

STATE OF ORISSA AND ORS. ETC. A
v.
SUKANTI MOHAPATRA AND ORS. ETC.

MARCH 19, 1993

[A.M. AHMADI AND M.M. PUNCHHI, JJ.] B

Service Law :

Orissa Ministerial Service (Method and Recruitment to Posts of Lower Division Assistants in the Offices of Heads of Department) Rules, 1975 : C

Rules 13 & 14—Appointment by Relaxation—Candidates appointed without following the relevant rules—Regularisation of such irregular appointees—Effect of—Inter-Se seniority—Fixation of—Whether the irregular appointees subsequently regularised can be placed above the regular appointees on the basis of total length of service. D

The Orissa Ministerial Service (Method and Recruitment to Posts of Lower Division Assistants in the Offices of Heads of Department) Rules, 1975 (the Rules) came into force with effect from 1.1.1976. Rule 3 thereof provided that recruitment to the said posts should be made by means of a competitive examination to be held once in every year. Rule 8(b) prescribed the minimum educational qualification as Intermediate in Arts/Science/Commerce. Rule 14 provided for relaxation of the provisions in respect of any class or category of persons in public interest. Rule 13 provided for the relative seniority of candidates with reference to the position in the competitive examination. A proviso came to be added to Rule 13 that those appointed by relaxation under Rule 14 would rank below the validly recruited candidates. E F

A large number of persons came to be recruited without resort to competitive examination. Many of them did not possess the minimum qualification. Their appointments were made by resorting to relaxation under Rule 14. Subsequently their services were regularised. G

The orders of regularisation and fixing of relative seniority were challenged before the Administrative Tribunal. The Tribunal observed that the power to relax cannot be resorted to regularise irregular appoint- H

A ments. However, in view of the lapse of time, it felt that quashing of regularisation would result in loss of livelihood to the irregular recruits, and so it did not strike down the regularisation order. As regards seniority, the Tribunal ordered that the regular appointees would be senior to the irregular appointees.

B Against the orders of the Tribunal the irregular appointees as also the State Government preferred appeals before this Court.

Disposing of the appeals, this Court,

C HELD : 1.1 . Rule 14 of the Rules empowers the Government to relax any rule or rules in public interest for any class or category of persons for reasons to be stated in writing. However, it is clear from the two orders that the regularisation was made for individuals specified in the orders who had made representations and not for any class or category of persons. It is true that the persons named in the orders were
D irregular appointees but the orders do not say that all irregular appointees will stand regularised under the said orders. [512E-F]

1.2. The first order of January 3, 1985 says that regularisation is being permitted on compassionate grounds which would depend on the
E fact-situation of each appointee. The subsequent order of February 14, 1985, does not even pretend to state that the action is in public interest. It is totally silent on this point. The essential requirement i.e. the condition precedent for the exercise of power under Rule 14, namely, public interest, is not shown to have been satisfied. Rule 14 permits
F relaxation of "any of the provisions of the rules" but it does not speak of regularisation. *Ex-facie* the two orders do not speak of any particular rule or rules having been relaxed but provides for regularising the services of specified individuals whose appointments were outside and inconsistent with the Rules. The reason for exercise of power in the case of nine appointees covered under the order of January 3, 1985 is stated
G to be "compassionate grounds" but in the case of those covered under the second order of February 14, 1985, no ground at all is given. Such orders, therefore, cannot have the protection of Rule 14 nor can the appointments be regularised as having been done under the Rules so as to dislodge the seniority of regularly appointed persons.

H

[512G-H; 513A-D]

1.3. Admittedly the employees whose services are sought to be regularised were appointed dehors the Rules. Rule 14 merely permits relaxation of any of the provisions of the Rules in public interest but not the total shelving of the Rules. The orders do not say which rule or rules the Government considered necessary and expedient in public interest to relax. What has been done under the impugned orders is to regularise the illegal entry into service as if the Rules were not in existence. Besides, the reasons for so doing are not set out nor is it clear how such regularisation can sub-serve public interest. [515C]

1.4. Rule 14 has to be strictly construed and proper foundation must be laid for the exercise of power under that rule. The Rules have a limited role of play, namely, to regulate the method of recruitment, and Rule 14 enables the Government to relax any of the requirements of the Rules pertaining to recruitment. The language of Rule 14 in the context of the objective of the Rules does not permit total suspension of the Rules and recruitment dehors the Rules. [515D-E]

