CASE NO.:
Appeal (civil) 8039 of 2003

PETITIONER:
Satchidananda Mishra

RESPONDENT:
State of Orissa & Ors.

DATE OF JUDGMENT: 17/09/2004

BENCH:
Y.K. Sabharwal & D.M. Dharmadhikari

JUDGMENT:
J U D G M E N T

[With CA Nos.8058, 8059, 8061-8062, 8063, 8064, 8065, 8066, of 2003, Contempt Petition (C) No.419 of 2002, CA Nos.8060 of 2003, 3015-16 of 2004 and SLP (C) Nos.13861-862 of 2004]

Y.K. Sabharwal, J.

The present appeal by special leave is directed against the judgment dated 6th August, 2001 passed by the Orissa High Court declining to set aside order of Orissa Administrative Tribunal whereby Orissa Medical Education Service (Appointment of Junior Teachers Validation) Act, 1993 (for short, 'the Validating Act') has been declared as ultra vires the Constitution of India. The factual background which gives rise to the present controversy is narrated as follows.

On 24th September, 1973, the Orissa Medical Health Services (Recruitment and Promotion to Teaching Posts in the Medical Colleges) Rules, 1973 (hereinafter referred to as the '1973 Rules') were framed under proviso to Article 309 of the Constitution. These Rules provided that appointment to the posts of Junior Teachers shall be made through a Selection Board by recruitment from amongst the Assistant Surgeons with at least one year's experience as such, in consultation with the Orissa Public Service Commission (hereinafter referred to as 'OPSC'). Rule 3(f) defined 'Selection Board' to mean a Selection Board appointed by the State Government to select persons for appointment to the Junior or Senior teaching posts and shall consist of the Principals of Medical Colleges in the State and such others as may be nominated by the Government. The 1973 Rules came to be repealed by another set of Rules dated 13th August, 1979 made under proviso to Article 309 of the Constitution, called 'The Orissa Medical Education Service (Recruitment) Rules, 1979 (for short, '1979 Rules'). Under these Rules, vide sub-rule (2) of Rule 4, minimum qualification of postgraduate degree in the concerned specialty or any other equivalent degree or qualification as prescribed by the Council was provided for appointment of Junior Teachers. Rule 3(f) provided that Selection Board was to be constituted with member of the OPSC as its Chairman. The Secretary to Government in the Health and Family Welfare Department, DHET and Principals of the Medical Colleges were to be its members. On 20th September, 1979, the Director of Medical Education and Training (DMET) issued advertisement-inviting applications from eligible candidates for appointment as Junior Teachers in various disciplines/specialties. The Selection Board as per 1979 was, however, never constituted. According to Government, as many posts of Junior Teachers remained vacant for long time, the Chief Minister passed orders on 27th January, 1980 to fill up those posts by ad hoc appointments without constituting a Selection Board under 1979 Rules. Despite 1973 Rules having been repealed, the Selection Board appointed on 3rd August, 1979 under the repealed Rules was allowed to make the selections. After obtaining orders of the Chief Minister on 4th August, 1980, orders were issued by the State Government to the selected candidates appointing them as Junior Teachers on ad hoc basis. Some appointments were also made on 11th November, 1980. In all, 49 candidates came to be appointed as Junior Teachers on ad hoc basis by the Government. On 9th February, 1982, the recommendations of the

Selection Board constituted under the 1973 Rules, were referred to the OPSC along with the entire list of 145 candidates who had applied for the post pursuant to the advertisement dated 20th September, 1979. The OPSC refused to concur with the ad hoc appointments of these 49 Junior Teachers. This led to the enactment of the Validating Act by which all the 49 Junior teachers appointed on ad hoc basis by the Government were deemed to have been validly and regularly appointed in the service from the date of their appointment as such.

The Administrative Tribunal by its order dated 30th November, 1998 declared the Validating Act ultra vires and inoperative. The decision of the Tribunal has been upheld by the Division Bench of the Orissa High Court by the impugned judgment.

