

ORISSA HIGH COURT

Sri Upendra Das

Vs

State of Orissa

O. J. C. No. 710 of 1969

(G.K. Misra, C.J. and S.E. Ray, JJ.)

24.11.1969

JUDGMENT

G.K. Misra, C.J.

1. On 28-6-69 the Orissa Public Service Commission (hereinafter to be referred to as the Commission) consisted of three members; (1) Sri Motilal Pandit, (2) Sri Upendra Das (petitioner) and (3) Sri. Kali Kinkar Samal (opposite party No. 2). On attainment of the sixtieth year, Sri Pandit retired in the afternoon of 28-6-69. On 27-6-60 the Chief Secretary to the Government of Orissa issued two notifications, No. 10281 and No. 10282 appointing Sri K. K. Samal as Chairman of the Commission and Sri Chintamoni' Mohapatra as member of the Cbmmission with effect from 29-6-69 forenoon. The petitioner has filed this writ application under Article 226 of the Constitution, for quashing the aforesaid notifications and for issuing an injunction against opposite party No. 2 restraining him from functioning as Chairman of the Commission.

2. From the statement of facts, it would appear that by 29-6-69 petitioner and opposite party No. 2 were persons who prior to their appointment as Members of the Commission held office under the Government of Orissa for at least ten years. Sri Chintamoni Mohapatra retired from Superior Judicial Service and was in the service of the State Government for at least 10 years prior to his appointment as a Member of the Commission.

3. On the aforesaid facts, Mr. Misra, for the petitioner, raised two contentions:

(i) The constitution of the Commission is contrary to Article 316 (1) proviso inasmuch as all the three members of the Commission were officials prior to their appointment and there is not a single non-official in the body of the Commission.

(ii) On 29-6-69, when opposite party No.2 was appointed Chairman of the Commission, he had not ceased to hold the office of a member of the Commission. His appointment as Chairman is unconstitutional being contrary to Article 319 (d).

Both the contentions require careful examination.

4. The implication of the first contention is that by 29-6-69 there being already two Members who were officials prior to their appointment as required by the proviso to Article 316 (1), the appointment of Sri Chintamani Mohapatra, as a Member would be invalid. Article 316 (1) proviso may be quoted:- "316 (1) The Chairman and other members of a Public Service Commission shall be appointed..... . in the case of a State Commission by the Governor of the State.

Provided that as nearly as may be one half of the members of every Public Service Commission shall be persons, who at the dates of their respective appointments have held office for at least ten years either under the Government of India or under the Government of a State....."

The corresponding provision in the Government of India Act, 1935, was Section 265(1) proviso which ran thus:-

"265 (1). The Chairman and other members of the Public Service Commission shall be appointed..... in the case of a Provincial Commission by the Governor of the Province.

Provided that at least one half of the members of the Public Service Commission shall be persons who, on the dates of their respective appointments, have held Office for at least ten years under the Crown."

Under the Government of India Act, the position was very clear that at least one half of the members of a Commission shall be from amongst officials having the necessary experience. There was no restriction as to from what class the other half would be recruited. The minimum having been fixed by the expression "at least one half there was no ban on the selection of the other half also from amongst officials. It was however open to the Governor to appoint the other half from amongst non-officials. In other words, under Section 265 (1) of the Government of India Act, 1935 all the members of the Public Service Commission could consist of officials only.

The expression "at least one-half" was substituted by the expression "as nearly as may be one half" in the proviso to Article 316-(1). On account of this change of language, it is contended by Mr. Misra that the residual members under the proviso to Article 316 (1) must necessarily be recruited from amongst non-officials only.