1.5 In the instant case, recruitments had taken place years back in total disregard of the Rules and now what is sought to be done is to regularise the illegal entry in exercise of power under Rule 14, which does not confer such a blanket power; its scope is limited to relaxing any rule, e.g., eligibility criteria, or the like, but it cannot be understood to empower Government to throw the Rules overboard. If the rule is so construed it may not stand the test of Article 14 of the Constitution. The proviso to Rule 13 can come into play in the matter of fixation of seniority between candidates who have successfully cleared the examination and a candidate who cleared the examination after availing of the benefit of relaxation. [515E-F]

R.N. Nanjundappa v. T.Thimmiah and Anr., 1972 SLR 94 (AIR 1972 SC 1767), relied on.

2. The relative seniority will be worked out as directed by the Tribunal but it will not have the effect of disturbing the seniority of regular appointees who will rank senior to the irregular appointees. It is clarified that any benefit derived by the irregular appointees under any interim orders contrary to the relief moulded by the Tribunal shall be adjusted and brought in tune with the said relief. [516C-D]

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1347 of 1993 etc. etc.

From the Judgment and Order dated. 23.9.1991 of the Orissa Administrative Tribunal, Bhubaneshwar in O.A No. 1494 of 1990.

B A.K. Panda, J.R. Das, P.N. Mishra, B.A. Mohanti, Ms. Aruna Mathur and C.S.S. Rao for the appearing parties.

The Judgment of the Court was delivered by

C AHMADI, J. Special leave granted in S.L.Ps Nos. 18926/91 and 389/92.

D In exercise of power conferred by the proviso to Article 309 of the Constitution of India, the Governor of Orissa enacted the Orissa Ministerial Service (Method of Recruitment of Posts of Lower Division Assistants in the offices of Heads of Department) Rules, 1975, (for short 'the Rules') which were brought into force with effect from January 1, 1976. Rule 3 thereof provides that the recruitment to the said posts shall be made by means of a competitive examination to be held once in every year. The eligibility criteria is laid down in Rule 8. The minimum educational qualification prescribed under rule 8(b) for the said post is that the candidate should have passed Intermediate in Arts/Science or Commerce or an equivalent qualification. Rule 13 provides that the relative seniority of each candidate shall be determined with reference to his position in the examination held in a particular year. Rule 14 deals with relaxation and is in the following terms :

F "When the Government are of opinion that it is necessary or expedient so to do it may by order, for reasons to be recorded in writing, relax any of the provisions of these rules in respect of any class or category of persons in public interest."

G A proviso came to be added to Rule 13 that those appointed by relaxation under Rule 14 shall in that year, rank below validly recruited candidates under Rule 3 or the first part of Rule 11 of the Rules.

H In the backdrop of these provisions the question which arises for consideration is whether the appointment of candidates made dehors these

rules could be 'regularised' in exercise of the power of relaxation conferred on the Government by the aforementioned Rule 14 of the Rules, and if yes, whether such irregular appointees whose services have been regularised under Rule 14 could be placed above the regularly appointed incumbents in seniority on the basis of the length of service ? On a plain reading of Rule 14 it is obvious that the relaxation power, so called, can be exercised in respect of a class or category of persons when the Government are of opinion that it is necessary or expedient so to do in public interest and for reasons to be recorded in writing. The rule empowers the Government to 'relax any of the provisions of these rules' in public interest. Now if we turn to the Government Order in Civil Appeals Nos. 2708-09 and 1673-74 of 1991 we find that the orders dated January 3, 1985 are in identical terms, the relevant part whereof reads as under :

".....after careful consideration Government have been pleased to relax the appointment of the following nine irregular L.D.Assistants of Directorate of Mining and Geology under provisions of Rule 14 of the O.M.S. (Method of Recruitment of Junior Assistants in the Office of Heads of Departments) Rules, 1975 on compassionate grounds in public interest."