In the aforenoticed background, primary issue which comes up for our consideration is about the validity of the Validating Act. It would be useful to reproduce sub-sections (1) and (2) of Section 3 of the Validating Act, which read as under:-

" Sec.3 (1) Notwithstanding anything contained in the Recruitment Rules 49 Junior Teachers appointed on ad hoc basis by the Government of Orissa from out of the regularly recruited Assistant Surgeons and posted in Medical Colleges of the State during the years 1980 and 1981 and are continuing as such on the date of commencement of this Act, shall, for all intends and purposes, be deemed to have been validly and regularly appointed in the service from the date of their appointment as such and no such appointment shall be challenged in any court of law merely on the ground that such appointments were made otherwise than in accordance with the procedure laid down in the Recruitment Rules.

Sec.3 (2) The inter se seniority of the Junior Teachers whose appointments are so validated under Sub Section (1) shall be determined on the basis of their respective date of appointment as such."

On 29th November, 2001, while issuing notice, this Court declined to interfere with the order to the extent it struck down Section 3(2) of the Validating Act and only issued limited notice concerning the validity of Section 3(1). Thus the only question that has been urged by learned counsel is about the validity of Section 3(1).

In the objects and reasons of the Validating Act, it has been stated that OPSC has turned down the panel of 49 Junior Teachers and if their services are terminated they would face extreme financial hardships besides the State's vacancies position. The Act has been brought to validate these appointments as there is no scope to regularise their services within the framework of 1979 Rules.

Clearly, all the appointments were wholly illegal. They were not in accordance with 1979 Rules. The Selection Board was not constituted in terms required by the 1979 Rules which stipulates a member of OPSC to be the Chairman of the Selection Board. The OPSC declined to concur with the illegal appointments. The question is whether such appointments stood regularised on enactment of the Validating Act under consideration.

In R.N.Nanjundappa v. T.Thimmiah and Anr. [(1972) 1 SCC 409], this Court held that "If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution illegality cannot be regularized. Ratification or regularization is possible of an act which is within the power and province of the authority but there has been some non compliance with procedure or manner which does not go to the root of the appointment."

It would be pertinent to note here that the irregularity in the appointment in the above mentioned case was sought to be regularised by way of a Rule made under proviso to Article 309 of the Constitution. The above observations were made in that context. In the present case the appointments are sought to be regularised by way of an Act of Legislature. In our view the safeguards

mentioned above would also be applicable in cases where the appointments are sought to be regularised by way of an Act of the Legislature.
It is an admitted position that the provisions of 1979 Rules were not followed and the appointments made in 1980 were after the said Rules had been enforced. It seems that the State Government wanted to bypass the OPSC. The Selection Board comprising of a member of OPSC as its Chairman was never constituted, and the selections were sought to be made by the Board constituted under the 1973 Rules. This, in our opinion, is an illegality which strikes at the root of the appointment and, therefore, it is beyond the scope of the Legislature to validate such illegal appointments as any such attempt would violate Articles 14 and 16 of the Constitution. It may also be noted that the ground that OPSC failed to appoint a member as the Chairman of the Selection Board in accordance with 1979 Rules and in the light of the urgency to fill up the vacancies, the said vacancies were filled up by the Selection Board constituted under the 1973 Rules, does not appear to be correct. The facts on record show a contrary position. By a letter dated 4th September, 1979, the Chairman of the OPSC had offered himself to be the Chairman of the Selection Board but no Selection Board was constituted under the 1979 Rules. A clarification in this regard was sought by OPSC by its letter dated 24th March, 1982 wherein the OPSC had specifically sought for an explanation in regard to the circumstances under which a member of the OPSC was not associated in the Selection Board meetings held on 04th July, 1980 and 10th November, 1980. In reply dated 20th September, 1982 to the above letter, the Secretary to the Government of Orissa, Health and Family Welfare Department did not clarify the abovementioned query and vaguely stated that :
"A large number of Junior Teaching posts in different discipline were lying vacant in the three Medical Colleges and their attached hospitals of the State. In the interest of teaching it was considered absolutely necessary to fill up the said posts on ad hoc basis immediately. As such it was decided to fill up the available vacancies by way of ad hoc appointments after screening the bio data of the eligible candidates at the Government level".

