

The State of Orissa

Vs

Sudhansu Sekhar Misra and Ors.

Civil Appeals No. 625-630 of 1967

(V. Ramaswami-I, R. S. Bachawat, G. K. Mitter JJ)

07.11.1967

JUDGMENT

HEGDE, J. -

These cases are the outcome of an unfortunate conflict between the High Court and the government of Orissa.

The Orissa Superior Judicial Service (senior branch) is a combined cadre consisting of officers holding purely judicial posts as well as posts which are essentially administrative in character. It consists of eight district and sessions judges, two additional district and sessions judges, secretary to government in law department, superintendent and legal remembrancer, law department, deputy secretary to government in the law department, member administrative tribunal and the Registrar of the Orissa High Court, in all 15 in number. All these officers are the members of the Orissa "Judicial Service" within the meaning of that expression in Art. 236(b) of the Constitution. Out of these, the district and sessions judges and additional district and sessions judges were discharging purely judicial functions. In view of Art. 229 of the Constitution, the power to appoint the Registrar of the High Court is exclusively that of the Chief Justice. Neither the High Court as such nor the Governor has any hand in his appointment. The power to appoint the secretaries to the government is that of the Governor. Under the Government of India Act 1935, the power to transfer a district judge from one post to another was that of the Governor though that power was always exercised in consultation with the High Court and by and large on the recommendation of the High Court. In Orissa, as in most of the other States, that practice continued till the decision of this Court in the State of Assam v. Ranga Mahammad and others [[1967] 1 S.C.R. 454]. Obviously when the Governor promulgated the Orissa Superior Judicial Service Rules 1963, he proceeded on the basis that the power to transfer the district judges and addl. district judges, from one post to another whether as a judge or to one of the posts in the secretariat was in his hands.

It appears that for some time past there were differences between the High Court and the government about the posting of some of the judicial officers. The High Court was anxious that a judicial officer occupying one of the administrative posts enumerated above, should not, in the interest of judicial work, continue in that post for an unduly long time. The High Court insisted that ordinarily judicial officers should not hold those posts for more than three years. The High Court was repeatedly requesting the government to send back judicial officers working in administrative posts as district judges or as addl. district judges as the case may be, after they had held those posts for three years or more. But those requests were not respected. On that account, there appears to have been some friction between the High Court and the government for some years past.

Shri B. K. Patro one of the district and sessions judges, was posted as superintendent and legal remembrancer in March 1962. Shri K. K. Bose, addl. district and sessions judge, was posted as joint secretary in the law department in the same month. He worked in that capacity till February 1965. Thereafter, he was posted as superintendent and legal remembrancer. Shri P. C. Dey, a district and sessions judge, was posted as member sales tax tribunal on 31-1-62. That was a non-cadre post.

In February 1965, the High Court took a policy decision to the effect that as a general rule, judicial officers working in special posts whether cadre or non-cadre, outside their regular line, should be recalled to the regular line after the completion of three years in the interest of the service as well as the officers, so that "Officers may not deteriorate by remaining out of touch from regular judicial work for continuously long periods and the service will not suffer by being deprived of the services of senior and experienced officers in manning the posts in the regular judicial line." It is of utmost importance that judicial officers should not be kept away from judicial work for a long time lest they should lose touch with judicial work and even more than that should become indifferent to judicial approach. The above policy decision was duly communicated to the government. The government by its letter of April 2, 1965, intimated that it had no objection to adhere to the principle of three years service in an appointment at a particular station against a special post. But when it came to the question of implementing that policy, the government was reluctant. Every time the High Court requested the government to release the three officers mentioned above for being posted as district and sessions judges or addl. district and sessions judges as the case may be, the government turned down those requests on one ground or the other. We do not think that it was proper for the government to do so. But at that stage the High Court felt helpless as it was under the impression that under law the Governor was the sole authority to effect the necessary transfers.

On September 21 1966, this Court rendered its decision in Ranga Mahammad's [[1967] 1 S.C.R. 454] case. Therein this Court held that power to transfer judges presiding over courts vested with the High Court under Art. 235 of the Constitution. Soon after that decision was rendered and without any further dialogue with government in the light of that decision, the High Court took the precipitate step of transferring the afore-mentioned officers to other posts and in their place posted officers who were doing judicial work till then. By its order dated October 10, 1966, the High Court ordered the following transfers :

- (a) Shri K. B. Panda who was attached to the commission of enquiry in connection with students' agitation, as law secretary to the government of Orissa,
- (b) Shri B. K. Patro, the then law secretary as district and sessions judge of Ganjam-Boudh,
- (c) Shri T. Misra, district and sessions judge, Ganjam-Boudh, as superintendent and legal remembrancer and ex-officio additional law secretary to the government of Orissa,
- (d) Shri K. K. Bose, the then superintendent and legal remembrancer and additional law secretary as district and sessions judge of Mayurbhanj-Keonjhar.
- (e) Shri P. K. Mohanti, district and sessions judge, Bolangir-Kalahandi, as deputy secretary to the law department, a post which was vacant then, and
- (f) Shri P. C. Dey, member sales tax tribunal, as district and sessions judge, Bolangir-

Kalahandi.

