

Nityananda Kar and Another

Vs

State of Orissa and Others

Civil Appeal No. 750 of 1987

(CJI Ranganath Misra, M. M. Punchhi, K. Ramaswamy JJ)

09.11.1990

JUDGMENT

M. M. PUNCHHI, J. -

1. These four matters have converged in this Court requiring settlement of a serious dispute of seniority in the Orissa Administrative Services. One is a civil appeal and the remaining three are writ petitions.
2. Prior to January 7, 1972, there were in the Services two cadres, namely, Orissa Administrative Service Class II (for short OAS II) and Orissa Subordinate Administrative Service Class III (for short OSAS III). The members of OAS II were known as Deputy Collectors and those of OSAS III as Sub-Deputy Collectors. Recruitment to OAS II was regulated by a set of rules known as Orissa Administrative Service Class II (Recruitment) Rules, 1959 (for short 'the Recruitment Rules of 1959') and recruitment to OSAS III was regulated by Orissa Subordinate Administrative Service (Recruitment) Rules, 1959. On the recommendation of a High Power Committee, the Government of Orissa decided to merge them and to have a single cadre known as OAS II with a senior branch (SB) and a junior branch (JB) so that all the existing officers, be they in OAS II and OSAS III should be absorbed in OAS II (SJ). It was decided that the total integration of the two branches was to be completed in a phased manner. The Government of Orissa in the Political and Service Department passed a Resolution dated January 7, 1972 for giving effect to the recommendation. The main features of the Resolution were that the aforesaid two cadres were abolished and a single cadre of OAS II with a senior and a junior branch was constituted. The incumbents of the existing OAS II cadre were absorbed in OAS II (SB) and those of OSAS III cadre were absorbed in OAS II (JB). The total integration of these two branches was contemplated to be completed in a phased manner in a period of about ten years. Later, on and from December 21, 1973, the two branches were abolished and a new cadre of OAS II was constituted and in terms of the government order, all members of the then existing OAS II (JB) known as Sub-Deputy Collectors were placed in the seniority list below the last person in the then existing OAS II (SB) known as Deputy Collectors. Thus, with effect from December 21, 1973 all became Deputy Collectors retaining their position where they were on the date of absorption, i.e. December 21, 1973.
3. For the purposes of promotion, the Orissa Administrative Service Class II (Appointment by Promotion, Transfer and Selection) Regulations, 1959 (for short 'Regulations of 1959') made provision for determining the 'year of allotment' for the members of the OAS II. Additionally Regulation 3 of Orissa Administrative Service Class II (Appointment by Competitive Examination) Regulations, 1959 providing for holding of competitive examination required the State Public Service Commission to conduct an examination having regard to the likely number of vacancies

each year in the manner prescribed for direct recruitment to the services. Based upon the concept of 'year of allotment', the State Government in the working of the merger Resolution gave due regard to the 'year of allotment' while settling claims of seniority between direct recruits to the merged service and the mergerists brought into that service.

4. Some of the mergerists who were initially in the OSAS III and came on integration to OAS II challenged the applicability of manner of fixing the 'year of allotment' before the Orissa High Court. A Full Bench of that High Court in Ananta Kumar Bose v. State of Orissa [AIR 1986 Ori 151 : 1985 Lab IC 862 : (1985) 3 SLR 225], repelled such challenge and left intact the seniority of the direct recruits of the years 1970 and 1971, since challenge to the assignment of seniority to the direct recruits who had been assigned 1972 as their 'year of allotment' was specifically abandoned before the High Court (as is reflective from paragraph 15 of the report). The High Court in rejecting the contention observed as follows : (AIR p. 162, para 13)

