STATE OF ORISSA & ANR. A

v.

ORISSA KHADI AND VILLAGE INDUSTRIES BOARD KARAMCHARI SANGH & ANR.

(Civil Appeal No. 6944 of 2015) B

MARCH 17, 2023

[DINESH MAHESHWARI AND SANJAY KUMAR, JJ.]

Orissa Khadi and Village Industries Board Act,1955 – s.36 – Orissa Khadi and Village Industries Board Regulations, 1960 – Regulation 40 and 52 – State Government decided not to introduce pension scheme for the employees of Orissa Khadi and Village Industries Board due to the financial hardship – Respondents challenged it before the High Court – The Single Judge issued directions to the State Government to amend the Regulations of 1960 and to take appropriate steps to incorporate the pension scheme for the Board's employees at par with the State Government employees – On appeal, the Division Bench of High Court dismissed the appeal and held that the direction of the Single Judge was only advisory in nature and the State Government shall honour the same while keeping in view the interest of the retired employees – In appeal before the Supreme Court, the State Government contended before the Supreme Court that the High Court was not justified in issuing such directions, which are contrary to the regulations that rule out pensionary rights to Board employees – Held: Board has been established under enactment of the State, it could be considered to be an instrumentality of the State, its distinct characteristic of being a Board established with particular aim and objective cannot be ignored – The employees of the Board cannot be treated as State Government employees in all respects just because the State has established the Board – Regulation 40 starts with exception clause, making that provision subject to other provisions of the Regulation – Regulation 52 specifically provides that the employees of the Board shall not be entitled to any pension – Further held, mandamus could not have been issued to the State to carry out amendment – Under Art. 142, the Supreme Court cannot issue directions in violation of statutory provisions – Orders of High Court were set aside.

H

Allowing the appeal, the Court

HELD: 1. The contentions urged on behalf of the respondents, seeking to put the employees of the Board at par with the employees of the State Government for all purposes, carry their own shortcomings. Even if Orissa Khadi and Village Industries Board has been established under an enactment of the State and for several relevant factors, it could be considered to be an instrumentality of the State, its distinct characteristic of being a Board established with particular aim and objective cannot be ignored altogether. The Board being a body corporate, incorporated by its name, has been established to carry out the purposes of the Act of 1955 and not beyond. In view of its independent corporate entity and existence, the provisions have been made in the Act of 1955 for making regulations by the Board consistent with the Act of 1955 and rules made thereunder with the previous sanction of the State Government, where the Regulations could provide, *inter alia,* for remuneration, allowances and other conditions of service of the staff of the Board (vide Section 36 of the Act). The Regulations of 1960 were framed accordingly. Therein, even while otherwise applying a substantial part of the Rules in the Orissa Service Code *mutatis mutandis* to the employees of the Board, Regulation 40 itself starts with a clause of exception, making that provision subject to the other provisions of the Regulations. Then, in Regulation 52 it has specifically been provided that the employees of the Board shall not be entitled to any pension except gratuity and CPF benefits; and further provisions have been made for the purpose of subscription/contribution to CPF. Thus, even when the State has established the Board to carry out its obligations in terms of Article 43 of the Constitution of India, it cannot follow as a corollary that the employees of this body corporate have to be treated as State Government employees in all respects. Such a corollary proposition would practically amount to merging of the Board with the State Government; rather making it as one of the Departments of the Government. This, in the face of existing statute, cannot be done. That being the position and when Regulations in question specifically make a distinct provision as regards retiral benefits, the same cannot be ignored by any stretch of arguments. [Para 16.1][1076-C-H; 1077-A-B]

2. Putting it differently, even if development of khadi and cottage industry is a Directive Principle of State Policy, it does not follow as a corollary that if the State establishes a Board or any organisation to carry out the obligations under such Directive Principles, it cannot make separate arrangements as regards the service conditions of the employees of such a Board or organisation. Significantly, Regulation 40 of the Regulations of 1960 starts with an exception clause and while general conditions of service of the Board's employees have been provided in terms of the service conditions of the employees of the State Government, the provision is subject to the other provisions of the Regulations. Hence, the other provision, that is the one contained in Regulation 52, cannot be ignored. [Para 16.1.1] [1077-B-D]

2. In regard to the submissions made on behalf of the State that the aforesaid existing Regulation 52 had neither been challenged nor declared invalid, it has been suggested on behalf of the respondents that when the employees had regularly been raising the demand for pension by way of representations and had taken up litigation too, challenge to the contrary provisions is inherent in their demands/prayers. These submissions have only been noted to be rejected for more than one reason. First, that merely making a prayer contrary to the existing provision in the statute does not carry in itself a challenge to the provision. Secondly, for challenging a particular provision, specific case is required to be made out of either want of statutory powers or of violation of any constitutional mandate. Neither any such ground of challenge had been urged nor could be assumed. Thirdly, it is *ex facie* evident that all through the prayer had been for amendment of Regulation 52 and not of declaring the same in its existing frame as being invalid. A prayer for amendment of the Regulation cannot be equated with a prayer to declare the same as invalid. As noticed hereinbefore, the State Government's denial of the proposed alteration was essentially based on its disagreement to alter the service conditions with effect from 01.04.1976. Viewed from any angle, invocation of the principles forbidding hostile discrimination remains baseless and the contentions urged on that basis are required to be rejected. [Para 16.2][1077-D-H; 1078-A]

3. The other factor indicated on behalf of the respondents that a small number of affected employees may not bring about much financial burden on the State hardly make out a case for issuing a mandamus to the State to amend the Regulations. Whether to amend the Regulations or not, in the scheme of Act of 1955 as also the Regulations of 1960, is required to be left to the State and for that matter, the number of employees to be affected/benefitted is not of much relevance. In this regard too, as noticed hereinbefore, apparently the objections of the State were against retrospective amendment of the Regulations and thereby allowing pension with effect from 01.04.1976. Moreover, the indications in the referred communications that such a prescription is likely to bring about a huge amount of administrative trouble to the Government cannot be dubbed as mere pretence or a bogus alibi. This Court would hasten to observe that irrespective of these observations and irrespective of the result of this litigation, nothing would prevent the State Government to carry out the amendment in the form suggested or in any other modified form, if the State Government would be willing to do so. The only question in the present appeal is as to whether a mandamus could have been issued to the State to carry out amendment. As noticed, the answer could only be in the negative. [Para 19][1079-D-H]

4. For what has been discussed hereinabove, this Court is clearly of the view that the direction issued in the impugned order dated 25.10.2010 by the Single Judge could not have been approved. The Division Bench of the High Court was conscious of the fact that such a mandamus cannot be issued so as to direct the State Government to carry out a particular amendment and, therefore, in the impugned judgment and order dated 20.12.2012, termed such a direction as being "advisory" in nature. However, the Division Bench went miles ahead in the very next proposition while observing that the State Government "shall" carry out this direction. Converting an advice to the State Government into a mandate in this manner, with great respect, is neither permissible nor countenanced by law. [Para 21][1080-B-D]

5. Under Article 142 of the Constitution of India, this Court cannot issue directions in violation of the statutory provisions; and sympathy or sentiment, by itself, cannot be a ground for passing an order beyond and contrary to the legal rights. [Para 22][1080-F]