The names of the concerned irregular appointees have then been stated without prejudice to *inter-se* seniority. In the other two appeals arising from Special Leave Petitions Nos. 18926/91 and 389/92 the text of the order is somewhat different from the one extracted above. In both these cases the order, though differing from the above extracted text, is identical in language, the relevant part whereof reads thus :

"I am directed to say that a proposal for regularisation of the following irregular recruits appointed as Junior Assistant in the office of the Chief Engineer, P.H., Orissa in violation of the provisions contained in Orissa Ministerial Service (Method of Recruitment to the posts of Lower Division Assistants in the Offices of the Heads of Department) Rules, 1975, was under active consideration of Government.

- A After careful consideration, Government has been pleased to regularise the irregular appointment of these 18 recruits under Rule 14 of the Orissa Ministerial Service (Method of Recruitment to the Posts of Lower Division Assistants in the Office of the Heads of Department) Rules, 1975.
- B The *inter-se* seniority of these irregular recruits vis-a-vis with that of regular recruits may be determined in accordance with the provision contained under Rule 13....."

- C From the texts of the aforesaid orders two things immediately come to notice, namely, (i) the orders relate to named individual irregular recruits and (ii) they purport to regularise the services of such recruits. Next the first order of January 3, 1985 says that the relaxation power conferred by Rule 14 is being invoked "on compassionate grounds in public interest" whereas the subsequent order of February 14, 1985 does not assign any reason whatsoever for the exercise of the power. Now under
- D Rule 14 the power to relax the provisions of the Rules can be exercised in public interest only for reasons to be recorded in writing. In the first order the only reason surfacing from the text of the order is compassion whereas the second order is entirely silent on the point. Besides, under Rule 14 the power extends to relaxation of any of the provisions of the Rules but the orders do not expressly state which rule or rules is or are intended to be relaxed and the matter is left to inference. Indeed it is quite obvious from the text of the orders which we have extracted hereinabove that what was intended was not to relax any particular rule or rules but to regularise the appointments of certain specified individuals whose appointments were not in accordance with the Rules. The Orissa Administrative Tribunal in
- E Original Applications Nos. 208 and 209 of 1987 which has given rise to civil Appeals Nos./2708-09 and 1673-74 of 1991 observes :
- F

- G "The group of nine Assistants had nothing in common between them except that they were appointed sometime or other in various different types of posts....By themselves they do not form a class or category except for the fact that they are irregular recruits. We have not been able to understand how compassionate ground and public interest go together. There is no doubt that these are cases which have been regularised on compassionate ground
- H but we have not been able to see any public interest in the

said regularisation. In fact, Annexure X amounts to a regularisation of irregular recruits. but there is no such provision of regularisation of irregular recruits in the said rules or any other rule pointed out to us."

A

The Tribunal then proceeds to point out that a large number of them do not have the minimum prescribed qualification of Intermediate Arts, Science or Commerce.

B

"Once we accept that Rule 14 gives power to Government to regularise irregular recruits by executive order then the entire rule framed for recruitment by a prescribed procedure can be set at naught."

C

The Tribunal thus saw a difference between regularisation and relaxation and came to the conclusion that Rule 14 did not permit regularisation of irregular recruits. It also felt that sympathy and compassion cannot outweigh public policy and concern for public interest. In this view of the matter it felt that the gradation list showing the regularised recruits senior to regularly appointed persons was not legally sustainable. It, however, dismissed the Applications as time barred, a view which it reviewed and reversed subsequently in M.P. Nos.187-188 of 1990, which order too is assailed before us.

E

In the subsequent two appeals arising out of S.L.Ps. Nos. 18926/91 and 389/92, the Tribunal held :

"It seems Government used the expression 'regularisation' as synonymous with 'relaxation'. In our opinion this is entirely wrong. In the guise of 'relaxation', Government has no power to 'regularise' the illegal appointments."

F

But realising that on the quashing of regularisation all the irregular recruits would lose their livelihood, the Court further observed :

"On equitable ground we feel that it shall not be proper for the end of justice to countenance such a situation where persons serving for 12 years under the Government would lose their jobs."

G

After pointing out that most of such recruits would have crossed the upper

H₁

A age limit for entry into Government service and many of them may have moved vertically by securing promotions, the Tribunal moulded the relief as under :

B "At this juncture on equitable ground while we do not propose to quash the regularisation we shall not at the same time allow the illegality and injustice to perpetuate further by denying the relief sought for in this application."