"The recruitment rules and regulations are consistent with the scheme that recruitment shall be made against the vacancies of a particular year. The principle of fixing the 'year of allotment' has been continuously and traditionally followed. In the civil list of earlier years (at least from the year 1965 were placed before us) it was found that both in respect of promotees and direct recruits the 'date of appointment' and 'year of allotment' are separately mentioned. A long standing practice which has been acted upon and acquiesced in for years resulting in rights accrued and benefits conferred and/or derived by assigning 'the year of allotment' to thousands of recruits to the said cadre should not be disturbed. The gradation list has been prepared having due regard to the principle contained in Rule 11 of the Recruitment Rules of 1959 as well as the special provision contained in the resolution dated December 21, 1973 (Annexure-2). Basing on the aforesaid principles, opposite parties 4 to 18 who were recommended by the OPSC for the year 1970 have been placed above the direct recruits of the said year. Similarly, opposite parties 30 to 56 have been placed above the direct recruits of 1971. The recommendation was received after the passing of the integration resolution. Hence issue of formal appointment letters was not necessary. Applying the principle of 'year of allotment' opposite parties 19 to 29, who were appointed to service under Rule 4(a) of the Recruitment Rules of 1959 on the basis of the results of the combined competitive examination of 1970, have been treated as the direct recruits of 1970. These opposite parties entered the service in March 1973 as per Annexure 4 much before passing of Annexure 2. As already held, the petitioners cannot be treated as promotees. Hence the above opposite parties should be placed above the petitioners. Similarly, opposite parties 57 to 80 were appointed to service under Rule 4(a) of the Recruitment Rules of 1959 basing on the results of the competitive examination of 1971 and they have been treated as the direct recruits of 1971. The petitioners who were Sub-Deputy Collectors, were integrated to OAS II by virtue of the Government Resolution dated December 21, 1973 and not in accordance with the procedure prescribed in the Recruitment Rules of 1959. So, they have been placed below the direct recruits of the years 1970 and 1971."

Special Leave Petition (Civil) No. 2565 of 1984 filed against the aforesaid decision of the Orissa High Court was dismissed by this Court in limine on April 2, 1984 and a review petition against that was also dismissed on July 19, 1984.

5. The direct recruits who had been assigned 1972 as their 'year of allotment', were originally made

opposite parties 81-90 in the writ petition before the High Court, but their names were got deleted by the writ petitioners. Apparently these direct recruits were treated senior to the writ petitioners, but subsequently by a government order had been declared as junior to the writ petitioners. They too filed writ petition numbered as O.J.C. No. 1366 of 1983 before the High Court challenging the Resolution of the government making them juniors but since the government vide a subsequent Resolution of August 19, 1983 restored them their seniority, the writ petition was not pressed by them. Though at a later stage they again wanted to join as parties in the Full Bench case before the High Court, the High Court thought it unnecessary to consider their case in that writ petition in view of the position indicated by it.

6. In Civil Appeal No. 750 of 1987 the two appellants as mergerists entered into the cadre of OAS II on December 21, 1973. Appellant 2, Bishnu Prasad Mishra was one of the writ petitioners before the Full Bench of Orissa High Court in Ananta Kumar Bose case [AIR 1986 Ori 151 : 1985 Lab IC 862 : (1985) 3 SLR 225]. This time the challenge was made by the appellants not only to the seniority of respondents 4-13 herein (who were once respondents 81-90 before the Full Bench of the Orissa High Court though deleted later) on two grounds, namely, that there was no invitation for filling up any post in the OAS II in the advertisement issued by the State Public Service Commission and yet respondents 4-13 had been given service on different dates in the year 1975, and secondly those respondents had been assigned 1972 as the 'year of allotment' without authority of law even though they had actually joined service on different dates in the year 1975. The High Court of Orissa on April 8, 1985 rejected the challenge taking the view that it was entirely covered by the Full Bench decision in Ananta Kumar Bose case [AIR 1986 Ori 151 : 1985 Lab IC 862 : (1985) 3 SLR 225]. In the civil appeal the challenge is to that decision.