D. S. Nakara and Ors. v. Union of India **(1983) 1 SCC 305 : [1983] 2 SCR 165;** *State of Jharkhand and Ors. v. Jitendra Kumar Srivastava and Anr.* **(2013) 12 SCC 210 : [2013] 8 SCR 177;** *Deokinandan Prasad v. State of Bihar* **(1971) 2 SCC 330 : [1971] Suppl. SCR 634;** *Haryana State Minor Irrigation Tubewells Corporation and Ors. v. G. S. Uppal and Ors.* **(2008) 7 SCC 375 : [2008] 6 SCR 662;** *Punjab State Cooperative Agricultural Development Bank Ltd. v. Registrar, Cooperative Societies and Ors.* **(2022) 4 SCC 363 – held inapplicable.**

Air India v. Nergesh Meerza and Ors. **(1981) 4 SCC 335 : [1982] 1 SCR 438;** *Gujarat State Khadi Gramodyog Board v. Gujarat State Khadi Gramodyog Pensioners Association* **2004 SCC OnLine Guj 105;** *University of Delhi v. Shashi Kiran and Ors.* **2022 SCC OnLine SC 594 – referred to.**

Case Law Reference

[2008] 6 SCR 662	**held inapplicable**	**Para 11.3**
[1983] 2 SCR 165	**held inapplicable**	**Para 11.4**
[2013] 8 SCR 177	**held inapplicable**	**Para 11.4**
[1982] 1 SCR 438	**referred to**	**Para 11.4**
[1971] Suppl. SCR 634	**referred to**	**Para 14.2**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 6944 of 2015.

From the Judgment and Order dated 20.12.2012 of the High Court of Orissa at Cuttack in WA No. 268 of 2011.

Shibashish Misra, Adv. for the Appellant.

Rana Mukherjee, Abhay K. Behera, Sr. Advs., Ms. Filza Moonis, Ms. Oindrilla Sen, Samarth Mohanty, V. K. Verma, Tarun Verma, Rajat Srivastav, Kedar Nath Tripathy, Advs. for the Respondents.

The Judgment of the Court was delivered by

DINESH MAHESHWARI, J.

1. This appeal is directed against the judgment and order dated 20.12.2012 in Writ Appeal No. 268 of 2011 whereby, the Division Bench of the High Court of Orissa has dismissed the intra-court appeal filed by the appellant State of Orissa and has affirmed the order dated 25.10.2010 in W.P. (C) No. 8438 of 2010, as passed by the learned Single Judge of the High Court, holding the employees of the Orissa Khadi and Village Industries Board[1] entitled to pension at par with the Government employees and also directing the State Government to amend the applicable regulations accordingly.

2. In this appeal, the appellant State of Orissa has essentially contended that the High Court was not justified in issuing directions contrary to the applicable regulations, which rule out pensionary rights to the employees of the Board in specific terms; and when the provisions contained in the regulations were neither under challenge nor were declared invalid.

3. While embarking upon the questions arising in this appeal, it shall be apposite to take note of the relevant statutory provisions at the outset.

3.1. The Orissa Khadi and Village Industries Board was established under the Orissa Khadi and Village Industries Board Act, 1955[2] with the aim and objective to organize, promote, develop, and regulate Khadi and Village Industries throughout the State of Orissa.

3.2. Section 3 of the Act of 1955 reads as under: -

> "**3. Incorporation of the Board.-** (1) The State Government with effect from such date as they may by notification appoint in this behalf, shall establish for the purpose of this Act a Board to be called the Orissa Khadi and Village Industries Board.

[1] Hereinafter also referred to as 'the Board'.

[2] Hereinafter also referred to as 'the Act of 1955'/'the Act'.

(2) The Board established under Sub-section (1) shall be a body corporate incorporated by its name with perpetual succession and common seal and may sue and be sued in its corporate name and shall be competent to acquire and hold and dispose of property both movable and immovable and to contract and do all things necessary for the purposes of this Act."

3.3. Section 36 of the Act of 1955 stipulates that the Board may, with previous sanction of the State Government, make regulations consistent with the Act and the rules made thereunder to provide, *inter alia*, for the remuneration, allowances, and other conditions of service of the staff. It reads as under: -

"**36. Regulations.-** (1) Subject to the provisions of Section 12 the Board may, with the previous sanction of the State Government by notification, make regulations consistent with this Act and rules made thereunder.

(2) In particular and without prejudice to the generality of the foregoing power, the Board may make regulations providing for –

(a) the procedure and disposal of its business;

(b) remuneration, allowances and other conditions of service of the staff of the Board;

(c) functions and duties of the Staff of the Board;

(d) functions of Committees and the procedure to be followed, by such Committees in the discharge of their functions."

3.4. In exercise of the powers so vested under Section 36 of the Act of 1955, the Board has made the Orissa Khadi and Village Industries Board Regulations, 1960[3] providing for general conditions of service of its staff, remuneration, allowances, grant of leave, retirement benefits etc.

Regulation 40 of the Regulations of 1960 reads as under: -

"40. **General conditions of service.-** Unless otherwise provided in these regulations, the rules in the Orissa Service Code, Volume I with all its Appendices, except Appendices 1 to 4, 8 and 12, as

[3] Hereinafter also referred to as 'the Regulations of 1960'/'the Regulations'.

A amended from time to time by the Government shall apply to the employees of the Board *mutatis mutandis*. For this purpose, the words "Government", "Government Servant" and "Head of Department" wherever they occur except in Chapter-I of the Code shall mean "the Board" "the employees of the Board" and "the President" respectively. "Superior Service" referred to in the Orissa Service Code shall mean posts in Classes I, II and III and "Inferior Service" shall mean posts in Class IV."

Regulation 52 of the Regulations of 1960, which is of direct relevance in the present appeal, reads as under:

C "52. **Retirement benefits**.- The employees of the Board shall not be entitled to any pension except the gratuity and the Contributory Provident Fund benefits admissible under these regulations."

Regulations 53 to 57 deal with the matters related to the D Contributory Provident Fund[4], subscriptions, realization of subscriptions, and contributions etc.

4. The factual aspects of the matter are not of much dispute. However, a few background aspects and their salient features may be noticed, particularly concerning the proposition for providing pension to E the employees of the Board and for amendment of the above-noticed Regulation 52 of the Regulations of 1960.

4.1. It would appear that the proposition for providing pensionary rights to the employees of the Board had been a matter of several communications between the Board and the State Government and had F also been the subject of a few litigations in the past. Shorn of unnecessary details, it could be noticed that from 06.10.1982 onwards, various proposals were mooted by the Board for providing pensionary benefits to its employees and requests were also made to the State Government to amend the Regulations of 1960 in this regard. On 25.02.1985, the Industries Department of the Government of Orissa sought for the views G of the Director of the Industries on the proposal to provide pension to the employees of the Board and in response, on 31.10.1985, the Additional Director of Industries, Government of Orissa opined that there should not be any objection to allow the pensionary benefits to the employees of the Board. Thereafter, on 18.12.1985, the Industries Department,

H [4] 'CPF', for short.

