A.F.R.

HIGH COURT OF ORISSA: CUTTACK

In the matter of applications under Articles 226 and 227 of the Constitution of India.

W.P.(C) No.13203 of 2013
M/s. Mohapatra Binder, represented by its
Proprietor Sibananda Mohapatra,
AT: Makarba Sahi, Cuttack and 58 others

W.P.(C) No.14475 of 2013
Snehamanjari Jena,
M/s Biraja Binding Works, represented by its Proprietor
AT: Kafala Bazar, PO: Chandinichowk, Town/Dist:Cuttack

W.P.(C) No.14524 of 2013
Meghanada Samal,
M/s Sonali Binding Works, represented by its Proprietor
AT/PO: Talatelenga Bazar, Town/Dist: Cuttack

W.P.(C) No.13590 of 2013
The Odisha Printers & Binders Mahasangha, Bhubaneswar
10, Janapath, Industrial Estate, Bhubaneswar,
Dist: Khurda, represented by its Secretary Subhasis Kar,
AT: Sutahat, Town/Dist: Cuttack

... Petitioners

-Versus-

State of Odisha, represented through the
Commissioner-cum-Secretary,
School and Mass Education Department,
Bhubaneswar, Dist: Khurda and others ... Opp. Parties
(In all cases)

For Petitioners : Mr. R.K. Mohanty, Sr. Advocate
(in W.P.(C) No.13203 of 2013) M/s D.Mohanty, S.Mohanty,
A.Mohanty & S.Mohanty

For Petitioner : Mr.R.K.Rath, Sr. Advocate
(in W.P.(C) No.14475 of 2013) Mr.Digambara Mishra

For Petitioner : M/s Deepali Mahapatra,
(in W.P.(C) No.14524 of 2013) K.Bhuyan

For Petitioner : M/s Milan Kanungo,
(in W.P.(C) No.13590 of 2013) P.R.Singh, S.K.Kanungo,
S.K.Mishra & S.Das

For Opp. Parties : Mr. Asok Mohanty
Advocate General

Mr.S.Parida,
Sr. Standing Counsel for
School & Mass Education Deptt.
(In all cases)

P R E S E N T:

THE HONOURABLE SHRI JUSTICE I. MAHANTY
AND
THE HONOURABLE SHRI JUSTICE B.N.MAHAPATRA

Date of Judgment: 20.12.2013

B.N. Mahapatra, J. Petitioners in the aforesaid four Writ Petitions have assailed the Tender Call Notice floated for printing and binding of Nationalized Text books on the ground that it is the outcome of unilateral decision taken by opposite party No.1-Commissioner-Cum-Secretary, School and Mass Education Department to go for National Tender for supply of Text books. The said Tender Call Notice (for short, "TCN") was published in the Odia daily 'Dharitri' on 07.06.2013 under Annexure-1 by opposite party No.2-Director, Text Book Production and Marketing, Bhubaneswar.

2. Petitioners' case in a nut-shell is that there are 5000 printing presses and binders which have been set up under the approval of respective District Industries Centres (for short, 'DIC') under the

Industrial Policy framed by the Industries Department, Government of Odisha. Many technicians, skilled and unskilled labourers are engaged in those organizations and maintaining their livelihood from their wages/ salaries. Admittedly, petitioners are small scale industrial units and they have engaged a number of workers including artisans from Scheduled Caste, Scheduled Tribe and physically challenged categories. Earlier a resolution was passed on 13.11.2009 by the State Government taking a decision to purchase the materials for printing works of the Nationalized Text books through National Tender. Challenging such resolution, some of the petitioners preferred W.P.(C) No.2862 of 2010 before this Court and vide order dated 19.05.2010, the said resolution was quashed by this Court directing the opposite parties to award the printing and binding work of the Nationalized Text books to such Small Scale Industrial Units (for short, 'SSIU') of the State like that of the petitioners.

