

A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) NO.576 of 2012

(In the matter of an application under Articles 226 & 227 of the Constitution of India).

K. Tapas Kumar Behera ***Petitioner***

-versus-

MD. O.H.P.C and others ***Opposite Parties***

For Petitioner : ***Mr. K. Pattanayak, Advocate***

For Opposite Parties : ***Mr. P.K. Rout, Advocate***

W.P.(C) NO.4940 of 2011

(In the matter of an application under Articles 226 & 227 of the Constitution of India).

Sasmita Parhi ***Petitioner***

-versus-

OHPC Ltd. and others ***Opposite Parties***

For Petitioner : ***Mr. K. Pattanayak, Advocate***

For Opposite Parties : ***Mr. P.K. Rout, Advocate***
Mr. M.R. Dhal, Advocate

W.P.(C) NO.32791 of 2011

(In the matter of an application under Articles 226 & 227 of the Constitution of India).

Smruti Sagar Mohanty ***Petitioner***

-versus-

O.H.P.C Ltd. and others ***Opposite Parties***

For Petitioner : ***Mr. K. Pattanayak, Advocate***

For Opposite Parties : ***Mr. P.K. Rout, Advocate***

★ **W.P.(C) NO.5302 of 2012** ★

(In the matter of an application under Articles 226 & 227 of the Constitution of India).

Sumit Shankar Kundu ***Petitioner***

-versus-

State of Orissa and others ***Opposite Parties***

For Petitioner : ***Mr. K. Pattanayak, Advocate***

For Opposite Parties : ***Mr. P.K. Rout, Advocate***

CORAM:

JUSTICE V. NARASINGH

DATE OF FINAL HEARING :19.12.2023

DATE OF JUDGMENT: 20.12.2023

V. Narasingh, J.

1. This Writ Petition has been filed challenging the order dated 17.09.2009 vide Annexure-4 directing execution of second bond for Rs.1,50,000/- (Rupees One Lakh Fifty Thousands) and the agreement vide Annexure-5.

2. Batch of Writ Petitions were filed by the different Petitioners assailing the decision of Odisha Hydro Power Corporation Limited (herein after referred to as "OHPC") whereby the Petitioners were compelled to deposit an amount of Rs.1,50,000/- (Rupees One Lakh Fifty Thousands) each towards Bond amount in terms of the Bond they executed at the time of their engagement in Corporation, as they have got better service opportunity in other places to work and wanted to resign from OHPC before the completion of agreed bond period of three years, in the face of earlier agreement at Annexure-3 stipulating that the Petitioners are liable to pay amount of Rs.50,000/-, Rs.40,000/- and Rs.30,000/-, if they leave the service of the Corporation in 1st, 2nd and 3rd years of service respectively.

3. Since the principal issue to be decided in all the cases is common i.e. whether a Bond with stipulation to pay certain amount in case of resigning the service before completing the

agreed tenure of service is justified and if so whether the amount quantified therein is reasonable in terms of not only the conditions laid down in the bond but also in the light of the principle decided inter alia by the Apex Court, all the matters were heard together and disposed of by this common order on the consent of the Parties.

3.A. The Writ Petition bearing W.P.(C) No. 576 of 2012 has been treated as the lead case, to answer the aforesaid issue, as agreed upon by the Parties during the course of hearing.

4. Heard Mr. K. Pattanayak, learned counsel for the Petitioner and Mr. P.K. Rout, learned counsel for the Opposite Parties-OHPC.