Government of Orissa sought for certain information from the Board as regards the annual requirement of funds if pension was paid to the employees of the Board and as to whether the amount required for payment of pension was more or less in comparison to Employees' Provident Fund[5] amount as also the details of the employees to be retired in the coming 5 years and the amount required for payment of pension to them. This was followed by the letter dated 15.05.1990 from the President of the Board stating justification for payment of pension to the Board's employees. On 19.09.1991 and then, on 08.10.1992, the Industries Department again sought for information regarding functioning of the Board, its objectives and updated financial statements as also the calculation of expenditure, if the pensionary benefits were extended to the employees of the Board. In response to this, on 18.12.1992, the Secretary of the Board furnished a reply to the State Government with justification for extending the pension scheme to the employees of the Board.

4.2. Pursuant to the aforementioned exchange of communications, on 17.03.1993, the Handicraft and Cottage Industries Department of the Government of Orissa asked the Board to obtain written clearance from the EPF Commissioner that they will refund the amount and forward the reply so as to enable the Department to submit the proposal to the Finance Department. On 24.04.1993, the Regional Provident Fund Commissioner intimated to the Board that the proposal for refund would be considered only as and when the proposed pension scheme was approved by the Government of Orissa. Thereafter, on 30.04.1993, the Board informed the Handicraft and Cottage Industries Department the total amount of accumulation, as indicated by the Regional Provident Fund Commissioner and requested to take up the matter with the Government and followed it up on 19.08.1993, with a request to the Department to expedite the matter. Again on 29.09.1993, the Department sought for certain clarifications from the Board and thereupon, on 25.07.1994, the Board informed that there will be no extra financial burden on the Government if pension scheme was made applicable to the employees of the Board.

4.3. After the aforesaid communications, the Handicraft and Cottage Industries Department, in its communication dated 26.10.1994, indicated the anomalies which were likely to result if the pensionary

[5] 'EPF', for short.

A benefits to the employees of the Board were allowed with effect from 01.04.1976 and suggested that Regulation 52 be suitably revised so that the date of implementation of the pension scheme would be decided by the Government instead of the Board. The relevant part of this communication reads as under: -

B "I am directed to refer to your letter No. 10491 dated 25.07.1994 on the above subject and to say that it has been proposed by the Orissa Khadi & VI Board (in regulation 52) to substitute every employee who has retired on or after the 1st day of April, 76 be entitled either to the benefit of pension schemes as applicable to the State Government employees as amended from time to time
C or to the benefit of employees provident fund as he may opt. It is relevant to point out that the Orissa Civil Service Pension Rules, and Orissa Civil Service Commutation of Pension Rules have come into force with effect from 01.04.1992. Some of the provisions of pension and commutation Rules, i.e. commutation of pension and
D 50% of the last pay drawn, maximum limit of gratuity, revised rate of family pension, liberalized voluntary retirement schemes and the revised procedure on medial examination in connection with pension etc. were not in existence during the year 1976 and such applicability of pensionary benefits to the Board employees
E with effect from 01.04.1976 will create discrimination and confusion. As such, the regulation 52 may be suitably revised with approval of the OK & VI Board so that the date of implementation of the pension scheme will be decided by the Government instead of the Board."

F 4.4. Thereafter, on 06.10.1995, the Deputy Secretary, Handicraft and Cottage Industries Department made a request to the Accountant General (A&E), Orissa to examine the proposal for introduction of pension scheme and to send his comments to the Finance Department, while stating that there will be no extra financial burden on the Government if the pension scheme was made applicable to the Board's employees
G with effect from 01.04.1976.

4.5. However, by way of the letter dated 31.07.1996, the Industries Department informed the Board that the proposal for introduction of pension scheme for its employees had not been agreed to by the Finance Department for a variety of reasons, including that: (a) earlier, by the
H letter dated 18.12.1992, the pension scheme was proposed to be

introduced with effect from 01.04.1985 but subsequently, the same was revised to be effective from 01.04.1976; (b) giving retrospective effect to pension scheme was rare and it would create administrative and financial complications in future; (c) the employees of the Board who had retired prior to 01.04.1976 will also claim pensionary benefits; and (d) all other Corporations/Institutions/Bodies of the State will agitate for pensionary benefits retrospectively, which would land the Government in administrative and financial trouble. The Board was, therefore, requested to re-examine the proposal in the light of the observations of Finance Department and to re-submit the same while keeping in view the factors concerning the sources of finance and financial burden on the Government.

4.6. In the aforementioned backdrop, some retired employees of the Board filed a writ petition, being OJC No. 15344 of 1998, before the High Court, which came to be disposed of by the order dated 06.02.2001, whereby the High Court directed the Industries Department to take a decision with regard to extension of pension scheme to the employees of the Board.

4.7. Thereafter, on 20.07.2001, the Board wrote a letter to the Industries Department giving justification for introducing the pension scheme in the manner that the requirement of funds to meet the pensionary scheme will be Rs. 1.83 crore; that by introduction of pensionary scheme, the Government will save Rs. 1.90 crore in the coming ten years; and that the retired employees were to refund a sum of Rs. 75.07 lakh towards EPF amount if they come over to the pensionary scheme. However, on 27.03.2002, the Industries Department intimated that the State Government had decided not to introduce the pensionary scheme for the employees of the Board after taking into account the precarious financial condition of the State.

5. Aggrieved by the aforesaid communication dated 27.03.2002, the ex-employees of the Board filed a writ petition before the High Court, being W.P. (C) No. 1951 of 2002. During the pendency of this writ petition, the existing employees of the Board filed another writ petition, being W.P.(C) No. 14729 of 2007, claiming pensionary benefits at par with other organizations of the State and the State Government employees.

5.1. On 12.09.2008, the High Court disposed of W.P. (C) No. 1951 of 2002 with the observations, *inter alia*, that the said petitioners

having retired long back and there being no provision for pension in their service conditions, no directions could be issued qua them for payment of any pension. However, in view of the pendency of other writ petition, the High Court provided that the claim of the said petitioners will be subject to the result of the other writ petition filed by the employees who were in service.

5.2. Thereafter, the said other writ petition, being W.P. (C) No. 14729 of 2007, was disposed of by the High Court on 25.11.2008, with direction to the appellant State to reconsider the matter and to take the decision expeditiously. The High Court observed and directed as under:-

> "3. No Counter Affidavit has been filed by the State. Be that as it may, it appears that the State Government has decided to introduce the pension scheme but then refrained from doing so due to financial emergency. In view of the fact that six years have passed in the meanwhile and as pension is no more a bounty this Court feels that ends of justice and equity will be better served if Opposite Party No. 1 is directed to reconsider the direction issued by this Court in the earlier Writ Petition and take a decision as expeditiously as possible, preferably within a period of six months, from the date of communication of this order, and directs accordingly."

6. Even after re-examination of the matter pursuant to the directions aforesaid, the Finance Department observed that the State Government could not bear the liabilities in implementing the pension scheme for the employees of the Board and this was communicated to the Board by the Industries Department, by way of its letter dated 14.12.2009, in the following terms: -

> "In inviting a reference to your letter No. 2128 dated 12.05.2009 on the above subject, I am directed to say that after detail examination Finance Department have been pleased to observe that State Government cannot bear the liabilities in implementing a pension scheme for the OK & VI Board."

7. Dissatisfied with such a response, the writ petition leading to this appeal, being W.P. (C) No. 8438 of 2010, was filed by respondent No. 1 (an association of the employees of the Board) on 04.05.2010 with the following prayers: -

> "Under the circumstances, it is humbly requested that the Hon'ble Court be pleased to issue a writ in the nature of mandamus or any

other appropriate writ/writs quashing the letter dated 14.12.2009 as per Annexure – 17.