7. After leave to appeal was granted by this Court, the State of Orissa passed the Orissa Administrative Service Class II (Appointment of Officers Validation) Act, 1986 with effect from June 2, 1987 validating certain appointments and determination of seniority. Section 3 thereof reads as under :

"3. (1) Notwithstanding anything contained in the Orissa Administrative Service, Class II (Recruitment) Rules, 1959 and the regulations framed thereunder or the Orissa Administrative Service, Class II (Recruitment) Rules, 1978 and the regulations framed thereunder or in any judgment, decree or order of any court but subject to the provisions of sub-section (2) -

(a) the appointment of the merger recruits to the Orissa Administrative Service, Class II and the determination of their seniority in the Orissa Administrative Service Class II vis-a-vis the officers appointed to the Orissa Administrative Service Class II by direct recruitment in respect of the recruitment year 1972 in accordance with Government Resolution in the Revenue Department No. 27662/R., dated April 23, 1984;

(b) the appointment of the officers to the Orissa Administrative Service, Class II in respect of the recruitment years 1970 and 1971 by the methods of promotion and direct recruitment, the determination of the seniority of the said officers in the Orissa Administrative Service Class II in accordance with Government Resolution in the Revenue Department No. 2208/R. (C.S.) dated November 11, 1973; and

(c) the appointment of the officers to the Orissa Administrative Service, Class II in

respect of the recruitment years 1972, 1973 and 1974 by the method of direct recruitment,

shall for all intents and purposes, be deemed to have been validly made and determined and shall not be liable to be challenged in any court of law or otherwise be opened to challenge merely on the ground that they were made or determined otherwise than in accordance with the provisions contained in the said rules and regulations.

(2)(a) Such number of "merged recruits" as would have been entitled to promotion in the recruitment year 1972 computed on the basis of percentage envisaged under Rule 10 of the OAS Class II (Recruitment) Rules, 1959, shall be deemed to be the promotees of the year 1972 and shall be placed above the direct recruits of the year 1972 in the gradation list.

(b) The remaining "merged recruits" shall be deemed to be the promotees of the year 1973 and shall be placed above the direct recruits of the year 1973 in the Gradation List."

Since challenge to appointments and determination of seniority in the terms of the Act stood apparently restricted, Bishnu Prasad Mishra and others approached this Court under Article 32 of the Constitution by means of Writ Petition No. 1044 of 1987 challenging the vires of the said Act.

8. A direct recruit of the year 1973, Pramod Chandra Patnaik has filed Writ Petition No. 929 of 1987 challenging the vires of the aforesaid referred to Act requiring extension of the principle laid down by the Orissa High Court in Ananta Kumar Bose case [AIR 1986 Ori 151 : 1985 Lab IC 862 : (1985) 3 SLR 225] to him as well, letting not the provisions of the impugned Act stand in his way.

9. And lastly there is Writ Petition No. 12770 of 1985 under Article 32 of the Constitution by a set of mergerists seeking quashing of resolution whereby the year of allotment concept was introduced by the government and which was upheld by the Orissa High Court. All these matters can conveniently be disposed of together.

10. We have heard learned counsel for the parties at great length. The view projected on behalf of the mergerists is that in the absence of clear cut rules determining seniority, length of service is to be the guiding principle. The view propounded for the direct recruits is that the principle of the 'year of allotment' has been the traditional and tested modality to regulate and govern seniority inter se between the promotees, later turned mergerists, and the direct recruits. A number of decisions of this Court were cited before us to harp on the principle but we think it unnecessary to detail them since all those decisions have now been tied up in a five Judge bench decision of this Court in Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra [(1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348], wherein the impact of each and every case has been taken note of to cull out and sum up a set of principles. Though this decision was rendered after the conclusion of the arguments in the instant case yet we find its ratio binding. Two of such propositions in paragraph 47 occur at serial (j) : (SCC pp. 745-46, para 47)

"The decision dealing with important questions concerning a particular service given after careful consideration should be respected rather than scrutinised for finding out any possible error. It is not in the interest of Service to unsettle a settled position."

and serial (k) : (SCC p. 746)

"That a dispute raised by an application under Article 32 of the Constitution must be held to be barred by principles of res judicata including the rule of constructive res judicata if the same has been earlier decided by a competent court by a judgment which became final."