5. The Petitioner applied for the post of Management Trainee (HRD) in terms of an advertisement issued by OHPC dated 9th February 2009. Offer of appointment was issued on 12th June 2009 advising him to join on 13.07.2009 by furnishing report to the Deputy General Manager (HRD) at OHPC Training Centre, Bhubaneswar. In the said appointment letter, it was also indicated that the Petitioner has to submit a service bond of Rs.50,000/- (Rupees Fifty Thousands) only for 3 years on a stamp paper as per the draft made by the OHPC Ltd. on 02.07.2009. The Petitioner accordingly furnished bond of Rs.50,000/- (Rupees Fifty Thousands) in favour of the OHPC on 02.07.2009. It was further stipulated in the said bond that an employee has to work for a minimum period of 3 years and in case he leaves within one year then he has to pay Rs.50,000/-

(Rupees Fifty Thousands) and if he leaves during second and 3rd year of his service then he has to pay Rs.40,000/- (Rupees Forty Thousands) and Rs.30,000/- (Rupees Thirty Thousands) respectively.

6. It is contended by the Petitioner that after letter of appointment was issued and the Petitioner joined and executed the service bond on 2nd July 2009, a subsequent decision by OHPC. was communicated vide letter dated 17th September 2009 (Annexure-4) directing to execute a bond for Rs.1,50,000/- which is not sustainable and such bond executed by the Petitioner was not willful rather it was under compelling circumstances and he was forced to sign such a bond even though he had already executed a bond since 2nd July 2009 (Annexure-3). The Petitioner admits that he executed a bond of Rs.1,50,000/- on 05.10.2009 but under duress as he has no alternative.

7. Relevant extract of Annexure-2 (order of selection) and Annexure-3 (Agreement) is culled out hereunder;

Annexure-2:-

“xxx xxx xxx

To

MR. K TAPAS KUMAR BEHERA

KRISHNA NAGAR

GOVT. HOSPITAL JUNCTION

PARALAK HEMUNDI

GAJAPATI

PIN-761200 (ORISSA)

Dear Sir,

With reference to your application and subsequent interview held on 27.05.2009, we

have the pleasure to inform you that you have been selected for engagement as **Management Trainee (HRD)** in OHPC Ltd. On your joining, you will be governed by the following terms & conditions of the Corporation.

1. You will have to execute a **service bond of Rs.50,000/- (Fifty thousand)** only to serve the Corporation for three (03) years including the training period on a stamped paper of Rs.20/-. A draft copy is enclosed.

2-8. xxx xxx xxx

9. You are advised to **join on 13.07.2009** and report to the **Deputy General Manager (HRD)**, at the **OHPC Training Centre, Infosys Road, Bhubaneswar**, failing which your offer of engagement shall be cancelled summarily.

10. xxx xxx xxx

The Management reserves the right to amend any of the terms and conditions without notice and assigning any reason thereof.

xxx xxx xxx”

Annexure-3:-

“AGREEMENT

AN AGREEMENT made this 2nd July day of 2009 BETWEEN THE Orissa Hydro Power Corporation Ltd., a company incorporated under the Indian Companies Act, 1956 having its registered office at Bhubaneswar, Police Station and Post Office, Saheed Nagar, Bhubaneswar, Dist- Khurda and different unit Projects/Plants in

the State of Orissa acting through Sri/Smt-
..... Its
duly empowered in this behalf (hereinafter called
the "Corporation" which expression shall unless
inconsistent with the context include its
successors and representatives) of the **first party**,
AND Sri K. TAPAS KUMAR BEHERA aged 27
..... yrs., son/ ~~daughter~~ /wife of Sri K ANANDA
RAO by profession Assr. Manager
(MT.resident of PARALAKHEMUNDI P.S
PARALAKHEMUNDI & P.O.
PARALAKHEMUNDI Dist. Gajapati (ORISSA)
(hereinafter for the sake of brevity called the
"Trainee" which expression shall unless in-
consistent with the context include the heirs,
successors and representatives) of the second
party.....

xxx xxx xxx

1. That during the continuance of this agreement Sri/Smt. K TAPAS KUMAR shall not enter the service or employment of any other individual, firm, company, authority or government and **shall not leave the employment** under this Corporation 1st Party) **before completion of three years** from the date of joining in the service. If Sri / Smt. K TAPAS KUMAR leaves the Corporation in his first year of service he has to pay a sum of **Rs.50,000/- Rs.40,000/- and Rs.30,000/-** in his 1st, 2nd, 3rd year of service respectively for violating the agreement.
2. That **no application** of Sri/Smt. K TAPAS KUMAR for employment **shall be**

forwarded by the management during the three years of the bond period.