And further be pleased to direct the Opposite Party No. 1 and 2 to give previous sanction under Section 36(1) of the Khadi and Village Industries Board Act, 1955 at an early date the Opposite Party No. 2 make regulation under Section 36(2) of the said Act introducing pension scheme as per the Resolution of the Orissa Khadi and Village Industries Board dated 10.02.2009.

And further be pleased to direct the Opposite Parties to grant pension to the Employees of Orissa Khadi and Village Industries Board from the date of their respective retirement.

Or pass appropriate direction(s) and order(s) as this Hon'ble Court thinks fit and proper."

7.1. A learned Single Judge of the High Court disposed of the writ petition so filed by respondent No. 1 by way of the impugned order dated 25.10.2010, with directions to the State Government to amend the Regulations of 1960 and to take appropriate steps to incorporate the pension scheme for the Board's employees at par with the State Government employees. The learned Single Judge took note of the exchange of communications as above noticed and deduced that the State Government was desirous of extending the benefit to the Board's employees but, ultimately the proposition was rejected only on the ground that the State Government could not bear the liabilities of pension scheme for the Board. The learned Single Judge observed that if one benefit was extended to the counterpart employees, the same could not be denied to the others and in this regard, took note of pensionary benefits extended to the employees of a couple of Universities as also the Social Welfare Advisory Board; and found that not introducing pension scheme in favour of the employees of the Board on the ground of financial stringencies, where similarly situated organisations were enjoying the benefits, was a matter of sheer discrimination and as a result, violative of Articles 14 and 16 of the Constitution of India. The learned Single Judge also observed that the Board is a part and parcel of the State Government when all service rules of the State Government employees were adopted and, therefore, it was a moral duty of the opposite parties to enact the provisions for providing pensionary benefits to the employees of the Board. A reference was also made to certain decisions relied upon on behalf of the employees with regard to the pensionary benefits extended

A to the employees of different Khadi and Village Industries Boards of other States and the learned Single Judge observed that consistently, it was held by the Courts that financial hardship was not at all a criterion or ground for depriving the employees of the Board of service benefits, such as pension. With these observations and analysis, the learned Single Judge proceeded to set aside the impugned communication dated 14.12.2009 and issued directions to the State Government in the following terms: -

> "17. As such the order dated 14.12.2009 vide Anenxure-12 is not sustainable and the same is quashed. In view of the aforesaid submission my considered opinion is that the Board employees are entitled to pension at par with the Government employees of the State and like other State Government organizations and for which the State Government should amend the Orissa Khadi and Village Industries Board Regulation by extending the pensionary benefit to the employees of the Orissa Khadi and Village Industries and accordingly, the Opposite Party Nos. 1 and 2 are directed to take appropriate steps to incorporate pension scheme for the Board's employees at par with State Government employees. The entire exercise shall be completed within a period of three months from the date of communication of this order."

E 8. In challenge to the order so passed by the learned Single Judge, the appellant State preferred an intra-court appeal, being W.A. No. 268 of 2011, which was decided by the impugned order dated 20.12.2012. The Division Bench of the High Court observed that the direction of the learned Single Judge was only advisory in nature and the same was in the welfare of the employees of the Board; and the State Government shall honour the same while keeping in view the interest of the retired employees in terms of the mandate of Article 41 of the Directive Principles of State Policy by discharging its constitutional obligations towards aged persons who have served the State through the Board. The relevant parts of the impugned order dated 20.12.2012 could be usefully reproduced as under:

> "10. After hearing learned counsel for the respective parties, we have examined the matter at length. Perusal of the different provisions of the Act, 1955, Rule, 1956 and Regulation, 1960 framed thereunder by the Government leaves no manner of doubt that the real control, authority of the Board rests with the Industries

Department of the Government, in other words the Board is under the direct control of the State Government and is totally dependant on the Government for running its administration and in carrying out its activities including finance. Notwithstanding the fact that the Board is a statutory one and right from the commencement, the management, the administration, the appointment, framing regulations, carrying on with its activities, formulations of policy are all controlled by the State Government. Furthermore, the employees of the Board in question are governed and controlled by Rules as are applicable to the State Government servants and the provisions of the Odisha Service Code, which are applicable to the State Government servants, are also applicable to the employees of the Board. The Travelling Allowance Rules and Odisha Leave Rules are also applicable to the employees of the Board. The function of the Board is well defined in Section 17 of the Act, 1955. To discharge such functions, programmes have been drawn by the Board with the sanction of the State Government and therefore, the State Government has all pervasive control over the Board and got power to frame Rules under Section 35 of the Act, 1955. It is true that the Regulation 52 of the Regulation, 1960 provides that the employees of the Board are not entitled to pensionary benefits but to overcome such a hurdle the Board have recommended to the Government for amending Regulation 52 and this Court also directed the Government to consider such demand of pension to the employees of the Board in OJC No.15344 of 1998 and W.P. (C) No.14729 of 2007. But the State Government on the ground that it cannot take extra burden of providing pension to the employees of the Board did not comply with the directions of this Court. Admittedly, when all conditions of service of the State Government employees are applicable to the Board employees, refusal to extend the pensionary scheme to such employees of the Board, in our considered view, amounts to discrimination and violative of Articles 14 and 16 of the Constitution of India. The learned Single Judge has dealt with the important aspect in detail in the impugned judgment. It was brought to our notice that the Board on several occasions moved the State Government through the Industries Department which is the controlling authority of the Board for extending pensionary benefits to the employees of the Board, but the same did not find favour

A with the Government on the ground that the State Government cannot carry the extra financial burden. In our opinion, the view taken by the learned Single Judge with regard to making provision for providing pension to the employees of the Board is quite justified and calls for no interference, as the same is in conformity with the decisions of Gujarat and Bombay High Courts in the cases B referred to supra upon which learned Senior Counsel has rightly placed reliance. For all practical purposes, the Board is an instrumentality of the State and therefore, it is covered under the Article 12 of the Constitution of India and undoubtedly amenable to the writ jurisdiction of this Court. We are quite aware of our C limitations under Article 226 of the Constitution. The direction of the learned Single Judge to Opposite Party Nos.1 and 2 to take appropriate steps to incorporate the pension scheme for the employees of the Board at par with the State Government employees is only advisory in nature and the same is in the welfare of the employees of the Board. The State Government shall honour D such advisory note keeping in view that the interest of the retired employees shall be taken care of by the State Government as mandated under Article 41 of the directive principles of the State policy by discharging its constitutional obligations towards aged persons who have served the State through Board, as the State E has decentralized its power and functions through its instrumentalities such as the Board and other statutory Corporation for good governance of the people under the Constitution of India.

11. In the result, after making a threadbare analysis and appraisal of factual and legal profile and proposition highlighted before us, F we find no merit in this writ appeal and the impugned order of the learned Single Judge does not call for any interference in any manner.

Accordingly, the writ appeal stands dismissed."

9. The appellant State of Orissa is aggrieved by the orders so G passed by the High Court. Before proceeding further, it may be noticed that while entertaining the petition seeking leave to appeal in this matter, on 11.04.2014, this Court stayed the operation of the impugned judgment and order of the High Court; and on 07.09.2015, while granting leave to appeal, the interim order dated 11.04.2014 was continued. The same H position has continued hitherto.