5. The Commission consists of three members. The expression "as nearly as may be one half" in its application to the Commission would mean either one or two. Half of three members is one and a half. Two is as much near to one and a half as one. The Governor has full discretion to fulfill this condition by appointing one or two members from amongst officials. As to how the residue would be filled up there is no indication in the proviso. The residue can, therefore, be filled up either from amongst officials or non-officials. If the Governor, chooses to fulfill the condition by appointing one official, it is open to him to fill up the posts of the remaining two members from amongst either officials or non-officials. In filling up the residue therefore no restriction has been prescribed, fettering the Governor's discretion.

6. It was however contended that as the expression "at least one half" was changed to "as nearly

as may be one half, the intention of the authors of the Constitution was that the residue would be filled up only from amongst non-officials. It would appear from the Constituent Assembly debates, dated 22-8-1949, when draft Article 285 (corresponding to the present Article 316 of the Constitution) was under discussion, that originally an amendment was brought to substitute the word "one-third" for the word "one-half" occurring in Section 265 (1) of the Government of India Act, 1935. This amendment was not accepted. There was another suggestion to substitute the words "not more than one-half" for the words "at least one half". This amendment was also defeated. Ultimately the expression "as nearly as may be one half" was accepted. Dr. B. R. Ambedkar, in his reply observed thus;-

"The first criticism is with regard to the composition of the Public Service Commission. The reservation made there that at least one half of the members of the Public Service Commission should have been servants of the Crown has been objected to on the ground that this is really a paradise prepared for the I. C. S. people. I am sorry to say that those who have made this criticism do not seem to have understood the purpose, the significance and the functions of the Public Service Commission. The function of the Public Service Commission is to choose people who are fit for public service. The judgment required to come to a conclusion on the question of fitness presupposes a certain amount of experience on the part of the person who is asked to judge. Obviously, nobody can be a better judge in this matter than a person who has already been in the service of the Crown. The reason, therefore, why a certain proportion is reserved to persons in service is not because there is any desire to oblige persons who are already in the service of the Crown, but the desire is to secure persons with the necessary experience who would be able to perform their duties in the best manner possible. However, I am to accept an amendment if my friend, Mr. Kapoor is prepared for it. I am prepared to say "Provided that as nearly as may be one half" instead of saying "Provided that at least one half".

Mr. H. v. Kamath then put a query, "Why not say 'not more than one-half?'". In reply, Dr. Ambedkar said "No. I have done my best". The aforesaid debate would clearly show that there was a demand to limit the number from the service but that was not accepted and amendment as finally accepted found favor in the expression "as nearly as may be one half". The intention of the Constitution makers seems to be that some non-official members should be taken in the Service Commission, but no provision was made to make any reservation in the case of non-officials as was done in the case of officials.

7. On this analysis and on the plain language of Article 316 (1) proviso, conclusion is irresistible that a varying minimum number of seats is reserved for officials in the composition of the Commission. So far as the residue is concerned, absolute discretion is given to the Governor to make a choice either from amongst officials or non-officials. There may be occasions when the Governor may appoint one official and two non-officials to fill up the three posts of members of the Commission; but even if the Governor appoints all the three members from amongst officials, his action cannot be said to be in violation of the proviso to Article 316 (1). The difference between Section 265 (1) proviso of the 1935 Act and Art, 316 (1) proviso may be succinctly put.

Under section 265, the service quota would be half at the minimum while under Article 316, the Governor has the discretion to reduce the service quota to less than half. Out of three members, two must be from the Service under the 1935 Act while under the Constitution, the proviso can be complied with if only one out of the three is from Service. For filling up the residue, there is no restriction on the discretion of the Governor in either case. The same view has been expressed by a Bench of this Court in *Raghunadha Rao v. State of Orissa*¹, We would accordingly reject the first contention that the composition of the personnel of the Commission, consisting of opposite party no. 2, the petitioner, and Sri Chintamoni Mohapatra, is unconstitutional.

