

SUPREME COURT OF INDIA

Ajay Kumar Das

Vs.

State of Orissa

C.A.No.4977 of 2009

(Tarun Chatterjee and R. M. Lodha JJ.)

31.07.2009

JUDGEMENT

R.M. Lodha, J.

1. Leave granted.

2. The short question that arises for consideration in this appeal by special leave is : is the direction issued by the High Court that the pay fixation of the appellant and similarly situated persons be done in accordance with the Government Circular dated April 16, 1971 justified or the pay fixation of these employees ought to be done as per Rule 74(b) of the *Orissa Service Code*.

3. The controversy arises from the facts which may be briefly noticed first. The appellant was appointed by the Government of Orissa as Overseer (Electrical) on November 16, 1964. He was deputed to serve in the Orissa State Electricity Board (for short, OSEB) in the then pay scale of 185-00-325. Later on, the post of Overseer was re-designated as Sub-Assistant Engineer (for short, 'SER'). The pay scale of SERs in OSEB was revised from time to time. Since scale of pay of SERs appointed directly by the OSEB was higher in comparison to the Sub-Assistant Engineer on deputation with OSEB and who were initially appointed by the Government of Orissa as Overseers, it was decided to provide such SERs (erstwhile Overseers) reducible personal pay. This was done so that the SERs (erstwhile Overseers) like the appellant and similarly situated persons do not get lesser salary in comparison to the SERs appointed directly by the OSEB. The appellant was promoted to the rank of Assistant Engineer (Electrical) in 1981 and at the time of promotion he was in the pay scale of 480-970 and drawing pay of Rs. 874. However, his pay in the promotional rank of Assistant Engineer was fixed at Rs. 850/- per month. The appellant was aggrieved thereby as, according to him, his pay should have been fixed on promotion at Rs. 950/- per month in view of Rule 74(b) of the *Orissa Service Code* (for short, code).

4. The appellant challenged his fixation of pay before the High Court of Orissa by filing Writ Petition but on formation of Orissa Administration Tribunal, the writ petition came to be

transferred to the Tribunal. The litigation has chequered history but it is not necessary to go into that; suffice it to say that the Tribunal by its Order dated December 23, 1999 directed that the appellant's pay on his promotion to the rank of Assistant Engineer (Electrical) be fixed taking his last pay drawn in the rank of SER into account and following the provisions of Rule 74(b) of the Code. This is how the Tribunal considered the matter :

“Having bestowed our anxious considerations on the submission of the learned counsel for the applicant and perused the relevant papers on record, we are of the opinion that annexure-6 decision of the Government regarding protection of pay is in effect a negative of the concept for pay protection. It was in pursuance of Government decision that though recruited by the O.S.E.B they were promoted by the Government to the rank of Assistant Engineer when they were enjoying higher scale of pay than the Sub- Assistant Engineers under the Government. Since the applicant was drawing pay at Rs. 874.00 per month in the scale of pay of Rs. 480.00-970.00 he could not be dragged to a lower scale of pay of Rs. 410.00-840.00 and his pay was fixed at Rs. 850.00 leading to reduction in his pay to the extent of Rs. 110.00 per month. This can hardly be called protection of pay which is sought to be ensured by annexure-6 instruction to be unfair and unreasonable and direct that the applicant's pay on his promotion to the rank of Assistant Engineer (Electrical) be fixed taking his last pay drawn in the rank of S.A.E. into account and following the provisions of Rule 74(b) of the Orissa Service Code and the differential salary paid to him within a period of 4 months from the date of receipt of a copy of this order.”

5. The State Government being dissatisfied with the order of the Tribunal challenged the same before the High Court. The grievance of the State Government before the High Court was that the Tribunal passed the order inconsistent with the Government Circulars, particularly the Circulars dated June 18, 1982 and March 17, 1983.

6. The High Court, although noticed that the pay of the Government Servant cannot be reduced on promotion yet by relying upon the Government Circular dated April 16, 1971, directed that pay of the appellant in the next higher post, i.e., Assistant Engineer was required to be fixed in accord with the said Circular. The effect of the High Court's order is that it reduces the scale of pay of the appellant. It is for this reason that the appellant has come up in appeal by special leave.