10. While questioning the impugned orders and the directions issued thereunder, learned counsel for the appellant State, after an elaborate reference to the provisions of the Act of 1955 and the Regulations of 1960 as also the exchange of communications, has submitted that the impugned orders remain unsustainable in law and deserve to be set aside.

10.1. Learned counsel for the appellant has contended that no direction contrary to Regulation 52 of the Regulations of 1960 could have been issued, particularly when the said Regulation 52 was neither a subject-matter of challenge before the High Court nor was declared invalid in any proceedings. Learned counsel has yet further submitted that the directions of the learned Single Judge, as approved by the Division Bench, without deliberating on Regulation 52 as also the other provisions in the Regulations of 1960 including those contained in Regulations 53 to 56, remain wholly unjustified and cannot be approved.

10.2. Learned counsel would submit that the prayers based on certain communications exchanged between the Board and the State Government could not have been countenanced at the instance of the employees, who had joined the services with the Board while being conscious of the stipulations in the Regulations and thereby, the conditions of their service. Learned counsel has submitted that even when relying on the resolutions adopted by the Board and the exchange of communications, the learned Single Judge has failed to consider that at no point of time, the State ever acceded to the proposal of the Board; and certain suggestions made by some of the officers of the Government at different levels could not have been taken in aid to direct the appellants to amend the said Regulation 52. Learned counsel has further submitted that the Division Bench of the High Court, although consciously took note of the stipulations of Regulation 52 and observed that the directions of the learned Single Judge were only advisory in nature but then, proceeded to make further observations, which are practically of issuing mandamus to the State Government to amend the Regulations. These directions, according to the learned counsel, enter into the arena of policy decisions and legislative functions; and the High Court has not been justified in issuing the same.

10.3. Learned counsel has further submitted that the learned Single Judge has referred to the pension granted to the employees of the State Social Advisory Board but, has failed to notice that 50% of those expenses were borne by the Government of India. Further, the employees of the

A University and the employees of the Board do not form a homogenous class and cannot be treated at par, especially when the Regulations of 1960 carry statutory force and Regulation 52 therein cannot be ignored.

10.4. Learned counsel for the appellant has also submitted that any reference to the provisions contained in relation to different State B Boards remain inapposite because any prescription by any other State cannot be *ipso facto* imposed on the appellant State. According to the learned counsel, contrary to the suggestions of the writ petitioners, there are many other State Boards in the country who have not granted pensionary benefits to their employees.

C 10.5. It is also submitted that the writ petition by the retired employees of the Board seeking pension after having withdrawn the amount from their CPF/EPF account was liable to be dismissed and hence, the impugned orders deserve to be set aside.

11. *Per contra*, learned senior counsel for respondent No. 1 has D duly supported the orders impugned and has made a variety of submissions which could be summarised as follows:

11.1. Learned senior counsel has referred to the provisions contained in the Act of 1955 and has submitted that respondent No. 2 is a statutory Board with the State Government exercising absolute control E over its affairs including budgetary control; and by virtue of powers under Section 36, the Regulations of 1960 were framed. In terms of Regulation 40, the rules in the Orissa Service Code, Volume I apply *mutatis mutandis* to the employees of the Board, meaning thereby that the employees of the Board were and are treated at par with State Government employees but, Regulation 52, which provides for gratuity F and contributory provident fund benefits, unjustifiably denies pensionary benefits to the employees of the Board.

11.2. Learned senior counsel for respondent No. 1 has referred to the aforementioned exchange of communications and has submitted that in the given set of circumstances and in the wake of repeated G representations, the Board, in all earnestness, took up the cause for grant of pension to its employees and also requested the Government to bring about appropriate amendments in view of the powers under Section 36 so that Regulation 52 could be amended to include pension, particularly when Regulation 40 did equate the employees of the Board at par with the State Government employees. Learned senior counsel has strenuously H

argued that the State Government, while in principle agreeing to grant of pensionary benefits by the letter dated 26.10.1994, cited only a specious plea of financial stringency for denying such pensionary benefits to the employees of the Board which could not have been countenanced. According to the learned counsel, the writ petition filed by the employees on the grounds of hostile discrimination and non-consideration of representation was rightly decided by the learned Single Judge with directions to the State Government to amend the Regulations so as to extend the pensionary benefits to the employees of the Board at par with the employees of the State Government. Further, the Division Bench of the High Court, while affirming the ultimate conclusion of the learned Single Judge, rightly observed that the State Government, while following Article 41 of the Directive Principles of State Policy, should honour the advice given by the Single Judge, by incorporating the pension scheme for the employees of the Board.

11.3. Learned senior counsel has vehemently argued that financial stringency cannot be a reason for denying pensionary benefits to the employees with reference to the decisions of this Court, including that in ***Haryana State Minor Irrigation Tubewells Corporation and Ors. v. G.S. Uppal and Ors.*: (2008) 7 SCC 375**, where, in paragraphs 33 and 34, this Court held that the High Court was right in rejecting the plea of the Corporation about inability to revise the pay scales of the employees on account of the financial burden on the Corporation. The learned counsel has also referred to the decision of this Court in ***Punjab State Cooperative Agricultural Development Bank Ltd. v. Registrar, Cooperative Societies and Ors.*:(2022) 4 SCC 363**. It has further been submitted that other Departments of the State, as noticed by the High Court, have been granted pensionary benefits where the cadre strength is much larger and hence, any reference to financial stringency is nothing but a bogey argument of the State Government.

11.4. Learned senior counsel for respondent No. 1 has further argued, with reference to the decisions of this Court in ***D.S. Nakara and Ors. v. Union of India*:(1983) 1 SCC 305** and ***State of Jharkhand and Ors. v. Jitendra Kumar Srivastava and Anr.*:(2013) 12 SCC 210**, that pension is neither a bounty nor is it a matter of grace, but is a claimable right. Therefore, feeble reasons such as financial constraints cannot be considered good enough for not extending pensionary benefits to retired employees, who are anyways treated at par with the State

Government employees for other purposes. Rather, the denial of such pensionary rights amounts to hostile discrimination between two sets of employees who are otherwise similarly circumstanced, and remains impermissible, as held by this Court in the case of ***Air India v. Nergesh Meerza and Ors.*****:(1981) 4 SCC 335.**

11.5. It has also been submitted that there were 383 employees (past and present) eligible for pension with effect from 01.04.1976, out of which, between the year 1976 to the month of May, 2022, 140 employees have died; at present, the existing posts are only 210 as the Government has abolished 173 posts; and the existing staff strength is only 58 because no appointment has been made since the year 1996. It has, thus, been contended that while the State Government employees, who are huge in number, are entitled to pension, denial of the same to a miniscule number of the Board employees (who are otherwise treated at par with State Government employees), on the ground of financial stringency does not behove well of a model employer like the State of Orissa, which is one of the few financially strong States within the Union of India.

11.6. Learned senior counsel has further submitted that in similar circumstances, a Division Bench of the Gujarat High Court, by the judgment dated 23.07.2004 in the case of ***Gujarat State Khadi Gramodyog Board v. Gujarat State Khadi Gramodyog Pensioners Association*****: 2004 SCC OnLine Guj 105**, allowed the grant of pensionary benefits to the employees of Gujarat State Khadi Gramodyog Board; and thesaid judgement was not interfered with by this Court in **SLP (Civil) CC No.1321- 1482 of 2005**, which also persuaded the High Court of Orissa to grant similar reliefs by the impugned orders and in the given set of facts, the impugned orders would call for no interference.