Mr. Misra contended that 49 Junior Teachers appointed in the year 1980 may be deemed to be regularised, they having been in service for so many years. Before we examine the decision in Narender Chadha and Ors. v. Union of India and Ors. [(1986) 2 SCC 157] relied upon by Mr.Misra, it may be noted that right from the beginning OPSC has been objecting to the selection. The State Government for the reasons best known to it was not interested in constituting a Selection Board with a member of OPSC as its Chairman which was the requirement of the 1979 Rules. In Narender Chadha's case the question that came up for consideration was altogether different, namely, the determination of seniority between the promotees and the direct recruits. Under Rule 8 (1) (a) (ii) of the Rules under consideration in the said case, the quota of the promotees was restricted to 25 per cent. The fact that the petitioners were not promoted by following the actual procedure prescribed under Rule 8 (1) (a) (ii) was accepted but this Court observed with the fact remained that they had been working in the posts for number of years; appointments were made in the name of the President by the competent authority; they have been continuously holding these posts; they were paid all along the salaries and the allowances payable to the incumbents of such posts and had not been asked to go back to the posts from which they were promoted at any time since the dates of their appointments and the order of promotion issued in some cases showed that they were promoted in the direct line of their promotions and, therefore, this Court came to the conclusion that it was idle to contend that the petitioners are not holding the posts in Grade IV of the two services in question and further it would be unjust at this distance of time on the facts and in the circumstances of the case before the Court, to hold that the petitioners are not holding the posts in Grade IV. The Court, however, added a note of caution by observing that it is not a view of the Court that whenever a person is appointed in a post without following the rules prescribed for appointment to that post, he should be treated as a person regularly appointed to that post. In the present case, we are considering the validity of the appointments that were admittedly made without following 1979 Rules. The decision in Narender Chadha's case was rendered having regard to the factual scenario in

that case. It cannot be pressed into service to support entirely illegal appointments.

Reliance has also been placed by learned counsel to Para 7 of the decision in State of Orissa and Anr. v. Gopal Chandra Rath and Others [(1995) 6 SCC 242] holding that the Validation Act has removed the lacuna by changing the definition of the Selection Committee and consequently validating the appointments made by such committee during the period in question. In the said case, the basis for illegality pointed out by this Court was changed by Validating Act. It was held that it is too well settled that the Legislature has the power to validate an Act by removing the infirmity indicated in any judgment and that too also retrospectively but they cannot merely set aside, annul or override a judgment of the Court. The infirmity pointed out by the Court therein was to the effect that the Selection Committee had not been appointed by the State Government as required under the Rules and, therefore, the process of selection was vitiated. The Validating Act changed the definition of the Selection Committee unlike the case in hand. The decision renders no assistance in the present case.

In celebrated Constitution Bench decision in the case of Shri Prithvi Cotton Mills Ltd. and Another v. Broach Borough Municipality and Others [(1969) 2 SCC 283], the principles about validating statues were laid down. It was held that if the legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transaction. The validity of a Validating Law, therefore, depends upon whether the Legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the courts had found in the existing law and makes adequate provisions in the Validating Law for a valid imposition of the tax. In the present case, this decision cited by Mr.Misra will have no application since neither the question of competence to make a valid law is in issue nor is there any question about removal of defect pointed out by the Court.

