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Court : Orissa

Decided On : Jul-08-1968

Reported in : 34(1968)CLT1210; (1969)IILLJ318Ori

Judge : Barman, C.J. and ;A. Misra, J.

Appellant : Narayan Pradhan and ors.

Respondent : State of Orissa and ors.

Judgement :

A. Misra, J.

1. These three writ petitions are taken up together as the questions which arise for determination are substantially common in all of them.

2. The petitioner under each of these applications has prayed for issue of a writ of mandamus or other appropriate writ or order declaring the Orissa Ministerial Service (Regulation of Recruitment and Conditions of Service of Irregular Recruits in the Departments of Secretariat) Rules, 1964, invalid and ultra vires and directing the State of Orissa, opposite party 1, to forbear from applying the said rules to them or affect their present terms and conditions of service, salary, emoluments and seniority in the gradation list.

3. Narayan Pradhan, petitioner in Original Jurisdiction Case No. 193 of 1964 was first appointed as a lower division assistant in the Board of Revenue (head of the department) on 30 June 1955. Thereafter, he was promoted on officiating basis to the post of a lower division assistant in the Secretariat on 19 June 1956 and as an officiating upper division grade II assistant, on 18 October 1957. He was confirmed as a lower division assistant on 19 September 1958. He passed his Secretariat training examination in 1959 and was promoted to officiate in upper division grade I, on 1 June 1962. In the joint gradation list published by Government in April 1952, his order of seniority was Shown as 3.3 among the grade I assistants of the Secretariat. He apprehends that his position in the gradation list is likely to be reduced to the position 48, if the Regularization Rules of 1964 are applied to him.

4. Radhakanta Mohanti, petitioner in Original Jurisdiction Case No. 151 of 1965, was initially appointed as a pasting clerk on 4 June 1953 in which post he was confirmed on 1 September 1956. He was promoted to the post of diarist on 1 May 1958 and confirmed therein on 28 March 1958. He was promoted as an upper division diarist on 16 July 1958 and subsequently promoted to officiate as lower division assistant in the Secretariat on 29 July 1959; as a grade II upper division assistant on 29 August 1960; passed his Secretariat training examination on 8 March 1961 and was promoted to officiate as an upper division grade I assistant on 19 October 1962. In the meanwhile he had been confirmed as a lower division assistant on 29 July 1961. Though he initially entered service as a Matriculate, he passed his Intermediate examination and thereafter his B.A. examination, while in service in the year 1964. By the application of the Regularization Rules of 1964 his position in the gradation list has gone down to the position 42.

5. Shyam Sundar Praharaj, petitioner in Original Jurisdiction Case No. 152 of 1965, was initially appointed as a diarist on 1 October 1955 in which post he was confirmed on 28 March 1958. He was promoted as an upper division recorder on 1 May 1958 and subsequently promoted to officiate as a lower division assistant on 27 September 1959; as a grade II assistant on 5 October 1960 and a grade I assistant on 19 October 1962. He was confirmed as a lower division assistant on 27 September 1961 and passed his secretariat training examination on 1 July 1962. Though initially he entered service as a Matriculate while in service, he

passed his Intermediate and also B.A. examination by 1964. By the application of the Regularization Rules of 1964 his position in the gradation list is said to have gone down by 43 places.

6. The Orissa Ministerial Service (Method of Recruitment and Conditions of Service of Lower Division Assistants In the Offices of Departments of Secretariat) Rules, 1951 (hereinafter called the Recruitment Rules of 1951) were framed to regulate the method of recruitment and appointment to posts of lower division assistants in the offices of departments of Secretariat and came into force from 1952. As recruitment of some lower division assistants had taken place during the period from 1951 to 1964 contrary to and in violation of the Recruitment Rules of 1951, the Governor, in exercise of powers under Article 309 of the Constitution, framed a set of rules on 23 October 1964 known as the Orissa Ministerial Service (Regularization of Recruitment and Conditions of Service of Irregular Recruits in the Departments of Secretariat) Rules, 1964 (hereinafter called the Regularization Rules of 1964). These rules, defined the expression 'Irregular recruit,' purported to regularize all irregular recruitments of lower division assistants and also laid down certain principles for determination of seniority of such irregular recruits. Consequently, Government issued the resolution dated 23 October 1964 directing all departments in the Secretariat to regulate and refix the inter se seniority of lower division assistants according to the principles laid down in the Regularization Rules of 1964.