11.7. Further, it has been submitted on behalf of respondent No. 1 that in very many cases, the employees who were drawing or contributing, or had withdrawn the CPF after retirement, were given the liberty of refunding such amount with interest as was determined in this Court for grant of pension; and with reference to the decision in the case of ***University of Delhi v. Shashi Kiran and Ors.*****: 2022 SCC OnLine SC 594**, it has been contended that similar treatment may be provided in relation to the employees of the Board for grant of pensionary benefits.

11.8. In the last, learned senior counsel has made a fervent plea that the case of the employees concerned may be sympathetically considered by this Court and for that matter, by using extraordinary powers under Article 142 of the Constitution, to render complete justice, this Court may call upon the State Government to facilitate grant of pension by recommending the amendment of Regulation 52 so that the employees, who have toiled on behalf of the Board representing the State Government, would have a secured retired life.

12. Learned counsel appearing for respondent No. 2, the Board, has duly supported the claim made by the employees for pensionary benefits and has opposed this appeal with a few additional submissions.

12.1. Learned counsel for the Board would submit that promotion of khadi and cottage industries being the constitutional obligation of the State in terms of Article 43 of the Constitution of India, the appellant State has enacted the Act of 1955 and has established the Board. This being essentially State endeavour, the parity claimed by the employees of the Board with their counterparts in State services could not have been denied.

12.2. It has also been submitted that there are two type of employees in the Board, one being those who have been recruited by the Board and the others being those who come on deputation to the Board for a particular period of time. While the deputationists who come from State Government are entitled to pension and pension related benefits, the employees who are recruited by the Board have been deprived of the same even though essentially, they are discharging the State functions, as enshrined in Article 43 of the Constitution of India.

12.3. It has further been submitted that not only the deputationists but even the employees of the Board are governed by the rules applicable to the State Government employees like Service Code, Financial Rules, Record Manual, Pay Scale Rules, Leave Rules, Reservation Rules, Conduct and Discipline Rules etc. Thus, when all other rules applicable to the State Government employees are applicable to the employees of the Board, it is rather unjust and violative of the principles of fairness envisaged by Article 14 to deny pension to such employees in terms of the Orissa Government Pension Rules.

12.4. According to the learned counsel, the High Court has rightly drawn analogy from Khadi Boards of different States as also from other

A Orissa Government institutions, where the employees are entitled to pension; and the direction for granting pension to the employees of the Board is neither unjust nor unreasonable nor unfair.

12.5. Learned counsel for the Board has again referred to the statistics to submit that only a small number of employees are to be B benefitted by grant of pension in the present case and that the Board employees are essentially appointed in Group B and Group C posts. Thus, the pension in their relation would not be of an astronomical figure; and, the contention of alibi based on lack of financial resources deserves to be rejected.

C 12.6. As regards the question of challenge to the provision by virtue of which pension has been denied to the employees of the Board, it has been argued that the employees of the Board have been fighting for grant of pension for a long period of time and the instant litigation is not the first round of litigation. The very fact of demanding pension on the part of these employees in itself is a direct challenge to the provision D denying pension to them; and in the backdrop of the present case, it cannot be construed that the employees of the Orissa Khadi Board have not raised a direct grievance against the provision denying pension to them.

12.7. Learned counsel for the Board has reiterated the plea that E in this matter of grant of pension to employees who are direct State functionaries in terms of Article 43 of the Constitution of India, a broad view is required to be taken and the grievance cannot be stiffened on a narrow technicality. It has, thus, been submitted that in the broader interest of justice and for doing complete justice, this Court could invoke Article F 142 of the Constitution of India to maintain the direction for grant of pension to the employees concerned.

13. We have given anxious considerations to the rival submissions and have examined the record with reference to the law applicable.

14. It may be observed in the first place that the principles G enunciated in the decisions cited by the learned counsel for respondents, that pension is neither a charity nor a bounty nor a gratuitous payment but, is earned for past services rendered; and that non-availability of financial resources cannot be a defence by the Government or any of its agencies or instrumentalities in taking away vested right accrued to the employees, are neither of any doubt nor of any dispute. However, while H

adverting to the question about applicability of these principles to the case at hand, we may examine the relevant observations and expositions in the cited decisions as *infra*.

14.1. In ***D.S. Nakara*** (supra), this Court reaffirmed the principles that pension is not a bounty or a matter of grace depending on the sweet will of the employer as also that pension is not an *ex gratia* payment and is a social welfare measure rendering socio-economic justice. In the referred passages, this Court observed and exposited as under: -

> "20. The antequated notion of pension being a bounty, a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in *Deokinandan Prasad v. State of Bihar* [(1971) 2 SCC 330] wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon anyone's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied matters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was reaffirmed in *State of Punjab v. Iqbal Singh.* [(1976) 2 SCC 1]
>
> ***** ***** *****
>
> 30. The discernible purpose thus underlying pension scheme or a statute introducing the pension scheme must inform interpretative process and accordingly it should receive a liberal construction and the courts may not so interpret such statute as to render them inane (see American Jurisprudence, 2d, 881).
>
> 31. From the discussion three things emerge: (i) that pension is neither a bounty nor a matter of grace depending upon the sweet will of the employer and that it creates a vested right subject to 1972 Rules which are statutory in character because they are enacted in exercise of powers conferred by the proviso to Article 309 and clause (5) of Article 148 of the Constitution; (ii) that the

A pension is not an ex gratia payment but it is a payment for the past service rendered; and (iii) it is a social welfare measure rendering socio-economic justice to those who in the hey-day of their life ceaselessly toiled for the employer on an assurance that in their old age they would not be left in lurch. It must also be noticed that the quantum of pension is a certain percentage correlated to the B average emoluments drawn during last three years of service reduced to 10 months under liberalised pension scheme. Its payment is dependent upon an additional condition of impeccable behaviour even subsequent to retirement, that is, since the cessation of the contract of service and that it can be reduced or withdrawn C as a disciplinary measure."

14.2. In the case of ***Jitendra Kumar Srivastava*** (supra), this Court reaffirmed that pension is not a bounty but is a hard earned benefit which accrues to an employee and is in the nature of property, which cannot be taken away without the due process of law. This Court D pronounced against denial of right of the petitioner to receive pension and, with reference to the Constitution Bench decision in ***Deokinandan Prasad v. State of Bihar*****: (1971) 2 SCC 330** as also with reference to ***D.S. Nakara*** (supra), said as under:-

"8. It is an accepted position that gratuity and pension are not E bounties. An employee earns these benefits by dint of his long, continuous, faithful and unblemished service. Conceptually it is so lucidly described in *D.S. Nakara v. Union of India* [(1983) 1 SCC 305…..

……It is thus a hard earned benefit which accrues to an employee F and is in the nature of "property". This right to property cannot be taken away without the due process of law as per the provisions of Article 300-A of the Constitution of India."