XXX XXX XXX”

8. The Petitioner completed one year of training and thereafter, his services were regularized. While continuing as such, he was selected for the post of Assistant Officer (Personnel and Administration) under CIPET as per appointment letter dated 23rd December 2011 at Annexure-7.

9. Though he had applied for the same post after obtaining NOC from OHPC Ltd, after being selected, when the Petitioner tendered his resignation before the Corporation on 24.12.2011 through proper channel, he was verbally advised to pay an amount of Rs.1.5 lakh for his early separation of service from OHPC and as a condition precedent for acceptance of his resignation, in terms of the impugned order and agreement at Annexures-4 & 5 respectively.

10. Relevant extract of impugned order at Annexure-4 (Petitioner's name at Sl. No.4) and Annexure-5 are culled out hereunder for convenience of ready reference;

Annexure-4:-

“XXX XXX XXX

Sub: Execution of Service Bond of Rs.1,50,000/- (One lakh fifty thousand) only – Regarding.

Sir,

Please find enclosed herewith a draft service agreement bond of Rs.1,50,000/- (One lakh fifty thousand) only to be executed by all the MTs, 2009

posted in the units of OHPC. In this regard, you are requested to serve the copies of agreement bond to the following trainees for immediate execution of the same on a stamp paper of Rs.20/- (Twenty) only.

xxx xxx xxx

Annexure-5:-

“xxx xxx xxx

NOW THEREFORE, it is hereby mutually agreed between and by the Parties as under.

1. That, (during agreement period Sri/Smt. K. TAPAS KUMAR BEHERA shall not enter the service or employment of any other individual, firm, company, authority or government and shall not leave the employment under this Corporation (1st Party) before completion of 03 (three) years from the date of joining the service.) If Sri/Smt leaves the Corporation before completion of 03 (three) years, he/she shall have to pay a sum of **(One lakh fifty thousand) only** for violating the agreement.

xxx xxx xxx”

11. It is contended by the Petitioner that since from the date of engagement till the date he tendered resignation, he has completed 2 years and 5 months in the organization, therefore, he cannot be compelled to pay an amount of Rs.1.5 lakh as out of the mandatory 3 years of service, he had already completed a

substantive period in the organization. As such, no prejudice is caused to the organization (OHPC) because of his early separation from OHPC on account of resignation before completing 3 years of service, since few months were left for completing 3 years.

12. Accordingly, the Petitioner finding no other way and no alternative efficacious remedy, has preferred this Writ Petition with a prayer to direct the OHPC to quash the decision enhancing the bond amount in terms of Annexure-4 dated 17.09.2009 so also the execution of the second agreement under Annexure-5 which was stated to have been signed by the Petitioner under duress.

13. The OHPC opposed the contentions of the W.P.(C) by filing a counter affidavit denying the allegation by the Petitioner and justified the requirement to execute the subsequent agreement/ bond inter alia stating that the prejudice is caused to the organization in case of early separation from organization. Inasmuch as, huge amount has been spent for training, developing the quality of professionals for a period of one year.

14. While admitting that pursuant to advertisement dated 9th February 2009 the Petitioner was selected and appointed as per appointment letter on 12th June 2009 and one of the stipulation was that the Petitioner was to execute a “service bond” of Rs.50,000/- for serving the Corporation minimum for a period of 3 years.

15. But it is also indicated in the said letter of appointment that the management reserves the right to amend any of the terms and conditions. Invoking such liberty indicated in the appointment letter, a direction was issued to execute the bond agreement with an amount of Rs.1,50,000/- vide Annexures - 4 and 5 impugned herein.