The Full Bench decision of the Orissa High Court in Ananta Kumar Bose case [AIR 1986 Ori 151 : 1985 Lab IC 862 : (1985) 3 SLR 225], related, as is obvious, to a State service and the High Court was asked to pronounce upon the same so as to solve the dispute between the mergerists and the direct recruits. The High Court dealt with the history of the two services and the circumstances and conditions which led to their merger well as the course of the legislative history. It took judicial notice of the long standing practice which had been acted upon and acquiesced in for years resulting in rights accrued and benefits conferred and derived on the basis of the 'year of allotment' to hundreds of recruits to the said cadre. The High Court in order to find out which of the two just solutions was a juster solution opted for the maintenance of the status quo inasmuch as it ordered that the rights accrued and the benefits conferred or derived by assigning the 'year of allotment' should remain sacrosanct and be not disturbed. That view, which arose on the understanding of the local conditions and the history of the service was left intact by dismissal by this Court of Special Leave Petition No. 2565 of 1984. Though it is true that the dismissal of a special leave petition against the High Court order is not ordinarily a seal of total approval of the views expressed by the High Court in arriving at its decision, yet in the instant case having regard to the nature of the controversy and it having been settled on the canvas of local conditions, we take the view that this Court's seal to the decision of the High Court must be taken as a seal of an approval of what it decided and thus a precedent settling the matter. Once that is so and borne in mind, the careful consideration and deliberations given by the Orissa High Court to the problem shall on approval of this Court be taken to have brought the case within the ambit of proposition (j) above-quoted from the Direct Recruits case [(1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348] and thus it is neither possible nor desirable for us to unsettle a settled position which dates back to decades and to axe down continuity and tradition followed for decades in the service of that State. Thus the principle of the 'year of allotment' cannot be permitted to be challenged vicariously in Civil Appeal No. 750 of 1987 or the Writ Petition Nos. 12770 of 1985 and 1044 of 1987 and shall be taken to have come to stay in the services also on the terms of principle (k) of the Direct Recruits case [(1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348].

11. It was urged on behalf of the appellants in Civil Appeal No. 750 of 1987 that respondents 4-13 had appeared in the competitive examination to Orissa Finance Service and Orissa Police Service and not for the Orissa Administrative Service II and yet were picked up by the State and appointed to Orissa Administrative Service Class II against the recruitment rules and appointed between February 21, 1975 and June 26, 1975 making them senior to the petitions without any basis. The grouse that the respondents 4-13 were accommodated in the Orissa Administrative Service, though taken herein does not seem to have been pressed before the High Court. We find that in the special leave petition no ground had been raised that this aspect of the case was pressed before the High Court and the High Court had failed to deal with it. Rather it is ex facie clear from the judgment under appeal, which was decided on the case being taken up for hearing with the consent of the learned counsel for the parties, and concluded then and there. The appellants cannot now be allowed to dispute the entry of respondents 4-13 to the Orissa State Service Class IV as direct recruits on the supposition that advertisement by the Public Service Commission was for two other services, namely, Orissa Finance Service and Orissa Police Service, though the examination was stated

normally to be common to the Orissa Administrative Service as well. Thus we reject the contention.