The question here is about the validity of the validating statute seeking to regularise illegal appointments without either repealing 1979 Rules or changing the definition of the Selection Board. Learned counsel for the appellant has also placed reliance on the decision in the case of Vijay Mills Company Limited and Ors. v. State of Gujarat and Ors. [(1993) 1 SCC 345]. The Court referred to various decisions which considered the law of validation generally including the decision in the case of Prithvi Cotton Mills (supra). The conclusions have been set out in Para 18 that there are different modes of validating the provisions of the Act retrospectively, depending upon the intention of the Legislature in that behalf. Where the Legislature intends that the provisions of the Act themselves should be deemed to have been in existence from a particular date in the past and thus to validate the actions taken in the past as if the provisions concerned were in existence from the earlier date, the Legislature makes the said intention clear by the specific language of the Validating Act. It is open for the Legislature to change the very basis of the provisions retrospectively and to validate the actions on the changed basis. In the said case, it was held that the Legislature had changed the very basis of the provisions retrospectively as was apparent from the provisions of the Amending Act. In the present case as already noticed, the validating statute has done nothing of the kind and only sought to regularise illegal appointments without repealing the rules that were applicable at the relevant time or amending the definition of the Selection Board with retrospective effect.

Reliance was also placed by Mr. Misra on Para 32 of the decision in the case of I.N. Saksena v. State of Madhya Pradesh [(1976) 4 SCC 750] holding that the State Legislature had legislative competence not only to change the service conditions of the State civil servants with retrospective effect but also to validate with retrospective force invalid executive orders retiring the servants, because such validating legislation must be regarded as subsidiary or ancillary to the power of legislation on the subject covered by Entry 41.

We are unable to see the relevance on the aforesaid decision for the present purpose. As already stated, no one has questioned here the legislative competence to change the service conditions of State civil servants with retrospective effect. The question is whether the change has been effected at all. We have already noted that the legislation did not effect any change. It only states that irregular appointments will be legal. The basis of illegality has not at all been changed by the legislation.

It was also contended that 1973 Rules will be applicable and not 1979

Rules. We cannot permit the appellants to urge this point since it was not urged earlier and is sought to be put forth for the first time during the course of hearing. Further, as already noted, the advertisement was issued after 1979 Rules had been enforced. In fact, in terms of 1979 Rules, the State Government desired OPSC to regularise the illegal appointments. Since OPSC did not concur, the validating statute was enacted. Reliance placed on B.L.Gupta and Anr. v. M.C.D. [(1998) 9 SCC 223] for the proposition that 1973 Rules will be applicable and not 1979 Rules is misplaced. The said decision is not relevant on the issue of constitution of Selection Board as per requirements of 1979 Rules.

Drawing support from the observation made in H.C. Puttaswamy and Ors. v. The Hon'ble Chief Justice of Karnataka High Court, Bangalore and Ors. [1991 Supp. (2) SCC 421], it was contended that the illegal appointees can also be treated to be regularly appointed. In the relied upon decision, this Court, after having reached the conclusion about the invalidity of the impugned appointments made by the Chief Justice, but, having regard to the circumstances of the case, since the consequence would have been to uproot the employees, adopted a humanitarian approach and held on facts that appointees deserved mercy. True, this Court has ample powers in a given case to direct regularisation of illegal and unsupportable appointments, if the justice of any particular case so demands but it cannot be taken as a rule of general application to perpetuate illegalities. Such a course is to be resorted to in exceptional circumstances. We do not think that the present case falls in that category. The OPSC was sought to be deliberately bypassed. There are no equities in favour of appellant who cannot be placed on a higher pedestal over those who were selected by OPSC and stood the test of merits, became successful and were appointed as per relevant Rules. We may also note that on 4th October, 1982, 1979 Rules were amended and selection through Selection Board was done away with and it was prescribed that the selection shall be made through OPSC.