8. The next question for consideration is whether the appointment of Sri Samal as Chairman with effect from 29-6-69 is unconstitutional. Mr. Misra contends that by the date of the notification made on 27-6-69, Sri Samal did not cease to be a member of the Commission and as such, he was not eligible to be appointed as Chairman on 29-6-69. Reliance is placed on Article 319 (d)

9. To appreciate the aforesaid contention Article 319 may be quoted in full:-

"319. Prohibition as to the holding of offices by members of Commission on ceasing to be such members:-

On ceasing to hold office-

(a) the Chairman of the Union Public Service Commission shall be ineligible for further employment either under the Government of India or under the Government of a State;

(b) the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman, or any other member of the Union Service Commission or as the Chairman of any other State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State;

(c) a member other than the Chairman of Union Public Service Commission shall be eligible for appointment as the Chairman of the Union Public Service Commission, or as the Chairman, of a State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State.

(d) a member other than the Chairman of a State Public Service Commission, shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission, or as the Chairman of that or any other State Public Service Commission, but not for any other employment either under the Government of India or under the Government of the State.

" Emphasis is put on the expression "On ceasing to hold office" with which the Article commences. It is contended that an ordinary member of the Commission must first cease to hold office as a member and it is only thereafter that he can be considered eligible for appointment as Chairman. The contention has no substance as will be discussed hereafter.

10. The marginal note to the Article is: Prohibition as to the holding of offices by members of

Commission on ceasing to be such members. Mr. Misra contends that a member would cease to function only in the manner prescribed under Article 316 (2). That clause says that a member of a Public Service Commission shall hold office for a term of six years from the date on which he enters upon his office, or until he attains in the case of a State Commission - the age of 60 years whichever is earlier. The proviso lays down that a member can resign his office by writing under his hand or he may be removed from the office in the manner provided in Clause (1) or Clause (3) of Article 317. Article 316 (2) does not deal with cases of ceasing to hold office on appointment to some other office. It merely covers cases of resignation or removal. Removal is directly dealt with in Articles 317 (1) and 317 (3). In our opinion, there is no justification to confine the application of the expression "ceasing to hold office" only to cases of termination of the office by resignation or removal. A member can cease to hold office on his being appointed to some other office to which he is eligible.

11. Article 319 deals with the case of eligibility of a member of a Commission to other offices. The prohibition has been made on grounds of public policy. In this Article, member of a Commission includes the Chairman. To appreciate the exact import of Article 319 (d) the other clauses require clear analysis. Clause (a) says that the Chairman of the Union Public Service Commission shall be ineligible for further employment either, under the Government of India or under the Government of a State. Here the prohibition is absolute and total. This is for the simple reason that he holds the highest office in the Union so far as Public Service Commission is concerned. The idea of putting such restriction is to free the members from corruption and from expectations of future employment under the Executive. Clause (b) permits a Chairman of a State Public Service Commission to be eligible for appointment as the Chairman or any other members of the Union Public Service Commission or such Chairman of any other State Public Service Commission but not for any other employment either under the Government of India or Government of a State. The Chairman holds the highest office in a State Public Service Commission. Higher than that is the office of Chairman or any other member of the Union Public Service Commission. The nature of work in both is similar. But the prohibition in respect of any other employment under the Government of India or under the Government of a State, is absolute. Neither in Clause (a) nor in Clause (b) is there any requirement that the incumbent must resign before he is considered eligible for the higher office.

Similarly, under Clause (c) a member other than the Chairman of the Union Public Service Commission shall be eligible for appointment as Chairman of that Commission. Clause (d) enables the members of State Commissions to become Chairman thereof.

12. It would thus be clear from the scheme of Article 319 that once a person becomes either a member or Chairman of a State Public Service Commission or the Union Public Service Commission, he is debarred from getting any employment either under the Union Government or the State Government. The only office which the incumbent is eligible to hold is the one higher than or parallel to what he was occupying in the Commission. That is why in the case of the Chairman of the Union Public Service Commission; the prohibition is absolute.