These orders were duly notified in the Orissa Gazette.

In pursuance of those orders, Shri K. B. Panda, Shri T. Misra and Shri P. K. Mohanti handed over charge of the posts they were holding and reported themselves at the secretariat for assuming charge of the post to which they were posted. But the government refused to accept them. Further it directed Shri Patro, Shri Bose and Shri Dey to continue in the posts they were holding. Those officers acted in accordance with the orders of the government. Consequently, the sessions divisions of Ganjam-Boudh, Mayurbhanj-Keonjhar and Bolangir-Kalahandi were without district and sessions judges for several days. It is at this stage the petitions which have given rise to those appeals were filed by some of the advocates practising in one or the other of the sessions divisions mentioned above, praying for a writ of mandamus against the government as well as the concerned officers to implement the transfers ordered by the High Court on October 10, 1966 and also a writ of quo warranto against Shri B. K. Patro, Shri K. K. Bose and Shri P. C. Dey requiring them to show cause under what authority they were holding the posts of the law secretary the superintendent and legal remembrancer and member sales tax tribunal, respectively. In every one of those petitions, rule nisi was issued. The government as well as concerned officers in the returns made by them justified the action taken by the government. On March 6, 1967 a special Bench of the High Court by majority allowed those petitions and made the rule absolute. The High Court overruled the prayer made on behalf of the government to stay the operation of its decision till necessary orders were obtained from this Court. It directed the government to implement its orders forthwith. Having no alternative before it, the government implemented the orders in question on March 6, 1967, on the very day the decision of the High Court was rendered. The government's prayer for necessary certificates for leave to appeal to this Court was rejected. Therefore, these appeals were filed after obtaining special leave from this Court.

The order of the High Court consists of two parts, namely, (1) holding that Shri B. K. Patro, Shri K. K. Bose and Shri P. C. Dey had no authority to act as law secretary, superintendent and legal remembrancer and member sales tax tribunal, respectively, on and after October 10, 1966, and (2) commanding the State of Orissa, the Chief Secretary to the government of Orissa, the Home Secretary to the government of Orissa, Shri P. C. Dey, Shri K. K. Bose and Shri Patro to implement the transfers ordered by the High Court on October 10, 1966.

It was not the case of the contesting respondents that Shri P. C. Dey, Shri K. K. Bose and Shri B. K. Patro had not the necessary qualifications to hold the posts they were holding. It was also not disputed that they had been validly appointed to those posts. In these circumstances we fail to see how the High Court could have held that they had no authority to hold the posts in question. Shri Sarjoo Prasad learned counsel for the High Court of Orissa at the very commencement of his arguments conceded that the order of the High Court holding that those officers had no authority to hold the posts in question is unsustainable. In view of that concession it is unnecessary for us to go into that question further.

As mentioned earlier, member, sales tax tribunal, was an ex-cadre post. Hence in the case of Shri P. C. Dey it must be assumed that his services were placed by the High Court at the disposal of the government for being posted as member sales tax tribunal. It is not the case of the parties that he was placed at the disposal of the government for any definite period. As seen earlier, he was holding the post in question ever since 1962. In those circumstances, the High Court was entitled to recall him and post him as a district and sessions judges. Hence that part of the High Court's order is

unassailable.