14.3. In the case of ***Haryana State Minor Irrigation Tubewells Corporation*** (supra), this Court disapproved the denial of revised pay scale to the employees on the specious grounds of financial constraints G and said as under: -

"33. The plea of the appellants that the Corporation is running under losses and it cannot meet the financial burden on account of revision of scales of pay has been rejected by the High Court and, in our view, rightly so. Whatever may be the factual position, H

there appears to be no basis for the action of the appellants in denying the claim of revision of pay scales to the respondents. If the Government feels that the Corporation is running into losses, measures of economy, avoidance of frequent writing off of dues, reduction of posts or repatriating deputationists may provide the possible solution to the problem. Be that as it may, such a contention may not be available to the appellants in the light of the principle enunciated by this Court in *M.M.R. Khan v. Union of India* [1990 Supp SCC 191] and *Indian Overseas Bank v. Staff Canteen Workers' Union* [(2000) 4 SCC 245] . However, so long as the posts do exist and are manned, there appears to be no justification for granting the respondents a scale of pay lower than that sanctioned for those employees who are brought on deputation. In fact, the sequence of events discussed above clearly shows that the employees of the Corporation have been treated on a par with those in Government at the time of revision of scales of pay on every occasion.

34. It is an admitted position that the scales of pay were initially revised w.e.f. 1-4-1979 and thereafter on 1-1-1986. On both these occasions, the pay scales of the employees of the Corporation were treated and equated on a par with those in Government. It is thus an established fact that both were similarly situated. Thereafter, nothing appears to have happened which may justify the differential treatment. Thus, the Corporation cannot put forth financial loss as a ground only with regard to a limited category of employees. It cannot be said that the Corporation is financially sound insofar as granting of revised pay scales to other employees is concerned, but finds financial constraints only when it comes to dealing with the respondents who are similarly placed in the same category…."

14.4. In the case of ***Punjab State Cooperative Agricultural Development Bank Ltd.*** (supra), this Court held that non-availability of financial resources could not be a defence by an agency or instrumentality of the Government in taking away vested right accrued to the employees. This Court said as follows: -

"57. In our view, non-availability of financial resources would not be a defence available to the appellant Bank in taking away the vested rights accrued to the employees that too when it is for

A their socio-economic security. It is an assurance that in their old age, their periodical payment towards pension shall remain assured. The pension which is being paid to them is not a bounty and it is for the appellant to divert the resources from where the funds can be made available to fulfil the rights of the employees in protecting the vested rights accrued in their favour."

B

15. A close look at the decisions aforesaid makes it clear that the principles therein, though hardly requiring reiteration, are not of any application to the present case.

15.1. It is evident that in all such cases where this Court frowned C upon denial of pension, the right to receive the same was found flowing from the applicable rules and the service conditions. The said decisions cannot be weighed to mean that pension is required to be granted as a matter of right even if prescription to the contrary is found in the rules and/or service conditions.

D 15.2. In the present case, it remains indisputable that the Regulations of 1960 governing the service conditions of the employees of the Board specifically contain the stipulation in Regulation 52 that they shall not be entitled to pension. The cited decisions on behalf of the respondents cannot be read as overriding the said Regulation 52.

E 15.3. So far as the questions relating to financial constraints are concerned, true it is that in the communications exchanged between the Board and the Government as also in the decisions communicated, financial constraints had also been indicated on behalf of the State Government as being one of the reasons for not acceding to the request for retrospective amendment of Regulation 52. The question is as to F whether the Government could not have at all referred to the financial constraints as one of the reasons for not acceding to such a prayer for amendment.

15.4. In our view, a reference to financial constraints by the Government while denying the prayer for retrospective amendment of G Regulation 52 cannot be disapproved with reference to the decisions aforesaid. A matter of denial of the revised pay scale to the employees who were otherwise treated at par with those with the Government employees at the time of revision of pay scale (as in the ***Haryana*** case, supra); or taking away vested rights accrued to the employees (as in the H ***Punjab*** case, supra), cannot be imported to the present case where the

Government has not found itself agreeable to the proposed alteration of the service conditions of the Board's employees with retrospective effect, i.e., with effect from 01.04.1976. It has not been a case of denial of any vested or accrued right of the employees of the Board.

16. In the given set of facts and circumstances, the decision of this Court in the case of ***Air India*** (supra), reaffirming the principles against hostile discrimination is also of no assistance to the respondents because what Article 14 forbids is hostile discrimination but not reasonable classification. In the referred passage in the case of ***Air India*** (supra), this Court re-emphasised the principles against hostile discrimination but, at the same time, underscored the principles of reasonable classification while observing as under:

"39....

"(1).....

(2) Article 14 forbids hostile discrimination but not reasonable classification. Thus, where persons belonging to a particular class in view of their special attributes, qualities, mode of recruitment and the like, are differently treated in public interest to advance and boost members belonging to backward classes, such a classification would not amount to discrimination having a close nexus with the objects sought to be achieved so that in such cases Article 14 will be completely out of the way.

(3) Article 14 certainly applies where equals are treated differently without any reasonable basis.

(4) Where equals and unequals are treated differently, Article 14 would have no application.

(5) Even if there be one class of service having several categories with different attributes and incidents, such a category becomes a separate class by itself and no difference or discrimination between such category and the general members of the other class would amount to any discrimination or to denial of equality of opportunity.

(6) In order to judge whether a separate category has been carved out of a class of service, the following circumstances have generally to be examined:

A (*a*) the nature, the mode and the manner of recruitment of a particular category from the very start,

(*b*) the classifications of the particular category,

(*c*) the terms and conditions of service of the members of the category,

B (*d*) the nature and character of the posts and promotional avenues,

(*e*) the special attributes that the particular category possess which are not to be found in other classes, and the like.""

C 16.1. The observations in the impugned judgment and order dated 20.12.2012 as also the contentions urged on behalf of the respondents, seeking to put the employees of the Board at par with the employees of the State Government for all purposes, carry their own shortcomings. Even if Orissa Khadi and Village Industries Board has been established under an enactment of the State and for several relevant factors, it could D be considered to be an instrumentality of the State, its distinct characteristic of being a Board established with particular aim and objective cannot be ignored altogether. The Board being a body corporate, incorporated by its name, has been established to carry out the purposes of the Act of 1955 and not beyond. In view of its independent corporate E entity and existence, the provisions have been made in the Act of 1955 for making regulations by the Board consistent with the Act of 1955 and rules made thereunder with the previous sanction of the State Government, where the Regulations could provide, *inter alia,* for remuneration, allowances and other conditions of service of the staff of the Board F (vide Section 36 of the Act). The Regulations of 1960 were framed accordingly. Therein, even while otherwise applying a substantial part of the Rules in the Orissa Service Code *mutatis mutandis* to the employees of the Board, Regulation 40 itself starts with a clause of exception, making that provision subject to the other provisions of the Regulations. Then, in Regulation 52 it has specifically been provided that the employees of the G Board shall not be entitled to any pension except gratuity and CPF benefits; and further provisions have been made for the purpose of subscription/contribution to CPF. Thus, even when the State has established the Board to carry out its obligations in terms of Article 43 of the Constitution of India, it cannot follow as a corollary that the employees of this body corporate have to be treated as State Government employees H

in all respects. Such a corollary proposition would practically amount to merging of the Board with the State Government; rather making it as one of the Departments of the Government. This, in the face of existing statute, cannot be done. That being the position and when Regulations in question specifically make a distinct provision as regards retiral benefits, the same cannot be ignored by any stretch of arguments.