13. Clause (3) of Article 316 lays down that a person who holds office as a member of a Public Service Commission shall, on the expiry of his term of office, be ineligible for reappointment to that office. The sub-clause imposes a disability only in respect of that very office. In other words, a member of a Commission cannot be reappointed as a member and so also the Chairman cannot be reappointed as Chairman. Article 319, on the other hand, is enabling except in respect of the

Chairman of the Union Public Service Commission against whose reappointment in any capacity there is a total ban. Both the clauses must be read together.

14. The moment a member is appointed Chairman, he ceases to be a member. The time-lag may be microscopic; yet cessation of membership precedes his appointment as Chairman. Even if Mr. Misra's contention that the word "On" in the opening expression in Article 319 would mean "after", on the plain language of the Article there cannot be a ban on a member of a Commission becoming the Chairman while he is still in office. The cessation of the membership and this functioning as Chairman both operate simultaneously, the former preceding the latter. It is not necessary that, in fact, the member should first submit his resignation before his eligibility for appointment as Chairman is taken into consideration.

15. Mr. Misra next contends that whatever may be the position on taking over 'charge as Chairman, opposite party No. 2 was clearly not eligible to be appointed as Chairman at the time the notification was issued. There is no substance in this contention either. At the time the notification was issued only the eligibility of the member was taken into consideration. It is only on taking charge that the Chairman functions as such and ceases to be an ordinary member. In the Chambers's Dictionary the word "eligible" contains the following meanings: "fit or worthy to be chosen; legally qualified for election or appointment; desirable". Eligibility is determined with reference to certain qualifications. The requirement that on cessation of membership the person is to function as Chairman, does not relate to the qualification or virtue of the person; the qualification is otherwise determined. The restriction that he should cease to be a member, in other words that he cannot function both as member and Chairman, relates only to the point of time and not to the intrinsic merit or qualification of the person. On the date of issue of the notification, Sri Samal was fit or worthy to be chosen as Chairman of the Commission. He was legally qualified for such appointment. The notification is therefore valid and no exception can be taken to it. It would come into force only when the incumbent joins his new office. The moment the incumbent joins the new office he ceases to hold the former office.

On the aforesaid analysis, the contention of Mr. Misra that opposite party No. 2 could not have been appointed as Chairman while he was member of the Commission, must be rejected.

16. In *Dhirendra Krishna v. Corporation of Calcutta*², this question came up for consideration though on a different point. Mr. Justice Mitter in paragraph 12 of his dissenting judgment observed thus:-

"As a person cannot hold two posts at the same time, it must be held that on appointment as a Chairman a person ceases to hold office as an ordinary member of the Commission. It cannot be gainsaid that there is difference in status between that of a Chairman and an ordinary member besides the difference in salary. As a person cannot function as a Chairman unless he is appointed expressly for the purpose, it follows that on being appointed the Chairman of a Public Service Commission, a person who was a member ceases to hold the office of an ordinary member though for many purposes he may be considered to be a member of the said Commission. We must read Article 316 along with the other Articles including Article 319, so that they harmonise with one another. I do not see why Article 316 (2) should control Article 319. If it is possible to arrive at an

interpretation which gives effect to both, we should adopt that construction. In my view, the expression "ceasing to hold office" in Article 319 is referable to any situation whereby a person who held an office before discontinuing to hold it, may be by effluxion of the period of office or resignation, or by appointment to another office. The Constitution does not seem to require that a member of the State Public Service Commission should resign his office before he could be appointed a member of the Union Public Service Commission."

This passage has our respectful concurrence.

17. If it was necessary that a member should resign before he is appointed as Chairman of the Commission, the Constitution would have said so. We accordingly find no merit in the second contention.

18. In the result, the application fails and is dismissed, but in the circumstances without costs.

S.K. Ray, J.

19. I agree.

Application dismissed.

Cases Referred.

¹ AIR 1955 Ori 113

² AIR 1966 Cal 290 (FB)