Before going into the validity of the orders of transfer relating to the other officers, it is necessary to ascertain the law bearing on the subject. As seen earlier, the cadre of the superior judicial service (senior branch) consisted of not only the posts of district and sessions judges and addl. district and sessions judges but also officers holding other posts. One of the officers included there is the Registrar of the High Court. Neither the government nor the High Court could have posted any officer as the Registrar of the High Court as that post can be filled only by the Chief Justice. To hold otherwise would be to contravene Art. 229 of the Constitution. Similarly the posts of the law secretary, deputy law secretary and the superintendent and legal remembrancer cannot be considered as district courts or courts subordinate to district courts within the meaning of those words in Art. 235 of the Constitution. Those posts are similar to the corresponding posts in other departments in the secretariat. Prima facie it is for the Governor to fill up those posts. It was conceded that if those posts had not been included in the cadre of superior judicial service the High Court would not have had any right to fill those posts. But we were told that in view of the decisions of this Court in *State of West Bengal v. Nripendra Nath Bagchi* [[1966] 1 S.C.R. 771] and *State of Assam v. Ranga Mahammad* [[1967] 1 S.C.R. 454] the High Court must be held to have that right as those posts are included in the cadre of superior judicial service. Before considering the correctness of that submission it is necessary to notice that this argument breaks down when we come to the question of filling up the post of the Registrar. If the argument advanced on behalf of the High Court is correct, the High Court must also have the power to fill up the post of the Registrar as that is also included in the cadre.

Now let us consider the ratio of the decisions in *Nripendra Nath Bagchi's* case [[1966] 1 S.C.R. 771], and *Ranga Mahammad's* [[1967] 1 S.C.R. 454] case. In *Bagchi's* case [[1966] 1 S.C.R. 771], this Court laid down that the word "control" found in Art. 235 includes disciplinary jurisdiction as well. The only question that fell for decision in that case was whether the government of West Bengal was competent to institute disciplinary proceedings against an addl. district and sessions judge. This Court upheld the decision of the High Court of Calcutta holding that it had no such jurisdiction. That was the single question decided in that case. It is true that in the course of the judgment, this Court observed that the High Court is made the sole custodian of the control of the judiciary, but that observation was made only in the context of the question that arose for decision. In *Ranga Mahammad's* case[[1967] 1 S.C.R. 454], the point that arose for decision was as to who was the authority to transfer a district judge, the State government or the High Court. In that case, the State government ordered the transfer of certain district judges without even consulting the High Court. The rule laid down in that decision is of no assistance in determining the question as to whether the High Court has power to fill up some of the posts in the secretariat. In the course of that judgment, this Court observed (at page 459 of the report) :

"The question we have posed resolves itself into a question of a very different but somewhat limited form, namely, whether the power to transfer District Judges is included in the 'control' exercisable by the High Court over District Court under Art. 235, or in the power of 'appointment of persons to be and the posting and promotion, of district judges' which is to be exercised by the Governor under Art. 233, albeit in consultation with the High Court. If the sense of the matter be the former, then the High Court and if the latter, the Governor, would possess that power. The right approach is, therefore, to enquire what is meant by 'posting' and whether the terms does not mean the initial posting of a District Judge on appointment or promotion to a vacancy in the cadre, permanent or temporary. If this be the meaning, as the High

Court holds, then the transfer of District Judges already appointed or promoted and posted in the cadre must necessarily be outside the power of the Governor and fall to be made by the High Court as part of the control vested in it by Art. 235."

After analysing Arts. 233 and 235 and noticing the development of the law on the subject this Court held that under Art. 233, the Governor is only concerned with the appointment, promotion and posting to the cadre of district judges but not with the transfer of district judges already appointed or promoted and posted to the cadre which power is vested in the High Court under Art. 235 as the control given to the High Court over the district courts under that Article includes control over the officers who preside over those courts.

Proceeding further this Court observed :

"This is, of course, as it should be, the High Court is in the day to day control of courts and knows the capacity for work of individuals and the requirements of a particular station or Court. The High Court is better suited to make transfers than a Minister. For however well-meaning a Minister may be he can never possess the same intimate knowledge of the working of the judiciary as a whole and of individual Judges, as the High Court. He must depend on his department for information. The Chief Justice and his colleagues know these matters and deal with them personally. There is less chance of being influenced by secretaries who may withhold some vital information if they are interested themselves. It is also well known that all stations are not similar in climate and education, medical and other facilities. Some are good stations and some are not so good. There is less chance of success for a person seeking advantage for himself if the Chief Justice and his colleagues, with personal information, deal with the matter, than when a Minister deals with it on notes and information supplied by a secretary. The reason of the rule and the sense of the matter combine to suggest the narrow meaning accepted by us. The policy displayed by the Constitution has been in this direction as has been explained in earlier cases of this Court.