12. Now what remains is the challenge to vires of the Orissa Administrative Service Class II (Appointment of Officers Validation) Act, 1987. Therein Section 2(a) and (c) respectively define 'direct recruitment' and 'merger recruits' in the following terms :

"2. In this Act, unless the context otherwise requires, -

(a) 'Direct recruitment' means recruitment to the Orissa Administrative Service, Class II by competitive examination conducted by the Orissa Public Service Commission in accordance with the provisions of the Orissa Administrative Service, Class II (Appointment by Competitive Examination) Regulations, 1959;

#(b) \* \* \*##

(c) 'Merger recruits' means the officers in the Orissa Administrative Service, Class II who had initially been members of the Orissa Subordinate Administrative Service and were inducted into the Orissa Administrative Service, Class II by merger of the Orissa Subordinate Administrative Service with the Orissa Administrative Service, Class II (Junior Branch) in accordance with the policy laid down by Government Resolution in the erstwhile Political and Services Department No. 363/Gen. dated January 7, 1972 and integration of the Orissa Administrative Service, Class II (Junior Branch) and the reconstituted Orissa Administrative Service, Class II (Senior Branch) into the Orissa Administrative Service, Class II in accordance with the policy laid down in Government Resolution in erstwhile Political and Services Department No. 19468/Gen. dated the December 21, 1973, excluding those officers who were recruited to the Administrative Services, Class II by promotion for the recruitment years 1970 and 1971."

For the view we have taken above in the governing principle of Ananta Kumar Bose case [AIR 1986 Ori 151 : 1985 Lab IC 862 : (1985) 3 SLR 225] and the employment of the traditional concept of the 'year of allotment', it is plain that the Validation Act above extracted has put an end to any controversy with regard to the direct recruits who were assigned the 'year of allotment' 1970 and 1971 in terms of Ananta Kumar Bose case [AIR 1986 Ori 151 : 1985 Lab IC 862 : (1985) 3 SLR 225]. This preservation is in consonance with the view we have taken on the strength and efficacy of the ratio in Ananta Kumar Bose case [AIR 1986 Ori 151 : 1985 Lab IC 862 : (1985) 3 SLR 225] on its being put at the pedestal of a case covered by principle (j) in Direct Recruits case [(1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348]. The application of the principle of the 'year of allotment' cannot be limited by any logic to the years 1970 and 1971 on the fortuitous circumstance of the challenge to seniority of the direct recruits who were assigned 1972 as the year of allotment was given up by the writ petitioners before the Orissa High Court, one of whom, namely, Bishnu Prasad Mishra is again the writ petitioner in Civil Writ Petition No. 1044 of 1987 and second appellant in Civil Appeal No. 750 of 1987. When the challenge to the seniority of the direct recruits who were assigned 1972 as the year of allotment is not tenable any more, the Orissa legislature preserving that principle of the year of allotment for the direct recruits of the year 1970 and 1971 and not extending the same to the direct recruits of the year 1972, to say the least is arbitrary and liable to be struck down under Article 14 of the Constitution, for what is good and valid for 1970 and 1971 direct recruits is equally good and valid for the direct recruits of the year 1972.

13. The accepted and continued position was strangely being upset when direct recruits of 1972 had acquired as vested right to be ranked senior to the mergerists. Though it is true that vested rights can also be taken away by an Act of legislature and it can be assumed that the legislature knew the subject it was dealing with, yet, in the instant case we are of the view that when complete integration of the two services of OAS III and OAS II had been brought about on December 21, 1973, without repeal of the recruitment rules of 1959, there was nothing to classify or differentiate between direct recruits of the year 1970 and 1971 on the one hand and the direct recruits of the year 1972 on the other. Since the two groups of recruits were similarly placed and the situation did not yield to any reasonable classification it was not open to the State legislature to maintain an artificial classification and provide by the impugned Act unequal treatment to the 1972 recruits. Thus we declare Section 3(2)(a) of the Validation Act insofar as it permits the deemed promotees of the year 1972 to be placed above the direct recruits of the year 1972 in the gradation list, as violative of Article 14.

14. The petitioner in W.P. No. 929 of 1987 was a direct recruit as Deputy Collector in OAS Class II with the year of allotment of 1973. There is no dispute that petitioner's recruitment was pursuant to decision taken by government prior to December 1973, to fill up a vacancy in the cadre. Explanation in Rule 4(2) of the Orissa Administrative Service Class II (Appointment by Promotion, Transfer and Selection) Regulations, 1959, provides :

"For the purpose of this sub-rule, year of allotment in relation to a member of Orissa Administrative Service means the year in respect of which government have decided to fill up a vacancy in the cadre of the Orissa Administrative Service against which the member is shown."