16. It is submitted by learned counsel for the OHPC that decision to enhance the bond amount is not arbitrary rather the basic reason for fixing such enhanced bond amount was that newly recruited executives should not leave the organization within 3 years of recruitment as it dislocate the works of different power houses functioning in the State under the Opposite Party-Corporation, and that the corporation had also incurred heavy expenses towards the recruitment process as well as while imparting the quality training to such recruitees.

17. Accordingly, a conscious decision was taken by the Board of Directors of OHPC Ltd. to enhance the bond amount to Rs.1,50,000/- and the copy of such decision of Board of Directors is annexed to the counter as Annexure-D and extracted hereunder;

**“ EXTRACTS TAKEN FROM THE MINUTES
OF 94TH MEETING OF THE BOARD OF
DIRECTORS OF OHPC LTD. HELD ON 10TH
JULY, 2009.**

Item No.94/5 (I)

Enhancement of the Bond amount for the executives.

As resolved in Item No.94/5 (b), considering the high cost involved in providing quality training to the new batch of recruitees, the bond amount shall be a lump sum amount of Rs.1.50 lakh (Rupees one lakh and fifty thousand) for all those being appointed fresh in OHPC but leave the employment within 3 (three) years from the date of joining the service of the Corporation including the training period.

The Board further advised to get this decision implemented with the present batch of recruitees.

xxx xxx xxx”

18. The Opposite Parties have also stated that the Bond for Rs.50,000/- even though executed by the Petitioner was never accepted by the management and the Petitioner had accepted the terms and conditions executed in the bond for Rs.1,50,000/- without any objection rather he submitted the bond for Rs.1,50,000/-. Hence, on the ground of acquiescence, the W.P.(C) is liable to be rejected.

19. With respect to relieving the Petitioner, it is contended by the Opposite Parties that in terms of interim order dated 13th January, 2012 of this Court after depositing a sum of Rs.50,000/- the Petitioner was relieved from OHPC Ltd. service with effect from 27th January 2012.

20. Relying upon the decision of Board of Directors of OHPC Ltd. held on 10th July 2009 extracted herein above, it is emphasised that the training cost comes to the tune of Rs.43,95,255/-. Therefore, the Board in its 94th meeting decided to enhance the bond amount to deflate training cost and to discourage the employees from leaving the organization (OHPC) before serving for at least 3 years. It was further urged on behalf of OHPC in order to avoid unnecessary expenditure in resorting to further recruitment process in the event a selectee leaves the corporation before 3 years execution bond of Rs.1,50,000/- by new recruits was prescribed.

21. It is apt to note that the Petitioner has submitted a rejoinder affidavit.

22. It is contended by the Petitioner that the conditions of the advertisement and subsequent offer made through appointment letter followed by submission of "Bond" by the Petitioner cannot be superceded and rendered otiose by the subsequent service Bond with retrospective effect.

23. It is contended by the Petitioner that since a contract is already in force by execution of a bond in terms of offer of appointment for an amount of Rs.50,000/- and had never been rejected/alterd or disputed by the OHPC, subsequent enhancement of the service bond amount at a later stage unilaterally is not permissible. Since, it ex-facie runs contrary to the conditions already agreed and acted upon. It is further stated by the learned counsel for the Petitioner that since the impugned

service bond for Rs.1,50,000/- was executed under duress, the same has to be set-aside.

23.A. To fortify contentions relating to the arbitrariness in enhancing the service bond amount, the Petitioner has further contended that no reason has been assigned by the Board of Directors save and except escalation in imparting training cost, to revise the service bond unilaterally enhancing the amount to Rs.1,50,000/- from Rs.50,000/- that too without any time frame as in Annexure-3.

24. Courts have generally held that employees' rights to livelihood must prevail over employers' interests, notwithstanding a pre-existing agreement between the two. It is well settled that in instances of conflict between employers' attempts to protect themselves from competition and the right of employees to seek employment wherever they choose, "*it is clear that the right of livelihood of the latter must prevail*".