C The Tribunal declared the petitioner (regular recruit) to be senior to the irregular recruits without striking down the regularisation order.

D The appeals have been preferred by those whose entry in service was irregular being dehors the Rules on the grounds that the Tribunal was wrong in the view it took regarding the Government's power under Rule 14 and the exercise of that power. The State of Orissa has also approached this Court to have its orders of January 3, 1985 and February 14, 1985 upheld. As all these appeals raise common questions of law, we have deemed it appropriate to dispose them of by this common judgment.

E From what we have discussed so far it does appear that after the Rules were brought into force with effect from January 1, 1976, the recruitment was made in total disregard of the Rules in 1976 and therefore even of those who did not possess the minimum educational qualification prescribed for the job under the Rules. Such recruits have been described as 'irregular'. Rule 14 empowers the Government to relax any rule or rules in public interest for any class or category of persons for reasons to be stated in writing. However, it is clear from the two orders reproduced hereinabove that the regularisation was made for individuals specified in the orders who had made representations and not for any class or category of persons. True it is that the persons named in the orders were irregular appointees but the orders do not say that all irregular appointees will stand regularised under the said orders. Then, the first order of January 3, 1985 says that regularisation is being permitted on compassionate grounds which would depend on the fact-situation of each appointee. Even if it is assumed that these irregular recruits constituted a class or category of persons, Rule 14 could be invoked in public interest only. If compassionate ground is the public interest for regularisation it is difficult to understand how such a factual aspect can form the basis for public interest. Assuming that their

having served for long years is a valid reason for regularisation, that, without anything more, will not meet the requirement of the action being in public interest. Rule 14 requires that the reasons in support of the action being in public interest must be stated in writing but no reason other than 'compassionate grounds' appears in the first order. And what are those compassionate grounds? The order does not provide the answer. The subsequent order of February 14, 1985, does not even pretend to state that the action is in public interest. It is totally silent on this point. It would, therefore, seem that the essential requirement i.e. the condition precedent for the exercise of power under Rule 14, namely, public interest, is not shown to have been satisfied. Next Rule 14 permits relaxation of "any of the provisions of the rules" but does not speak of regularisation. *Ex-facie* the two orders do not speak of any particular rule or rules having been relaxed but provides for regularising the services of specified individuals whose appointments were outside and inconsistent with the Rules. The reason for exercise of power in the case of nine appointees covered under the order of January 3, 1985 is stated to be "compassionate grounds" and in the case of those covered under the second order of February 14, 1985, no ground at all. Such orders, therefore, cannot have the protection of Rule 14 nor can the appointments be regularised as having been made under the Rules so as to dislodge the seniority of regularly appointed persons.

The Rules were made under the proviso to Article 309 for regulating the method of recruitment to the posts of Lower Division Assistants in the offices of the Heads of Departments. The method of recruitment set out in Rule 3 is through a competitive examination to be held once in every year. According to Rule 4 this competitive examination has to be conducted by a Board of Examiners after the Chairman of the Board has invited applications from those desirous of appearing at the examination through public advertisement. Rule 8 lays down the eligibility criteria as regards age, educational qualification, knowledge of Oriya language, etc. Rule 9 sets out the syllabus of the examination and Rule 10 provides for allotment of successful candidates to different departments. Rule 11 is somewhat important since it lays down the procedure for filling up vacancies after the list of candidates is exhausted. Where the vacancy has arisen after the list is exhausted such vacancy may be filled by a successful candidate of the previous year and failing that by any qualified candidate on a temporary basis till the result of the next year's examination is declared. Rule 12 provides the period of probation while Rule 13 lays down

- A the rule for fixation of seniority. It says that the relative seniority of each candidate shall be determined with reference to his position in the competitive examination in any particular year. Where, however, a candidate of the previous year is selected under Rule 11 for appointment in the subsequent year he shall rank just below the successful candidates of the year in which the appointment was made. To this a proviso has been added
- B as under :

- C "Provided that those appointed as junior assistants, in relaxation of provision under Rule 14, shall in that year rank below all candidates who have been validly recruited under Rule 3 and under first part of Rule 11 of the said rules."