In the absence of any other definition the same concept would obviously have applied in respect of the OAS Class II Service prior to merger. The final decision of government to merge the two cadres was taken on December 21, 1973. The Orissa Administrative Service Class II (Appointment by Promotion, Transfer and Selection) Regulations, 1959 provided :

"No person being a Member of Orissa Administrative Service shall be considered for promotion to the Service (OAS Class II)..."

It is, therefore, clear that OAS Class II cadre prior to merger was providing promotional channel to officers of OAS Class III. Rules prescribed the manner in which direct recruitment and promotional appointment were to be made to OAS Class II. The Full Bench of the Orissa High Court which we have accepted as laying down the binding and correct legal position clearly found that the mergerists from OAS Class III were neither promotees nor direct recruits and formed a class by themselves. The 1972 resolution of the State Government had decided spreadover process for absorption but in December 1973, immediate and one-time merger was decided and acted upon. We have already held that the recruits to OAS Class II with 1972 as the year of allotment were senior to the mergerists. Once the concept and application of "year of allotment" is upheld, necessarily the OAS Class II direct recruits of 1973 would in the facts and circumstances be senior to the mergerists. They are eleven in all as it appears from the government notification of February 16, 1976. There would be no justification to have the mergerists from Class III Service brought into the combined cadre in December 1973, to be senior to these 1973 recruits - their number being substantial - who are only eleven people. On the other hand, there may be justification in the matter of fixing of seniority inter se between the direct recruits of 1973 to OAS Class II and the mergerists to follow the prevailing system of promoting Class III officers to Class II by a particular number and fixing the inter se

seniority in accordance with the then prevailing regulations. If the seniormost persons among the mergerists are considered for such purpose by fiction of being promotee, perhaps no injustice would be done.

15. We had been told at the hearing of these cases that the seniority dispute of 1973 direct recruits was already the subject matter of a pending proceeding before the State Administrative Tribunal. It had also been pointed out to us that in this writ petition the petitioner impleaded none excepting the State Government and its officers and that the State Government filed a counter-affidavit merely relying upon the validating provisions of the 1986 Act. We have already come to the conclusion that the validating provision qua the 1972 direct recruits is arbitrary and liable to be set aside. Once the concept of year of allotment is upheld and the facts indicated above are taken into account, the same conclusion would have to be reached even for the 1973 direct recruits of OAS Class II. But, as we have said, we do not intend to finally dispose of the proceeding pending before the State Administrative Tribunal and petitioner is free to work out his ultimate remedy before the Tribunal in the pending proceeding.

16. No final orders, therefore, are made in this writ petition and the dispute is left for determination before the Tribunal following the law as indicated above.

17. Thus to sum up, we hold that Ananta Kumar Bose case [AIR 1986 Ori 151 : 1985 Lab IC 862 : (1985) 3 SLR 225] is the binding decision as approved by this Court on the important questions dealt therein and the foundation laid concerning integration of both the services of OAS II and OSAS III as merged in OAS II and we decline to unsettle a settled position in the interest of the service. We accordingly dismiss Civil Appeal No. 750 of 1987 and also Writ Petition No. 12770 of 1985 and to that extent Writ Petition No. 1044 of 1987 on that point. We have, however, allowed the later writ petition in part to the extent above indicated of declaring Section 3(2)(a) ultra vires of Article 14 of the Constitution and extend the benefit of Ananta Kumar Bose case [AIR 1986 Ori 151 : 1985 Lab IC 862 : (1985) 3 SLR 225] to the 1972 direct recruits as well. For the reasons indicated we have not made any final order on merit in W.P. No. 929 of 1987. In the facts and circumstances of the case, however, we leave the parties to bear their own costs.

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