25. However, the Supreme Court in **Niranjan Shankar Golikari vrs. The Century Spinning And Mfg Co** (**MANU/SC/0364/1967 : (1967)ILLJ740SC**) cited judgment of the Calcutta High Court [I.L.R (xi) CAL 545] with approval. "*An agreement to serve a person exclusively for a definite term is a lawful agreement, and it is difficult to see how that can be unlawful which is essential to its fulfilment, and to the due protection of the interests of the employer, while the agreement is in force.*"

26. Thus, it implies that the restrictive negative covenants are valid for the duration of employment and not violative of Section 27 of the Indian Contract Act, 1872. The validity of the restrictive covenants can be called into question if they extend to post-termination scenarios.

27. For convenience of ready reference Section 27 of the Contract Act is culled out hereunder;

“27. Agreement in restraint of trade, void:-

Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Exception 1. Saving of agreement not to carry on business of which goodwill is sold:-

One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business.”

28. Indian courts, however, have unequivocally held contracts containing restrictive covenants to be valid if the organization has spent significant resources on personnel training or skills enhancement of the employee. This proposition, however, comes with various caveats.

29. It is held that the existence of a legal injury accruing as a consequence of breach is a pre-requisite for claiming liquidated

damages in accordance with Section 74 of the Indian Contract Act, 1872.

“74. Compensation of breach of contract where penalty stipulated for:- When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.”

29.A. In other words, the employer must show a legal injury automatically resulting from the breach of the commitment to serve for a minimum period. According to the Court, a presumption of legal injury arises in cases *“where the employer or the management concerned was shown to have either incurred any expenditure or involved itself into financial commitments to either give any special training either within the country or abroad or in having conferred any special benefit or favour to the detriment of the claimant in favour of the violator involving monetary commitments.”*

30. Therefore, the inevitable conclusion from the foregoing discussion is that the employer must prove that the employee was the beneficiary of special favour or training or concession at the

expense of the employer. Otherwise, actual injury accruing as a result of the breach would have to be proved.

31. However, just because a legal injury is proved, that does not per se entail that the Court would grant the employer the whole of the damages stipulated by the contract. In this case, the employee resigned from employment after serving two years instead of three years as mandated by the bond.

32. Based on these cases, it becomes clear that employment bonds are unequivocally enforceable if following requirements are satisfied:

- i. The employer has actually spent money on the employee,
- ii. The said expenditure is in lieu of a promise from the employee that he or she would not leave the employment for duration specified in the contract,
- iii. The employee has breached the contract and left the employment before the stipulated period,
- iv. On account of the breach, the employer has suffered loss.

33. From the above analysis, it is clear that the restrictions that operate during the period for which the employee has agreed to serve would usually not amount to a restraint of trade. This comes with caveat that the covenants are not one-sided, do not impose unreasonable fetters and are not oppressive. However, restrictions operating subsequent to termination would be

considered invalid and in breach of Section 27 of Indian Contracts Act, 1872 extracted above. In addition, the service bonds would also be valid with respect to trainees if the employer proves that it has suffered a legal injury resulting from the trainee's breach of the bond.

34. Accordingly, this Court is of the considered view that Opposite Party-OHPC had issued an offer appointment to the Petitioner and directed execution of a service bond valued at Rs.50,000/- as a condition precedent and in obedience thereto, the Petitioner executed such bond. On the basis of execution of such bond, the Petitioner was allowed to join and in the facts of the present case, the same has to be construed as a concluded contract.

The bond executed earlier was proportionate to period an employee would serve an organization. Notwithstanding the same, the Petitioner had to execute the second bond purportedly in view of the decision of the Board. While doing so, there was no mention about the service bond of Rs.50,000/- already executed by the Petitioner. As such, the execution of the 2nd bond which has been made applicable retrospectively is not legally sustainable, binding on the Petitioners who had no other choice but to sign on the dotted lines.