7. The petitioners allege that by extending the application of the Regularization Rules of 1964 and readjusting their seniority and ranking in accordance with the principles laid down therein, the seniority and ranking of each of them has been affected and thereby their prospects of future promotion and emoluments have been adversely affected. According to them, they were not governed by the Recruitment Rules of 1951, as those rules were intended to apply and applied only to direct recruits to the posts of lower division assistants and had no application to promotees. The Recruitment Rules of 1951 not being applicable to them, they cannot be treated as 'irregular recruits' under the Regularization Rules of 1964 and their right in their present posts or their position in the gradation list cannot be readjusted and adversely affected. They further assert that they being promotees

to the posts of lower division assistants, they are governed by the provisions of the Secretariat instructions which have the force of law and have not in any manner been superseded by the Recruitment Rules of 1951, In the alternative, they allege that conceding for the sake of argument that they would come within the ambit of the definition of 'irregular recruit' contained in Rule 2(b) of the Regularization Rules of 1964, the said rules are to be struck down as wholly ultra vires, illegal and unconstitutional. Petitioners in Original Jurisdiction Cases Nos. 151 and 152 of 1965 further state that the formula given in the table under Rule 5 of the Regularization Rules of 1964 is liable to be struck down as it is arbitrary and does not contain any rational basis for determining inter se seniority.

8. These applications are resisted by the State of Orissa mainly on the following grounds, that the Recruitment Rules of 1951 framed under Article 309 of the Constitution lay down the qualifications and manner of recruitment of lower division assistants for appointment in the different departments of the Secretariat. It is further stated that each of the petitioners is an 'irregular recruit' as defined under Rule 2(b) of the Regularization Rules of 1964 as their appointments had been made in violation of the Recruitment Rules of 1951. In short, the stand of the State is that the petitioners being 'irregular recruits,' the Regularization Rules of 1964 are clearly applicable to them and unless the said rules had regularized the irregularity which had occurred in appointing them, their appointments would have been void. So far as the formula providing for readjusting and determining seniority of irregular recruits is concerned, it is stated that the same has been provided taking Into consideration the educational qualification and experience attained by a candidate, both of which are vital for efficiency, and as such, It is not correct to say that the formula is arbitrary or without any rational basis.

9. In Original Jurisdiction Case No. 152 of 1965, 36 assistants of the Finance Department who claim to have been appointed under Rule 11 of the Recruitment Rules of 1951 have entered appearance as interveners. According the them, the Regularization Rules of 1954 by regularizing the irregular appointments under Rule 3 and providing a formula for determination of seniority of the said irregular recruits has adversely affected their service conditions and future chances of promotion. They state that many of the irregular recruits who must be deemed to

be junior to them will be upgraded on relaxation of their seniority under Rule 5 of the Regularization Rules of 1964 and thereby their future prospects will be adversely affected. Similarly, they state that the Regularization Rules of 1964 are void as they have the effect of altering the service conditions of the interveners and as rights under the Recruitment Rules of 1951 are contractual in nature, the State cannot unilaterally alter them to their detriment. On these grounds, they allege that the 'irregular recruits' should, in no case, be considered senior to persons appointed after passing the examination held by the Public Service Commission under the Recruitment Rules of 1951 irrespective of the period of their service.

10. There is no dispute that the Recruitment Rules of 1951 containing the qualifications and regulating the method of recruitment and appointment of lower division assistants in the different departments of Secretariat were in force during the period from 1951 to 1964. Rule 3 of the said rules prescribes the method of recruitment and Rule 20 prescribes the qualifications of a candidate eligible to appear at the competitive examination to be held by the Public Service Commission once every year for such recruitment. Admittedly, petitioners in these writ applications were not recruits under the provisions of the aforesaid rules. Petitioner in Original Jurisdiction Case No. 193 of 1964 who was working as a lower division assistant in the Board of Revenue was appointed in the Secretariat as a lower division assistant on 19 June 1958; petitioner in Original Jurisdiction Case No. 151 of 1965 who previously held the posts of pasting clerk and diarist was appointed to officiate as a lower division assistant in the Secretariat on 29 July 1959 and petitioner in Original Jurisdiction Case No. 152 of 1965 who was working as a diarist was promoted to officiate as a lower division assistant on 27 September 1959. It is also not disputed that during the period from 1951 to 1984 when the Recruitment Rules of 1951 were in force, certain appointments of lower division assistants had been made in contravention of the said rules which necessitated the framing of the Regularization Rules of 1964 under Article 309 of the Constitution to regularize such irregular appointments. As a consequence, the gradation list had to be revised for which purpose a formula has been provided in Rule 5 of the Regularization Rules of 1964.