3. Mr. R.K. Rath, learned Senior Advocate appearing on behalf of the petitioners submitted that the impugned TCN published in the Odia daily 'Dharitri' on 07.06.2013 under Annexure-1 being contrary to industrial policy resolution, cannot sustain in the eye of law and the same is without jurisdiction. The said impugned notice stipulates that all tenders shall be for both printing and binding and therefore, there is a deviation from the preceding tenders and this has been made illegally without any basis, having lost sight of the fact that the very purpose/objective of Micro, Small and Medium Enterprises Development

Act, 2006 (for short, "MSMED Act") would be defeated and at the same time all the binding firms like that of the present petitioners would perish in the process. As a result of publication of the impugned TCN under Annexure-1, all the printing and binding works are to be handed over to one tenderer which is bad and illegal. The TCN hits the Industrial Policy of the State. Thus, the benefit conferred by the statutory provision would be replaced by an executive decision. Seventy thousand workers including technicians, skilled and un-skilled labourers engaged in binding and printing works will lose their livelihood. Industrial Policy having been approved by the Cabinet before the same was issued by the State Government, the State Government cannot deny any benefit which is otherwise available to SSIU under the Industrial Policy Resolution.

4. Mr. Rath further submitted that if the National Tender will be invited, then the small entrepreneurs like the petitioners' units cannot compete with the bigger industries of outside the State. Thus, the very purport of MSMED Act, 2006 and various provisions in the Industrial Policy Resolution to protect the small scale industries will be frustrated. The TCN under Annexure-1 is not in public interest and moreover, there is no failure on the part of EPM rate contract holders of the units of the petitioners regarding quality of papers. The object of Directive Principles of State Policy embodied in Part-IV of the Constitution is to embody the concept of welfare State. The impugned notice is nothing but a colourable exercise of power which violates the principles of natural

justice as no opportunity of hearing was afforded to the members of the petitioners-association who are enjoying the facilities provided in the Government Industrial Policy Resolution for more than 21 years. The stipulations in the impugned Notification under Annexure-1 are designedly made to forcefully and artificially oust the MSME/SSI Units like the petitioners from their existence. Policy of the State Government is to ensure that SSI units should get marketing support, which includes facility of preferential purchase of products.

5. It was further submitted that the opposite parties have always caused delay in supplying papers to the petitioners which fact they have admitted in their counter affidavit. The judgment of a Division Bench of this Court by which a similar notification issued in the year 2009 was quashed has attained finality as the same has never been challenged before any forum. After passing of the judgment, opposite parties had acted upon the decision and implemented the same in the tenders issued subsequently, awarding printing and binding works to the private printers and binders of the State. Therefore, the principle of res judicata applies and the opposite parties cannot challenge that finding on new factual backdrops.

6. It was further submitted that it is evident from the affidavits filed by opposite party No.2, that the orders were placed to procure paper much after commencement of the academic session. The allegation of hue and cry for untimely supply of books is because of opposite parties.

The papers were never supplied in time which leads to delay in supply of books. This is manifestly clear from Annexures- 5 and 6 to the rejoinder affidavit. Opposite parties contumaciously placed the orders for cover printing with some Printers whereby acting beyond the advertised tender and continuing with a separate and parallel Printing and Binding work although the very work in question is sub judice in the present writ petition and this Court vide order dated 28.06.2013 passed an interim order which has been flouted cleverly by the opposite parties. The decision of the SLC of Government held on 04.05.2013 is unilateral, without any basis and meant for achieving their illegal goal/objective and at the same time contemptuous, being contrary to the judgments of the Division Bench of this Court passed in W.P.(C) No.2862 of 2010 and W.P. (C) No.3355 of 2010. As regards enhancement of rate due to price hike, the same was first enhanced in 1997 then in 2006 and lastly in 2011 by the State Government, whereas the rate hike should be made every year taking into account the enhanced rates of raw materials, printing and binding charges. Concluding his argument, Mr. Rath, learned Senior Advocate made a prayer to allow the writ petitions.