Obviously relying on the observation of this Court that after a judicial officer is posted to the cadre, it is for the High Court to effect his transfers, the court below has come to the conclusion that as the posts of the law secretary, deputy law secretary and superintendent and legal remembrancer are included in the cadre, the High Court has the power to fill those posts by transfer of judicial officers. The cadre this Court was considering in Ranga Mahammad's [[1967] 1 S.C.R. 454] case, namely, Assam Superior Judicial Services Cadre consisted of the Registrar of the Assam High Court and three district judges in the first grade and some additional district judges in grade II. In that cadre, no officer holding any post under the government was included. Hence the reference by this Court to the cadre is a reference to a cadre consisting essentially of officers under the direct control of the High Court. It was in that context this Court spoke of the cadre. The question of law considered in that decision was as regards the scope of the expression "control over district court" in Art. 235. The reference to the cadre was merely incidental. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury L.C. said in *Quinn v. Leatham* [[1901] A.C. 495] :

"Now before discussing the case of *Allen v. Flood* [1898] A.C. 1 and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to

be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

It is not a profitable task to extract a sentence here and there from a judgment and to build upon it. Neither Bagchi's case nor Ranga Mahammad's case is of any assistance to us in deciding the question whether the High Court has competence to fill some of the posts in the secretariat by transfer judicial officers under its control. Just as the executive cannot know the requirements of a particular court, the High Court also cannot know the requirements of any post in the secretariat. Just as the High Court resents any interference by the executive in the functioning of the judiciary, the executive has a right to ask the High Court not to interfere with its functions. It is for the executive to say whether a particular officer would meet its requirements or not. The High Court cannot, as contended by the learned Attorney-General, foist any officer on the government.

The cadre with which we are concerned in this case consists of three parts i.e., (1) presiding officers of district courts, (2) the Registrar of the High Court and (3) the judicial officers working in the secretariat. No doubt all these officers belong to the judicial service of the State and they were before 1962 presiding over district courts or courts subordinate to them and as such were under the control of the High Court. Hence without the consent of the High Court the government could not have posted them to administrative posts in 1962. It must be presumed that they were taken over by the government with the consent of the High Court.

While sparing the service of any judicial officer to the government it is open to the High Court to fix the period during which he may hold any executive post. At the end of that period, the government is bound to allow him to go back to his parent department unless the High Court agrees to spare his services for some more time. In other words, the period during which a judicial officer should serve in an executive post must be settled by agreement between the High Court and the government. If there is no such agreement it is open to the government to send him back to his parent department at any time it pleases. It is equally open to the High Court to recall him whenever it thinks fit. If only there is mutual understanding and appreciation of the difficulties of the one by the other, there will be harmony. There is no reason why there should be any conflict between the High Court and the government. Except for very good reasons we think the High Court should always be willing to spare for an agreed period the services of any of the officers under its control for filling up such executive posts as may require the services of judicial officers. The government, in its turn should appreciate the anxiety of the High Court that judicial officers should not be allowed to acquire vested interest in the secretariat. Both the High Court and the government should not forget the fact that powers are conferred on them for the good of the public and they should act in such a way as to advance public interest. If they act with that purpose in view as they should, then there is no room for conflict and no question of one dominating the other arises. Each of the organs of the State has a special role of its own. But our Constitution expects all of them to work in harmony in a spirit of service.

As Shri K. K. Bose and Shri B. K. Patro had not been placed at the disposal of the government for any definite period, it was open to the High Court to recall them and post them as presiding officers of district courts. Hence, the High Court was within its powers in posting Shri B. K. Patro as district and sessions judge of Ganjam-Boudh division, Shri K. K. Bose as district and sessions judge of

Mayurbhanj-Keonjhar division, and Shri P. C. Dey as district and sessions judge of Bolangir-Kalahandi division though it would have been graceful if it had effected those transfers after reasonable notice to the government. But it was beyond the powers of the High Court to post Shri K. B. Panda as the law secretary, Shri T. Misra as superintendent and legal remembrancer and Shri P. K. Mohanti as the deputy law secretary. That part of the High Court's order is clearly unsustainable. But as mentioned earlier, the government has already implemented that part of the order as well. Those officers are now functioning in the posts to which they were transferred. The learned Attorney-General told us that the government has no objection to those officers continuing in those posts for the present. We are sure if any change is required the same will be effected by mutual understanding between the High Court and the government.

In the result these appeals are partly allowed and the order of the High Court holding that Shri B. K. Patro, Shri K. K. Bose and Shri P. C. Dey had no authority to hold the posts they were holding on or after October 10, 1966 is set aside. Though we hold that the orders of the High Court posting Shri B. K. Panda as law secretary, Shri T. Misra as superintendent and legal remembrancer and Shri P. K. Mohanti as deputy law secretary were in excess of its powers, we do not set aside the mandamus issued by it for the reasons mentioned earlier. In other respects the judgment appealed against is upheld.

The parties will bear their own costs in these appeals.

Appeals allowed in part.

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