11. The main contentions advanced by learned Counsel for petitioners in all the writs are as follows:

(1) there were two channels for appointment to the posts of lower division assistants in the Secretariat, one being by direct recruitment under the Recruitment Rules of 1951 and the other by promotion under the Secretariat instructions which have the force of law. The present petitioners belong to the latter category, and as such, neither the Recruitment Rules of 1951 nor the Regularization Rules of 1964 are applicable to them,

(2) Even if the aforesaid rules are applicable to them, the table given under Rule 5 of the Regularization Rules of 1964 for determination of seniority of irregular recruits is to be struck down as the same is arbitrary and is not based on any rational basis.

(3) And even if the aforesaid provisions are applicable to them, only the period of irregular service as lower division assistants is to be taken for the purpose of Rule 5 in determining their seniority.

12. Point (1).--It is contended for petitioners that the Secretariat instructions of 1940 were in force till they were replaced by the new Secretariat instructions of 1961 and they had the force of law. Reference is made to Paras. 26, 27 and 29 of the said instructions and it is urged that thereunder provision had been made for appointment both by promotion and competitive examination. The Recruitment Rules of 1951 provided for recruitment by competitive examination through the Public Service Commission and did not touch the provisions of the Secretariat instructions relating to appointments by promotion. On these grounds, it is urged that the Recruitment Rules of 1951 were not applicable to petitioners and necessarily the Regularization Rules of 1964 also cannot apply to them.

13. Rule 2(f) of the Recruitment Rules of 1951 defines the expression 'service' as the Orissa Ministerial Service consisting of lower division assistants in offices of departments of Secretariat and Rule 3 expressly lays down that recruitment to the said service shall be by means of a competitive examination held once every year. The succeeding rules provide the authority by whom and the manner in which

examinations are to be conducted. There is absolutely no provision for filling up any of these posts in the service by promotion or otherwise, except as laid down in the statutory rules. The contention that the Secretariat instructions of 1940 had the force of law, and as such, the provision relating to promotion remains unaffected is not correct. The preface to the said instructions clearly states that Part I containing the paragraphs referred to by learned Counsel, consists of executive instructions of the Provincial Government for the transactions of business in the Secretariat. Therefore these instructions cannot have the force of law. Even assuming that the Secretariat; instructions of 1940 contained provisions permitting appointment of lower division assistants by promotion from inferior posts, such instructions cannot prevail over the statutory rules framed under Article 309 in 1951, so far as the method of recruitment and Qualification of candidates are concerned. Thus, we have no hesitation in holding that with effect from the date of coming into force of the Recruitment Rules of 1951, appointments to such posts could be made only in accordance with the provisions contained therein and any appointment whether by promotion or direct in violation of the said rules was irregular.

14. Under Rule 2(6) of the Regularization Rules of 1954, the expression 'irregular recruit' has been defined as any person appointed as a lower division assistant in any of the departments of the Secretariat between 12 December 1951 and 13 June 1964 in contravention of Rule 3 or continuance of a person in such post in contravention of Rule 11 of the Recruitment Rules. Petitioners in these three writ applications were appointed as lower division assistants during the aforesaid period. Therefore, their appointments being in contravention of the Recruitment Rules of 1951, they were 'irregular recruits' as defined in the Regularization Rules of 1954. That the Regularization Rules of 1954 were intended to apply to such persons finds support from some of the items of the table given under Rule 5 which provide for determination of seniority of such persons with different periods of service in inferior posts. In short, irrespective of the executive instructions that existed prior to 1951, so far as appointment to posts of lower division assistant is concerned, only one method of recruitment WAS provided for under the Recruitment Rules of 1951. As such, the Regularization Rules of 1954 are applicable to petitioners and their contention to the contrary has no merit.

