment is contrary to the statutory provisions/rules. In *Hari Bansh Lal* (supra) the Court took note of the stand of the Law Officer of Jharkhand State Electricity Board and commented on the somersault in the stand made by the State and thereafter proceeded to note that the

appellant Hari Bansh Lal had retired in 1985 and there is no prescription for upper age limit for appointment as Member or Chairman of the Board. The Court took note of the encomiums by the Electricity Board and the State Government before the High Court. Eventually, the learned Judges opined thus: -

> "43. Though, in the PIL, the writ petitioner has mentioned the age of Mr. Lal as 90, it is factually incorrect and Mr Lal himself swore an affidavit and asserted and it is not disputed by the State that he is 84 as on date and according to him, he is hale and healthy. We have already reproduced the stand of the State Government before the High Court about his qualification and service rendered as Member and Chairman in the State Electricity Board." xxx xxx xxx "45. Taking note of all these relevant factors and of the fact that admittedly, there is no age-limit prescribed in the rules for appointment to the post of Chairman and also with regard to the stand of the State Government about the qualification as well as good service rendered by the appellant, we feel that in the event of quashing the High Court's order, he should be allowed to continue as Chairman of the Electricity Board."

41. Keeping the aforesaid opinion in mind, we shall address to the controversy in the case at hand. From the factual depiction it is seen that though the policy and the Scheme provide that the age of the candidate shall not exceed 55 years as on 1.9.2007, yet the tenure is extendable thereafter depending upon the performance. We have referred to the same only for the purpose that though there is a maximum age limit at the time of submission of an application, yet the term can be extended. It may be apposite to note here that even if the maximum age limit is provided for submission of application and the period of appointment is three years, it is extendable depending upon the performance. Having regard to the nature of language used, it is to be construed that it is a contract appointment to choose a highly qualified and skilled person. The extension is also dependent upon performance. No limit is provided for number of extensions. It would depend upon the capability, efficiency and suitability as adjudged by the employer. Needless to say, for grant of extension the person would not have a right. Similarly his continuance for the term of three years will depend upon the nature of appointment letter issued to him. Thus viewed, we are inclined to think that the principle stated in Hari Bansh Lal's case would get attracted. That apart, there is no maximum age limit for Chairman. He holds a higher post and his experience and capability have been appreciated by the Commission. It is a well known principle that the employer can ask an officer to remain in charge of another office till the said post is filled up. It is within the permissible authority of the employer. Under the Scheme the Chairman was not getting any remuneration. He was only getting sitting fees. Looking at his ability and efficiency the Commission thought it appropriate that he should be given the charge of CEO and accordingly an honorarium was fixed. Honorarium was not equivalent to the salary. The High Court has erroneously opined that it was an appointment. The 5th respondent was not getting two sets of salary. Thus analysed, we have no hesitation that the reasons ascribed by the High Court to quash the arrangement are unacceptable and, accordingly, the decision on that score deserves to be lancinated and we so do.

42. We may proceed to state that once we have dislodged the the decision of the High Court whereby it has opined that the Chairman could not have been allowed to remain in-charge of CEO as a logical corollary the direction for recovery gets annulled. But we think it appropriate to add something. Even in a writ of quo warranto while declaring that a person is not eligible to hold the post had rendered service, we are disposed to think, there cannot be recovery of amount. While exercising the power for issue of writ of quo warranto the Court only makes a public declaration that the person holding the public office is a usurper and not eligible to hold the post and after the declaration is made he ceases to hold the office. Till the declaration is made, the incumbent renders service and when he has rendered service he cannot be deprived of his salary. Denial of pay for the service rendered tantamount to forced labour which is impermissible. When an appointment is admitted and the incumbent functions in the post and neither suspended nor removed from service, he is entitled to get salary, for it is his legal right and it is the duty of the employer to pay it as per the terms and conditions of the appointment. The matter may be different when someone continues after retirement by a false declaration or misrepresentation. Recovery of salary would amount to deprivation of payment while the incumbent was holding the post and had worked. Asking someone to work and when his appointment is nullified by issue of a writ of quo warranto by the Court, we think that neither the employer can recover the amount nor the Court can direct for recovery of the same. There has to be some other reason for denial of payment, recovery of salary or honorarium. In this context, we may fruitfully reproduce a passage from People's *Union for Democratic Rights and others vs. Union of India and others*[17]: -

> "... if a person has contracted with another to perform service and there is consideration for such service in the shape of liquidation of debt or even remuneration he cannot be forced, by compulsion of law or otherwise, to continue to perform such service, as that would be forced labour within the inhibition of Article 23. This Article strikes at every form of forced labour even if it has its origin in a contract voluntarily entered into by the person obligated to provide labour or service (vide *Pollock v. Williams*[18]. The reason is that it offends against human dignity to compel a person to provide labour or service to another if he does not wish to do so, even though it be in breach of the contract entered into by him. There should be no serfdom or involuntary servitude in a free democratic India which respects the dignity of the individual and the worth of the human person."

43. In view of the aforesaid analysis we are of the resolute opinion that even while issuing a writ of quo warranto there cannot be any direction for recovery of the sum. While entertaining a PIL pertaining to a writ of quo warranto we would add that it is the obligation of the court to pave the path which are governed by constitutional parameters and the precedential set-up. It is to be borne in mind that laws are commended to establish a society as required by the paradigms laid down by law. The courts while implementing law may not always be guided by total legalistic approach but that does not necessarily

mean to move on totally moralistic principle which has no sanction of law. We have been constrained to say so as we find that there is a temptation to say something in a public interest litigation which can be construed as the overreach. It needs no special emphasis to state that formulations of guidelines or directions issued are bound to be within the constitutional parameters.

44. The matter may be viewed from the point of view of the 5th respondent. True it is, his remaining in-charge of the post of the CEO was called in question before the High Court in a public interest litigation wherein a writ of quo warranto was issued. A judgment can be erroneous but when there is a direction for recovery of the honorarium, it indubitably creates a dent in the honour of a person. Honour once lost may be irredeemable or irresuscitable. Mr. Ramachandran has number of times submitted before us that because of the humiliation faced, the 5th respondent decided not to continue in the post of the Chairman also. We have stated so because we strongly feel that a cautious approach is requisite while dealing with a writ of quo warranto.

45. Resultantly, the appeals are allowed and the judgment and order passed by the High Court is set aside. In the facts and circumstances of the case there shall be no order as to costs.

Judgment referred

[1]*AIR 1965 SC 0491*

[2]*2003 (4) SCC 0712*

[3]*1993(4) SCC 0119*

[4]*2002 (6) SCC 0269*

[5]*2011 (4) SCC 0001*

[6]*2010 (9) SCC 0655*

[7]*1998 (7) SCC 273*

[8]*2004 (3) SCC 349*

[9]*2004 (3) SCC 363*

[10]*2005 (1) SCC 590*

[11]*2005 (5) SCC 136*

[12]*AIR 1984 SC 0802*

[13]*AIR 1987 SC 0579*

[14]*AIR 2007 SC 758*

[15]*2010 (3) SCC 0402*

[16]*2011 (5) SCC 464*

[17]*1982 (3) SCC 235*

[18]*322 US 4: 88 L Ed 1095*