7. Rule 74(b) of the Orissa Service Code reads thus:

“Where a Government servant holding a post is promoted or appointed to another post carrying duties and responsibilities of greater importance than those attached to the post held by him, initial pay in the time scale of the higher post shall be fixed at the stage next above the pay notionally arrived at by increasing his pay in respect of the lower post by one increment at the stage at which such pay has accrued: Provided that where a Government servant, immediately before his promotion or appointment to higher post, is drawing pay at the maximum of the time scale of the lower post, his initial pay in the time scale of the higher post shall be fixed at the stage, next above

the pay notionally arrived at by increasing his pay in respect of the lower post by an amount equal to his last increment in the time scale of the lower post:

Provided further that the provision of this sub- rule shall not apply when a Government servant holding a class-I post is promoted or appointed to another class-I post.”

8. Rule 74(b) of the Code, thus, provides that on promotion of a Government servant, his initial pay in the time scale of promotional post needs to be fixed at the stage next above the pay notionally arrived at by increasing his pay in respect of the lower post by one increment at the stage at which such pay has accrued. In a case where the Government servant immediately before his promotion has been drawing maximum of the time scale of the lower post, his pay on the promotional post needs to be fixed by notionally increasing his pay in respect of lower post by an amount equal to his last increment. In other words on promotion, a Government servant, by virtue of Rule 74(b), gets higher pay than what he was getting immediately before his promotion. Rule 74(b) of the Code is aimed at protecting the scale of pay of a Government employee in his promotional cadre and seeks to ensure that in no case an incumbent is directed to receive less emoluments, less pay than what he was drawing prior to his promotion. This provision statutorily ensures that the State Government employee gets the benefits of receiving higher scale of pay than that of the post held by him prior to such promotion. Surely, in the light of Rule 74(b), initial pay in the time scale of higher post of a Government servant cannot be fixed which is less than the pay he was getting immediately before promotion.

9. The Circular dated June 18, 1982 contemplates that the completed years of service rendered by SERs under the OSEB should be treated as having been rendered under the Government in the Government scale of SERs and their pay in the scale of Assistant Engineers under the Government be fixed following the principle under Rule 74(b) of the Code. The aforesaid Circular was modified by a subsequent Circular dated March 17, 1983 whereby a clarification was made that in case of promotion of SERs of OSEB to the rank of Assistant Engineer under Government, if the pay so fixed as per principles laid down in the Government Circular dated June 18, 1982 becomes less than the pay last drawn by them under the Board, the difference may be allowed to them by reducible personal pay to be absorbed in future increments.

10. Neither the Circular dated June 18, 1982 nor the subsequent Circular dated March 19, 1983 modifying the earlier Circular dated June 18, 1982 can override the statutory provision contained in Rule 74(b) of the Code if it results in reduction of pay of the employee on promotion. That Orissa Service Code has been framed under Article 309 of the Constitution of India is not in dispute. It is well settled that Statutory Rules framed under Article 309 of the Constitution can be amended only by a Rule or Notification duly made under Article 309 and not otherwise. Whatever be the efficacy of the Executive Orders or Circulars or Instructions, Statutory Rules cannot be altered or amended by such Executive Orders or Circulars or Instructions nor can they replace the Statutory Rules. The Rules made under

Article 309 of the Constitution cannot be tinkered by the administrative Instructions or Circulars.

11. Seen thus, upon promotion of the appellant to the rank of Assistant Engineer from SER, his pay in the time scale of Assistant Engineer has to be fixed as per Statutory Rule 74(b), more particularly, in a situation such as the present one because by relying upon the Government Circulars dated June 18, 1982 or March 19, 1983 or April 16, 1971, the appellant's scale of pay gets reduced.

12. The State Government has not challenged the applicability of Rule 74(b) of the Code in the matter. That being the position, the appellant's pay has to be fixed in accordance with Rule 74(b) of the Code and not otherwise. The view of the Tribunal, therefore, that the appellant's pay be fixed on his promotion to the rank of Assistant Engineer (Electrical) taking his last pay drawn in the rank of Sub-Assistant Engineer and following the provisions of Rule 74(b) of the Code being eminently just, proper and in accordance with law warranted no interference at the hands of the High Court.

13. Appeal, accordingly, has to be allowed and is allowed. The order dated March 2, 2006 passed by the High Court impugned in the present appeal is set aside and the order dated December 23, 1999 passed by Orissa Administrative Tribunal is restored. The differential salary shall be paid to the appellant now within two months from today. No order as to costs.