15. Point (2).--The next contention is that even assuming that the Regularization Rules of 1964 are applicable to petitioners, their seniority cannot be determined in accordance with the instructions contained in the table given under Rule 5(3) of the said rules as those instructions are arbitrary and without any rational basis. Rule 5 prescribes the principles for determining the seniority of the irregular recruits whose appointments have been regularized under the provisions contained in Rule 3, Rule 18 of the Recruitment Rules of 1951 provides for regulation of relative seniority of candidates appointed in accordance with those rules after coming out successful in the competitive examination. During the period from 1951 to 1964, as already stated, a number of appointments in contravention of the Recruitment Rules of 1951 had been made which necessitated the framing of the Regularization Rules of 1964. Therefore, when the irregularity in their appointments was removed and they were put on a par with candidates who had been appointed under the Recruitment Rules of 1951, it was necessary to make provisions for determining their seniority. Rule 5, Sub-rule (1), provides for the year of allotment of such candidates and Sub-rule (2) states that the year of allotment is to be determined on the basis of the percentage given to different categories as indicated in the table annexed to Sub-rule (3). Column (1) of the table provides that the date of first appointment in the Secretariat of an irregular recruit is to be the basis on which the percentage is to be fixed. For this purpose, different categories have been described in Col. (1) on the basis of Qualification and experience and different percentages are prescribed in Col. (2). It is true that some of these irregular recruits have after entering service in the Secretariat attained the educational qualification laid down in the Recruitment Rules of 1951, but that did not alter their status of being irregular recruits, because even then they could not be considered as candidates who have come through an examination held by the Public Service Commission as laid down in those rules. In such circumstances, when experience and qualification on the date of irregular appointment are taken as the basis, the argument that the table is prescribed arbitrarily without any rational basis cannot be accepted. Hence, we do not find any merit in this contention.

16. Lastly, it is urged that for the purpose of determining seniority the period of irregularity is to be confined to the period which the petitioners served as lower

division assistants and not in any other posts. It is contended that in view of the definition of 'irregular recruit' in Rule 2(b) of the Regularization Rules of 1964, only the period served as lower division assistants should be treated as irregular and not the rest of the period of their service in the Secretariat. In our opinion, this contention also has no force. The appointment of a person was invalid at the inception being contrary to the Recruitment Rules of 1951, though subsequently such irregular recruits were given officiating promotions to higher grades. The irregularity in their appointments in the Secretariat Ministerial Service cannot be said to have ceased on their being given an officiating promotion to a higher rank. Under the Secretariat instructions appointments to the higher ranks of assistants could be only toy promotion from lower ranks of lower division assistants. Therefore it will not be correct to say that the irregularity existed only during the period they served as lower division assistants and disappeared thereafter, and as such, we do not consider that this contention has any merit.

17. The interveners in Original Jurisdiction Case No. 152 of 1965 claim to have been appointed under Rule 11 of the Recruitment Rules of 1951. Their main contention is that having been appointed under Rule 11 of the said rules they have acquired a right to certain positions in the order of seniority in the gradation list and the irregular recruits whose appointments have been validated by the Regularization Rules of 1984 can in no case be senior to them. In support of his stand, they contend that the Regularization Rules of 1964 are invalid as they purport to deprive them of their right to seniority which they had already acquired. Similarly, it is also urged that the conditions of service of persons recruited under the Recruitment Rules of 1951 being contractual in nature are binding on both the parties and they cannot be unilaterally altered by the State.

18. The Regularization Rules of 1964 have been made in exercise of powers under Article 309 of the Constitution and the power of the Governor to frame such rules is not disputed. Rule 6 of the Regularization Rules of 1964 gives overriding effect to the said rules notwithstanding anything inconsistent therewith contained in the Recruitment Rules, etc. As a result in the determination of seniority, the provisions contained in the Regularization Rules of 1964 will prevail over the provisions in the earlier rules. The contention that the conditions of service

contained in the Recruitment Rules of 1951 being contractual cannot be altered unilaterally is equally untenable. In repelling such a contention, the Supreme Court in the decision in *Roshan Lal Tandon and Anr. v. Union of India and Anr.* 1968--I L.L.J. 576, observed as follows at p. 582: It is true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office, the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. In other words, the legal position of a Government servant is more one of status than of contract. The hallmark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties. The emolument of the Government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee....

The aforesaid observations clearly negative the contentions raised by the interveners. It was farther contended that though Government may have the power to unilaterally alter the conditions of service, they cannot be given effect retrospectively. In a recent decision of *B.S. Vadera and Ors. v. Union of India* S.C. Writ Petition No. 98 of 1967, and *G.S. Chaggar v. Union of India and Ors.* S.C. Writ Petition No. 165 of 1967 such a contention was rejected, and it was held that rules framed under Article 309 are to be given full effect both prospectively and retrospectively. Thus, we do not find any merit in the contentions of the interveners.

19. In the result, for the reasons discussed above, the three writ petitions are dismissed, but in the circumstances, there will be no order as to costs.

Barman, C.J.

20. I agree.