7. Per contra, Mr. Asok Mohanty, learned Advocate General vehemently argued that production of Nationalized Text books is a time consuming process as printing and binding works are awarded separately. It is a time bound nature of job. Except Odisha, in no other State printing and binding works are allotted separately. By instant

procedure, petitioners are paying a poor attention towards timely supply of books. In order to avoid this dislocation, State Level Committee meeting was held on 04.05.2013 and it decided to allot the work to those Printers who have their own binding units. The Printing and binding rates in our State are high in comparison to the rates of other States. The private Printers and Binders like the petitioners are demanding enhancement of their rates every year. Some times, they resort to strikes by not printing the Nationalized Text books and not supplying the finished Text books for a long period of time in order to fulfill their unreasonable demands. Therefore, National Tender was called for achieving a better and timely delivery of text books and to avoid hue and cry situation at the beginning of the academic year.

8. IPR-2007 currently in vogue, read in conjunction with the Odisha MSME Development Policy, 2009, more particularly Rule 7.2(d) of the Policy only authorizes the Government to outsource Printing and Binding services through “Open Tender” mechanism. Under the policy frame work of IPR-2007 and Odisha MSME Development Policy, 2009, it is mandatory to procure all goods and services only from EPM rate contract holders or from the list of goods from exclusive purchase list.

9. Out of the total paper, i.e., 8928.498 M.T. supplied by two numbers of paper suppliers only 6778.303 M.T. was meant for printing through private presses. At the time of commencement of private printing on 30.11.2012, the paper meant for printing was already in stock. Major

quantity of paper supplied by the supplier during May, 2013 was stored for the purpose of printing to be undertaken by the TBPM for the next academic session. Similarly, a stock of around 1350 M.Ts. of paper was available as on 01.06.2013 after supply of paper meant for printing to private presses on the last occasion, i.e., on 31.05.2013. TBPM carried the stock and supplied paper to those printing firms in which period there occurred little gap in supply of paper by the paper supplier, and there has been inordinate delay in receiving paper from TBPM by those printing firms on several occasions.

10. In other States, like Andhra Pradesh, Chhatisgarh, Bihar and Tamil Nadu National Tenders have been invited. There will be no burden of extra expenditure on the State Government towards transportation cost to be claimed by the national level Printers because, in Clause No.2 of the tender condition, opposite party No.2 asked to quote the rate of printing charges which is inclusive of transportation charges. The tenderers who quote lowest rate of printing shall be selected. There is no chance/scope to claim transportation charges as the rate includes all expenses of printing including transportation charges. In order to avoid monopoly by using low cost paper by the printers, the State Government is supplying high quality paper which shall be used by the Printers for production of qualitative books. States like Tamil Nadu, Bihar, Chhatisgarh and Andhra Pradesh are also

purchasing paper centrally and supplying the same to the selected Printers.

11. On the rival contentions of the parties, the only question that falls for consideration by this Court is as to whether the opposite parties are justified in floating National Tender Call Notice under Annexure-1 for printing and binding of Nationalized Text books?

12. Undisputed facts are that earlier, resolution was passed on 13.11.2009 by the State Government taking a decision to purchase materials for printing works of Nationalized Text books through National Tenders. Challenging such resolution some of the petitioners preferred W.P.(C) No.2862 of 2010 before this Court; this Court on 19.05.2010 quashed the said resolution directing the opposite parties to award the printing and binding of text book works to SSI units of the State like the petitioners. This fact has not been disputed by the opposite parties. Perusal of order dated 19.05.2010 passed in W.P.(C) No.2862 of 2010 reveals that various grounds similar to that of the grounds taken in this Writ Petition were considered by this Court and order dated 19.05.2010 was passed. Admittedly, the said order of this Court dated 19.05.2010 has not been challenged by opposite parties in any Court. On the contrary, they acting upon the said judgment of this Court entrusted the printing and binding works to the local SSI units and MSME. Thus, the said order attained finality. Now question arises whether the said order/judgment of this Court dated 19.05.2010 is binding on the parties.