16.1.1. Putting it differently, even if development of khadi and cottage industry is a Directive Principle of State Policy, it does not follow as a corollary that if the State establishes a Board or any organisation to carry out the obligations under such Directive Principles, it cannot make separate arrangements as regards the service conditions of the employees of such a Board or organisation. Significantly, Regulation 40 of the Regulations of 1960 starts with an exception clause and while general conditions of service of the Board's employees have been provided in terms of the service conditions of the employees of the State Government, the provision is subject to the other provisions of the Regulations. Hence, the other provision, that is the one contained in Regulation 52, cannot be ignored.

16.2. In regard to the submissions made on behalf of the State that the aforesaid existing Regulation 52 had neither been challenged nor declared invalid, it has been suggested on behalf of the respondents that when the employees had regularly been raising the demand for pension by way of representations and had taken up litigation too, challenge to the contrary provisions is inherent in their demands/prayers. These submissions have only been noted to be rejected for more than one reason. First, that merely making a prayer contrary to the existing provision in the statute does not carry in itself a challenge to the provision. Secondly, for challenging a particular provision, specific case is required to be made out of either want of statutory powers or of violation of any constitutional mandate. Neither any such ground of challenge had been urged nor could be assumed. Thirdly, it is *ex facie* evident that all through the prayer had been for amendment of Regulation 52 and not of declaring the same in its existing frame as being invalid. A prayer for amendment of the Regulation cannot be equated with a prayer to declare the same as invalid. As noticed hereinbefore, the State Government's denial of the proposed alteration was essentially based on its disagreement to alter the service conditions with effect from 01.04.1976. Viewed from any angle, invocation of the principles forbidding hostile discrimination

A remains baseless and the contentions urged on that basis are required to be rejected.

17. On behalf of respondents, strong reliance has also been placed on the decision of the Gujarat High Court in the case of ***Gujarat State Khadi Gramodyog Board*** (supra), while pointing out that this Court did B not interfere with the same and rejected the petition seeking leave to appeal. It has been argued on the basis of this decision that the pension rights having been allowed to the employees of the similar Board in the State of Gujarat, there is every reason to endorse the same treatment for the employees of the respondent Board. The submissions do not take the case of the employees of the respondent Board any further. C This is for the simple but pertinent reason flowing from a marked difference of the service conditions. The High Court noticed in paragraph 14 of the referred judgment that pension scheme in relation to employees of that Board was made applicable with effect from 12.11.1973; and those who were members of the contributory provident fund were also D made eligible for the pension scheme. In paragraph 14, the High Court noticed, *inter alia*, as under: -

> **"14.** For all practical purposes, respondent no. 1-Board is an instrumentality of the State and, therefore, it is covered under Article 12 and undoubtedly amenable to the writ jurisdiction of E this Court. Since 1973 in the set-up of respondent no. 1, pension scheme was introduced and was made applicable from 12.11.1973, and who were the members of the Contributory Provident Fund (CPF), they were made eligible for the pension scheme. It is, also, corroborated and supported and reinforced by the Resolution dated 06.11.87. It is, therefore, clear that the petitioners, who were F employees of the respondent No. 1-Board, and who have retired after 1.1.86 were also entitled to pensionary benefits. The respondent No. 1-Board, undoubtedly, has been paying pension to the employees, those who have retired from service of the Board, got pensionary benefits but not in terms of the recommendations G made by the 5th Pay Commission report until 31.12.1995. As a result of which, the pension which was being paid to the petitioners, were due and payable, prior to the recommendations of the 5th Pay Commission and it continued. However, the effect of the recommendations made by the 5th Pay Commission report, accepted by the State and despite that the respondent no. 2-State, H

as well as, the respondent No. 1-Board, have not been given. In other words, the pensionary benefits which were available under the pension scheme, which were not revised in terms of the 5th Pay Commission report, though accepted and adopted by the respondents authorities, have not been paid so far."

17.1. Thus, in the said case, pension scheme had already been introduced and was made applicable from 12.11.1973; and the employees who were the members of CPF, were made eligible for the pension scheme. In fact, the question therein was as to whether the employees of the Gujarat State Khadi Gramodyog Board, who had retired prior to 01.01.1996, were entitled to the payment of pension according to the revised pay scale as per the recommendations of the 5th Pay Commission Report. The observations in the said decision cannot be applied to issue a writ of mandamus to the appellant State to amend the Regulations and to change the service conditions.

18. In view of the foregoing, it follows that the cited decisions are of no assistance to the claim of the respondents.

19. The other factor indicated on behalf of the respondents that a small number of affected employees may not bring about much financial burden on the State hardly make out a case for issuing a mandamus to the State to amend the Regulations. Whether to amend the Regulations or not, in the scheme of Act of 1955 as also the Regulations of 1960, is required to be left to the State and for that matter, the number of employees to be affected/benefitted is not of much relevance. In this regard too, as noticed hereinbefore, apparently the objections of the State were against retrospective amendment of the Regulations and thereby allowing pension with effect from 01.04.1976. Moreover, the indications in the referred communications that such a prescription is likely to bring about a huge amount of administrative trouble to the Government cannot be dubbed as mere pretence or a bogus alibi. We would hasten to observe that irrespective of these observations and irrespective of the result of this litigation, nothing would prevent the State Government to carry out the amendment in the form suggested or in any other modified form, if the State Government would be willing to do so. The only question in the present appeal is as to whether a mandamus could have been issued to the State to carry out amendment. As noticed, the answer could only be in the negative.

A 20. The other submission made on behalf of the respondents as regards refund of amount with interest in case of grant of pensionary rights does not make out any case in favour of the employees of the Board. As observed hereinabove, writ of mandamus cannot be issued to the appellant State to carry out amendments as desired by the respondent. Hence, the question of refund of the amount received by the employees concerned does not arise in this case.

21. For what has been discussed hereinabove, we are clearly of the view that the direction issued in the impugned order dated 25.10.2010 by the learned Single Judge could not have been approved. The Division Bench of the High Court was conscious of the fact that such a mandamus cannot be issued so as to direct the State Government to carry out a particular amendment and, therefore, in the impugned judgment and order dated 20.12.2012, termed such a direction as being "advisory" in nature. However, the Division Bench went miles ahead in the very next proposition while observing that the State Government "shall" carry out this direction. Converting an advice to the State Government into a mandate in this manner, with great respect, is neither permissible nor countenanced by law.

22. Learned counsel for the respondents, in all fairness, have made a plea in the last that this Court may exercise the powers under Article 142 of the Constitution of India to fill the gaps and to provide for pensionary benefits to the employees of the Board so as to do complete justice. In this regard too, even while respecting the endeavour, we could only observe that under Article 142 of the Constitution of India, this Court cannot issue directions in violation of the statutory provisions; and sympathy or sentiment, by itself, cannot be a ground for passing an order beyond and contrary to the legal rights. In the face of existing Regulation 52, we find it difficult to accede to the prayer made by the learned counsel for the respondents. In this regard, we could only reiterate that nothing contained in this judgment shall otherwise be of any impediment, if the State Government would be willing to carry out any amendment to the Regulations of 1960.

23. Subject to the observations foregoing, this appeal succeeds and is allowed; the impugned orders are set aside; and the writ petition filed by the respondent No. 1 is dismissed. No costs.

Ankit Gyan Appeal allowed.
(Assisted by : Vinayak and Aarsh Choudhary, LCRAs)