- D Rule 14 we have already extracted earlier. Rule 15 provides for reservations and concessions to SC/ST and other candidates. Rule 16 stipulates that these rules shall have over-riding effect notwithstanding anything inconsistent therewith contained in any other recruitment rules, orders, etc. It becomes clear from these rules that after they came into force they alone held the field. Secondly, the method of recruitment is only one, namely, direct recruitment through a competitive examination to be conducted by the Board of Examiners. The only exception that we find is in Rule 11
- E which permits a temporary appointment till the next year's examination result is declared. Despite the Rules having come into force with effect from January 1, 1976, appointment were made in disregard of the Rules from 1976 and onwards. It is this batch of irregularly appointed employees whose services were sought to be regularised under rule 14 by the orders
- F of January 3, 1985 and February 14, 1985. Counsel for the regular recruits contend that what the Government has done in exercise of power under Rule 14 is to set at naught the entire body of the Rules as if they never existed. The power of relaxation, contend counsel, cannot be so used as to render the Rules non-est. In support of this contention strong reliance was placed on the following observations in the case of *R.N.Nanjundappa v. T. Thimmiah and Anr.*, 1972 SLR 94 (AIR 1972 SC 1767) :
- G

- H "If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution, illegality cannot be regularised. Ratification or regularisation is possible of an act which is within the power and

province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularisation cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules."

In the present case also the appointments of the employees whose services are sought to be regularised were dehors the Rules. Rule 14 merely permits relaxation of any of the provisions of the Rules in public interest but not the total shelving of the Rules. The orders do not say which rule or rules the Government considered necessary and expedient in public interest to relax. What has been done under the impugned orders is to regularise the illegal entry into service as if the Rules were not in existence. Besides the reasons for so doing are not set out nor is it clear how such regularisation can sub-serve public interest. Rule 14 has to be strictly constructed and proper foundation must be laid for the exercise of power under that rule. The Rules have a limited role to play, namely, to regulate the method of recruitment, and Rule 14 enables the Government to relax any of the requirements of the Rules pertaining to recruitment. The language of Rule 14 in the context of the objective of the Rules does not permit total suspension of the Rules and recruitment dehors the Rules. In the present case the recruitments had taken place years back in total disregard of the Rules and now what is sought to be done is to regularise the illegal entry in exercise of power under Rule 14. Rule 14, we are afraid, does not confer such a blanket power; its scope is limited to relaxing any rule, e.g., eligibility criteria, or the like, but it cannot be understood to empower Government to throw the Rules overboard. If the rule is so constructed it may not stand the test of Article 14 of the Constitution. The proviso to Rule 13 can come into play in the matter of fixation of seniority between candidates who have successfully cleared the examination and a candidate who cleared the examination after availing of the benefit of relaxation. We are, therefore, of the opinion that the Tribunal committed no error in understanding the purport of Rule 14.

The Tribunal's order in review is assailed on the ground that it had no justification to reverse its earlier order by which it had held that the challenge was time-barred. The Tribunal exercised the review jurisdiction

- A as it had failed to notice the correct provision and had, therefore, applied the wrong provision in declaring the proceeding time-barred. The Tribunal rightly points out that since the cause of action had arisen prior to the establishment of the Tribunal, the proceedings stood governed by section 21(2) (a) and not section 21(1) (a) of the Administrative Tribunals Act, 1985, which it had wrongly invoked. We, therefore, see no merit in this challenge.
- B

- Now even though the Tribunal came to the conclusion that Rule 14 did not permit regularisation made under the impugned orders of January 3, 1985 and February 14, 1985, it, having regard to the long service put in by the employees named in the said two orders and on compassionate considerations has supported the regularisation under Article 162 of the Constitution. It has moulded the relief on such consideration. Since that part of the order has not been assailed and since the appellants cannot be worse off by appealing, we cannot interfere with that part of the order. It will, therefore, be worked out as directed by the Tribunal but we may clarify that it will not have the effect of disturbing the seniority of regular appointees who will rank senior to the irregular appointees. We may also clarify that any benefit derived by the irregular appointees under any interim orders contrary to the relief moulded by the Tribunal shall be adjusted and brought in tune with the said relief. The benefit of this relief, to the extent relevant, will be given to irregular appointees covered under both the impugned orders of January 3, 1985 and February 14, 1985.
- C
- D
- E

With the above clarification, we dismiss all these appeals with no orders as to costs.

G.N.

Appeals disposed of.