13. At this juncture, it would be beneficial to refer to some of the decisions of the Hon'ble Supreme Court.

The Constitution Bench of the Hon'ble Supreme Court in the case of ***Daryao and others, v. State of U.P. and others, and a batch of cases,*** AIR 1961 SC 1457 held as under;-

> 10. In considering the essential elements of res judicata one inevitably harks back to the judgment of Sir William B. Hale in the leading Duchess of Kingston's case, 2 Smith Lead Cas. 13th Ed. pp. 644, 645. Said Sir William B. Hale "from the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: First, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another court; Secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose." As has been observed by Halsbury, "the doctrine of res judicata is not a technical doctrine applicable only to records; it is a fundamental doctrine of all courts that there must be an end of litigation". Halsbury's Laws of England, 3rd Ed., Vol. 15 Paragraph 357. P. 185. Halsbury also adds that the doctrine applies equally in all courts, and it is immaterial in what court the former proceeding was taken, provided only that it was a court of competent jurisdiction, or what from the proceeding took, provided it was really for the same cause" (p. 187. Paragraph 362). "Res judicata", it is observed in Corpus Juris, "is a rule of universal law pervading every well regulated system of jurisprudence, and is put upon two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the State that there should be an end to litigation- interest republiae ut sit finis litium; the other, the hardship on the individual that he should

be vexed twice for the same cause- nemo debet is vexari pro eaden causa", Corpus Juris, Vol. 34m, p. 743. In this sense the recognised basis of the rule of res judicata is different from that of technical estoppel. "Estoppel rests on equitable principles and res judicata rests on maxims which are taken from the Roman Law", Ibid p. 745. Therefore, the argument that res judicata is a technical rule and as such is irrelevant in dealing with petitions under Art. 32 cannot be accepted.

11. The same question can be considered from another point of view. If a judgment has been pronounced by a court of competent jurisdiction it is binding between the parties unless it is reversed or modified by appeal, revision or other procedure prescribed by law. Therefore, if a judgment has been pronounced by the High Court in a writ petition filed by a party rejecting his prayer for the issue of an appropriate writ on the ground either that he had no fundamental right as pleaded by him or there has been no contravention of the right proved or that the contravention is justified by the Constitution itself, it must remain binding between the parties unless it is attacked by adopting the procedure prescribed by the Constitution itself. The binding character of judgments pronounced by courts of competent jurisdiction is itself an essential part of the rule of law, and the rule of law obviously is the basis of the administration of justice on which the Constitution lays so much emphasis. As Halsbury has observed "subject to appeal and to being amended or set aside a judgment is conclusive as between the parties and their privies, and in conclusive evidence against all the world of its existence, date and legal consequences" Halsbury's Laws of England, 3rd Ed., Vol. 22, p. 780 paragraph 1660. Similar is the statement of the law in Corpus Juris: "the doctrine of estoppel by judgment does not rest on any superior authority of the court rendering the judgment, and a judgment of one court is a bar to an action between the same parties for the same cause in the same court or in another court, whether the latter has concurrent or other jurisdiction. The rule is subject to the limitation that the judgment in the former action must have been rendered by a court or tribunal of competent jurisdiction", Corpus Juris