35. This Court of equity cannot be oblivious of the predominant position of the Opposite Party-OHPC in getting the second bond for Rs.1,50,000/- executed. As such, the direction for execution of such bond in Annexure-4 and the agreement at

Annexure-5 impugned herein are liable to be set-aside. They are accordingly quashed.

36. Yet, the right of the Opposite Party- OHPC cannot be lost sight of in terms of the ratio decided by various Courts of law including this High Court, relied upon by the Opposite Party.

37. In this context, learned counsel for the Opposite Parties (OHPC), Mr. P.K. Rout relied upon the judgment of this Court in the case of **Umesh Chandra Pati vs. State of Orissa and others** reported in **2015 (I) OLR - 1129** wherein, this Court upheld the power of the employers to enforce the amount as per bond in the event the Petitioners therein fail to rejoin the post originally held by him or refuse to serve institute or any of its subsidiaries for a period equivalent to period of 3 years on successful completion of his studies as per Clause (e) of the Bond. Hon'ble Single Judge arrived at the finding in the said case referring to the agreement between the Petitioners therein and the Opposite Parties Indira Gandhi Institute of Technology, Sarang. The said judgment is not applicable in the factual matrix of the case at hand since unlike the present case there was no execution of an earlier agreement for lesser amount of Rs.50,000/- which was unilaterally enhanced to Rs.1,50,000/-, retrospectively.

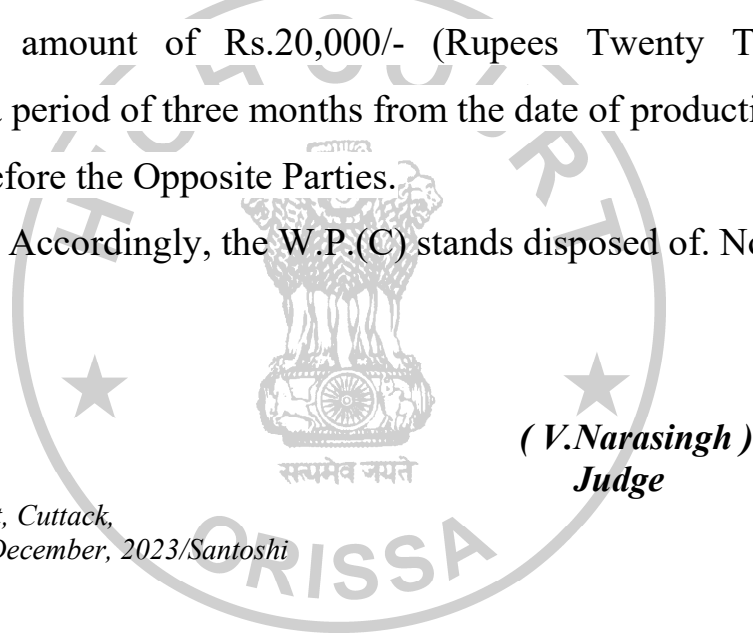
38. Therefore, this Court upholds the power of the OHPC to enforce the conditions as laid down in the 1st Bond executed by the Petitioner which includes a condition to reduce the Bond of Rs.50,000/- while on successful completion of first, second and third years. This Court finds the same to be reasonable and

legally enforceable, while setting aside Annexure-4 and 5 inter alia on the ground of equity unilaterally, enhancing the amount from Rs.50,000/- to Rs.1,50,000/- retrospectively.

39. Therefore, Petitioner is found liable to pay an amount of Rs.30,000/- (Rupees Thirty Thousand) towards the Bond value in terms of the 1st Bond he had executed as he had already served OHPC for more than two years of service as on the date he tendered resignation.

40. The Opposite Party, OHPC is directed to refund the balance amount of Rs.20,000/- (Rupees Twenty Thousand) within a period of three months from the date of production of the order before the Opposite Parties.

41. Accordingly, the W.P.(C) stands disposed of. No costs.



Orissa High Court, Cuttack,
Dated the 20th of December, 2023/Santoshi