We may further note that Section 3(1) amounts to deeming of a legal position without deeming of a fact. It was observed in the case of Delhi Cloth and General Mills Co. Ltd. v. State of Rajasthan & Ors. [(1996) 2 SCC 449] that "a legal consequence cannot be deemed nor, therefrom, can the events that should have preceded it. Facts may be deemed and, therefrom, the legal consequences that follow." In this case the procedure as prescribed under Sections 4 to 7 of Rajasthan Municipalities Act, 1959, for inclusion of the villages of Raipura and Ummedganj in Kota Municipality was not followed. Under the Courts order and Judgment, Kota Municipality was restrained from imposing tax on the petitioner Company, which was situated in the said villages, on the ground that the said villages were not validly included in the Kota Municipality. Sections 4 to 7 of the Rajasthan Municipalities Act, 1959 remained on statute book unamended when the Kota Municipal Limits (Continued Existence) Validating Act, 1975 was passed. Section 3 of the Validating Act provided that:-

"Notwithstanding anything contained in Sections 4 to 7 of the 1959 Act or in any judgment, decree, order or direction of any court, the villages of Raipura and Ummedganj should be deemed always to have continued to exist and they continue to exist within the limits of the Kota Municipality, to all intents and for all purposes"

The validity of the Validating Act was in question. This Court observed that "the Validating Act provides that, notwithstanding anything contained in Sections 4 to 7 of 1959 Act or in any judgment, decree, order or direction of any court, the villages of Raipura and Ummedganj should be deemed always to have continued to exist and they continue to exist within the limits of the Kota Municipality, to all intents and for all purposes. This provision requires the deeming of the legal position that the villages of Raipura and Ummedganj fall within the limits of the Kota Municipality, not the deeming of facts from which this legal consequence would flow. A legal consequence cannot be deemed nor, therefrom, can the events that should have preceded it. Facts may be deemed and, therefrom, the legal consequences that follow." (Emphasis supplied). For the reasons and on the ground that the Validating Act did not cure the defect leading to the invalidity of the inclusion of the said villages in Kota Municipality, the validating Act was held to be invalid.

The deeming clause in the present case is to the same effect as that of the

above mentioned case. The legal consequences of appointments being regular has been deemed without deeming facts either of repealing 1979 Rules and making 1973 Rules operative or changing the basis, namely, definition of Selection of Board. In this view, we have no hesitation in holding that Section 3(1) has to meet the same fate as was met by Validating statute in Delhi Cloth Mills case.

The validity of the Validating Act is further assailed on the ground that it by mere declaration validates the invalid appointments without removing the basis of invalidity of the appointments made. Black's Law Dictionary (7th Edition, Page no.1421) defines Validation Acts as "a law that is amended either to remove errors or to add provisions to confirm to constitutional requirements". In the case of Hari Singh & Ors. v. The Military Estate Officer & Anr. [(1972) 2 SCC 239] the Supreme Court held that "The meaning of a Validating Act is to remove the causes for ineffectiveness or invalidating of actions or proceedings, which are validated by a legislative measure". The Supreme Court in the case of ITW Signode India Limited vs. Collector of Central Excise [(2004) 3 SCC 48] observed that "A Validation Act removes actual or possible voidness, disability or other defect by confirming the validity of anything, which is or may be invalid." The purpose of a Validating Act is to remove the cause of ineffectiveness or invalidity. A Validating Act presupposes a positive act, on the part of the legislature, of removing the cause of ineffectiveness or invalidity. In the present case nothing has been done.

Before concluding, we may notice another aspect that was pointed out by learned counsel. The Tribunal in its order observed that rightly or wrongly, Dr. K.C. Biswal, Dr. S.N. Mishra and Dr. S.C. Misra have been promoted to the higher rank since a long time and they have been holding such higher position on the basis of the recommendation of the OPSC and in such circumstances, it would be unjust to pass any orders to disturb them from their present positions. Learned counsel for Dr. Satchidananda Misra contended that the High Court has not disturbed the aforesaid directions of the Tribunal. On the other hand, learned counsel for Dr. Rama Raman Saranji (Respondent No.4 in CA No.8039/03) contended that the writ petition filed by his client challenging the aforesaid direction of the Tribunal is pending before the High Court. In this view, on this aspect, we express no opinion leaving it to be decided by the High Court in accordance with law.

In the light of the above discussion, the judgment and order of the Orissa High Court is upheld and accordingly the appeals are dismissed but leaving the parties to bear their own costs. The contempt petition and Special Leave Petitions are also disposed of in terms of this judgment.