> Secundum. Vol. 50 (Judgments). P. 603. "It is, however, essential that there should have been a judicial determination of rights in controversy with a final decision thereon", Ibid. p. 608. In other words, an original petition for a writ under Art. 32 cannot take the place of an appeal against the order passed by the High Court in the petition filed before it under Art. 226. There can be little doubt that the jurisdiction of this Court to entertain applications under Art. 32 which are original cannot be confused or mistaken or used for the appellate jurisdiction of this Court which alone can be invoked for correcting errors in the decisions of High Courts pronounced in writ petitions under Art. 226. Thus, on general considerations of public policy there seems to be no reason why the rule of res judicata should be treated as inadmissible or irrelevant in dealing with petitions filed under Art. 32 of the Constitution. It is true that the general rule can be invoked only in cases where a dispute between the parties has been referred to a court of competent jurisdiction, there has been a contest between the parties before the court, a fair opportunity has been given to both of them to prove their case, and at the end the court has pronounced its judgment or decision. Such a decision pronounced by a court of competent jurisdiction is binding between the parties unless it is modified or reversed by adopting a procedure prescribed by the Constitution. In our opinion, therefore, the plea that the general rule of res judicata should not be allowed to be invoked cannot be sustained."

14. The Hon'ble Supreme Court in ***State of Karnataka Vs. All India Manufacturers Organisation,*** (2006) 4 SCC 683**,** held as under:-

> "Res Judicata is a doctrine based on the larger public interest and is founded on two grounds: one being the maxim nemo debet bis vexari pro una et eadem causa (no one ought to be twice vexed for one and the same cause) and second, public policy that there ought to be an end to the same litigation. It is well settled that Section 11 of the Civil Procedure Code, 1908 (hereinafter "CPC") is not the foundation of the principle of res judicata, but merely statutory recognition thereof and hence, the section is not

> to be considered exhaustive of the general principle of law. The main purpose of the doctrine is that once a matter has been determined in a former proceeding, it should not be open to parties to re-agitate the matter again and again. Section 11 CPC recognizes this principle and forbids a court from trying any suit or issue, which is res judicata, recognising both "cause of action estoppel" and "issue estoppel".

15. Learned Advocate General has made an attempt to persuade this Court that certain points with reference to Industrial Policy Resolution were not argued in the earlier writ petition which he wanted to be considered by this Court in the present Writ Petitions. Such prayer of learned Advocate General is not entertainable by application of principle of constructive res judicata.

16. The Constitution Bench of the Hon'ble Supreme Court in ***Direct Recruit Class-II Engineering Officers' Association Vs. State of Maharashtra & Ors.,*** (1990) 2 SCC 715 held as under:-

> "……. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of constructive res judicata underlying Explanation IV of Section 11 of the Code of Civil Procedure was applied to writ case. We, accordingly hold that the writ case is fit to be dismissed on the ground of res judicata....."

17. In ***Forward Construction Co. & Ors Vs. Prabhat Mandal (Regd.), Andheri & Ors,*** *AIR 1986 SC 391*, the Hon'ble Supreme Court held

that in view of Section 11, Expln. IV it could not be said that the earlier judgment would not operate as res judicata as one of the grounds taken in the subsequent petition was conspicuous by its absence in the earlier petition. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of litigation of every matter coming within the legitimate purview of the original action both in respect of the matter of claim or defence.

18. The Hon'ble Supreme Court in the case of ***Hope Plantations Ltd. v. Taluk Land Board***, (1999) 5 SCC 590 held as under:-

> **"26.** It is settled law that the principles of estoppel and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppel though these two doctrines differ in some essential particulars. Rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstratedly wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation. These two aspects are "cause of action estoppel" and "issue estoppel". These two terms are of common law origin. Again, once an issue has been finally determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is to approach the higher forum if available. The determination of the issue between the parties gives rise to, as noted above, an issue estoppel. It operates

> in any subsequent proceedings in the same suit in which the issue had been determined. It also operates in subsequent suits between the same parties in which the same issue arises. Section 11 of the Code of Civil Procedure contains provisions of res judicata but these are not exhaustive of the general doctrine of res judicata. Legal principles of estoppel and res judicata are equally applicable in proceedings before administrative authorities as they are based on public policy and justice."

19. In view of the above settled legal position, there is no need to reexamine the issue which has already been decided by this Court vide its order dated 19.05.2010 passed in W.P.(C) No.2862 of 2010 and has attained finality.

20. The other ground which the learned Advocate General emphatically argued in support of floating the tender dated 07/06/2013 under Annexure-1 is that the present petitioners were paying poor attention towards timely delivery of nationalized Text books. Show cause notice has been issued to defaulting Printers and Binders who have not delivered the books in time. Always Binders are shirking their responsibility to the Printers likewise Printers are throwing their responsibility upon the Binders. For non-supply of nationalized Text books to school going children in time hue and cry situation has been accrued in the State. Agitation among the public has been reflected in the newspaper as well as in the floor of the House. Therefore, in order to avoid this dislocating situation, State Level Committee meeting on 04.05.2013 decided to allot work to the Printers only who have their own

binding units. Combating such allegation, learned counsel for the petitioners submitted that the opposite parties have always caused delay in supplying papers to the petitioners as a result of which, there has been delay in delivering supply of nationalized text books.

To test the veracity of the rival contentions of the parties in the matter of delay in supplying the nationalized text books, this Court verified the various dates and figures furnished along with affidavits and additional affidavits filed by opposite parties. It is noticed that some times the opposite parties did not have adequate quantity of paper in their stock. Even in the month of May, after procuring paper, the same was supplied to the Printers. It is further noticed that supply of paper to the petitioners was never done in a lot. Rather, paper has been supplied to the petitioners in phases. Needless to say that only after receipt of papers the work of printing and binding begins. Thus, delay in supply of text books can also be attributed to the opposite parties.

Moreover, we find that the decision taken in the proceeding of the State Level Committee meeting held under the Chairmanship of the Commissioner-Cum-Secretary to Government, School and Mass Education Department on 04.05.2013 to allot the work to Printers only who have their own binding units is not a policy decision of the Government; it is merely a proceeding of the State Level Committee.

21. For the reasons stated above, the Tender Call Notice published in the Odia daily 'Dharitri' on 07.06.2013 under Annexure-1

by opposite party No.2-Director, Text Book Production and Marketing, Bhubaneswar is quashed.

22. In the fact situation, we issue the following directions:-

(i) Opposite parties shall entrust the Printing and Binding Works of Nationalized Text books to the petitioners like the preceding years;

(ii) For the purpose of negotiation of rate, the petitioners/their representatives shall present themselves before the competent authority, i.e., opposite party No.2-Director of Text Book Production and Marketing, Bhubaneswar on 26th. of this month;

(iii) Opposite parties must ensure timely supply of papers to the Printers, who in turn complete their printing work in time. The binders must ensure timely completion of their binding work.

(iv) It is open to the opposite parties to take necessary action as permissible if delay is attributable to any Printers and/or Binders in completing their work in time.

23. Before parting with the case, we feel it appropriate to make an observation that the State and its instrumentalities while taking a decision to procure any materials and services for their use, they must give preference to the manufacturers of the required goods and service

providers, who are SSI Units, Micro Small and Medium Enterprises holding EPM rate contract, since various industrial policies are being floated by the Government to support the small scale industries and under the MSMED Act protection is also given to Micro Small and Medium Enterprises. Otherwise, the very purpose of framing of Industrial Policy Resolutions as well as enactment of the MSMED Act would be frustrated. The MSMED Act was enacted with an intention to provide for facilitating promotion, development and enhancing the competitiveness among MSM Enterprises.

Section 11 of the MSMED Act reads thus:

> "Procurement Preference Policy:- For facilitating promotion and development of Micro and Small Enterprises, the Central Government or the State Govt. may, by order notify from time to time, preference policies in respect of procurement of goods and services, produced and provided by Micro and Small Enterprises by its Ministries or Departments, as the case may be, or its aided institutions and public sector enterprises."

24. With the aforesaid observations and directions, the writ petitions are allowed.

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B.N.Mahapatra,J.

I.Mahanty, J. I agree.

.....
I.Mahanty*,*J.

Orissa High Court, Cuttack
The 20th December, 2013/ss/ssd/skj