

## STATE OF ORISSA

v.

## KHAGESWAR DAS AND OTHERS

August 12, 1975

[A. ALAGIRISWAMI, P. K. GOSWAMI AND N. L. UNTWALIA, JJ.]

*Orissa Industries Service Rules, 1971, r. 3(1)(ii)—If violative of Art. 16, Constitution of India.*

Rule 3(1)(ii) of the Orissa Industries Service Rules, 1971, provided that the junior grade of the service shall include the posts of Deputy Directors, Senior lecturers in Engineering Schools etc. besides the posts of Principal, Engineering Schools (except Mining Engineering) and Polytechnics which carry a special scale of pay.

The 1st respondent was appointed a lecturer in a Mining Engineering School. In 1960, the School was brought under the administrative Control of the Industries Department of the State Government, and the respondent became an officer of the Industries Department. Later, he was appointed Principal of the School. In 1964, there was a bifurcation of the common cadre of the Department, and a separate cadre for teaching posts of Engineering Schools in the State was created. In 1967, the two cadres were again merged forming a combined cadre for the officers of the Industries Department. The reason given for the merger was that the separate cadre for teachers was not beneficial to them, because, promotion prospects for them were bleak in view of the limited posts available for promotion. After the merger, in 1969, even though the 1st respondent was senior to the 2nd respondent, the latter was promoted as Joint Director superseding the former.

The High Court quashed the order and struck down r. 3(1)(ii) as violative of Art. 16.

Dismissing the appeal to this Court,

HELD : (1) In the resolution of 1967 merging the two cadres it was stated that the conditions of service of all the officers will be governed by a set of cadre rules to be framed later, but no such rules were framed at the time of promotion of the 2nd respondent. The 1971-rules were framed during the pendency of the writ application, filed by the 1st respondent, in the High Court. There was, therefore, at the time of promotion of the 2nd respondent, nothing to show that the post of a teacher or the Principal of a Mining Engineering School was treated as an ex-cadre post and on a separate footing for the purpose of promotion to the administrative posts. [303G-H]

(2) Rule 3(1)(ii) when it says in the first part 'Senior lecturers in Engineering Schools, it includes senior lecturers of Mining Engineering School also. Even when the two cadres were separated, all Engineering Schools including Mining Engineering Schools were placed on the SAME FOOTING. But, in the last part of the rule when referring to the post of Principal, the Principal of a Mining Engineering School is excluded. The exclusion is without any justification or reasonable basis. [304E-H]

Therefore, the rule is violative of Arts. 14 and 16 and the non-consideration of the case of the 1st respondent at the time of promotion of the 2nd respondent was wholly arbitrary and illegal. [303H; 304H]

(3) It is however not necessary to strike down the entire rule 3(1)(ii). It is sufficient if the words 'except Mining Engineering' are struck down and deleted. [304H]

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 254 (N) of 1974.

Appeal by special leave from the judgment and order dated the 30th November, 1972 of the High Court of Orissa in O.J.C. No. 129 of 1970.

B *Gobind Das* and *B. Parthasarathi*, for the appellant.

*B. P. Maheshwari* and *Suresh Sethi*, for respondent No. 1.

The Judgment of the Court was delivered by

C UNTWALIA, J.—The State of Orissa has preferred this appeal by special leave from the judgment and order of the High Court passed in a Writ Petition filed by respondent No. 1. Respondent No. 2 was appointed by promotion to the post of Joint Director of Industries, Government of Orissa in supersession of the claim of respondent No. 1. The High Court has quashed the said order and directed the appellant to consider the case of respondent No. 1 for promotion to the post of Joint Director according to his seniority in the combined cadre formed by Resolution dated 2-10-1967. Rule 3(1) (ii) of the Orissa Industries Service Rules, 1971 has been struck down as being violative of Article 16 of the Constitution of India.

D Respondent No. 1 was appointed as a lecturer in Mining in the Orissa School of Mining Engineering, Keonjhar on 6-2-1960. The said School was brought under the administrative control of the Industries Department of the Government of Orissa in pursuance of a Resolution dated 18-2-1960. The service of respondent No. 1 thereupon stood transferred under the administrative control of the Industries Department with effect from 21-3-1960. The post of the lecturer in the Mining Engineering School was upgraded by order of the State Government made in August, 1960. The petitioner was brought into the common cadre of the Industries Department of Government of Orissa and while he was so continuing, he was appointed as Principal of the Mining Engineering School. The provisional appointment made was regularized by the Industries Department by a notification dated 19-12-1962, a copy of which was Annexure D/2 to the Writ application.—This notification clearly shows that at that time respondent No. 1 was treated as an officer of the Industries Department.

E Then came a Resolution of the Government dated 21-4-1964. The common cadre of the Industries Department was bifurcated into two. A separate cadre was created for teaching posts of Engineering Schools in Orissa including the Mining Engineering School. Respondent No. 1 exercised his option to remain in the teaching cadre of the Industries Department.

H As per Resolution of the Government dated 2-10-1967 the two separate cadres in the Industries Department were again amalgamated and merged into one. Consequently the cadre of the teaching staff of the Engineering Schools including the Mining Engineering School and that of the administrative staff became a single combined cadre.

Even then respondent No. 1 was not considered for promotion to the post of Joint Director when respondent No. 2 who was junior to him was promoted to the post. Feeling aggrieved by the non-consideration of his case for promotion, respondent No. 1 filed the writ application in the year 1970. During the pendency of the writ application, the Governor of Orissa framed the Orissa Industries Service Rules, 1971—hereinafter called the Rules, under proviso to Article 309 of the Constitution. Respondent No. 1 amended his writ application, made out a case of discrimination in the framing of the Rules and attacked them as being violative of Articles 14 and 16 of the Constitution.

In paragraph 5 of the counter filed by the appellant the formation of a combined cadre by Resolution dated 2-10-1967 was admitted. But it was asserted that in spite of the merger of the two cadres into one the intention of the Government was to treat the post of the Principal of a Mining Engineering School as an ex-cadre post under the Industries Department. The Mining Engineers were excluded from the junior grade of service under the Industries Department in accordance with the Rules of 1971. Earlier also, respondent No. 1 got class I post out of turn treating him as belonging to ex-cadre post.

The High Court has come to the conclusion that before 21-4-1964 there were no separate cadres for the teaching and the administrative staff of the Industries Department. The cadre was one. It was bifurcated in 1964 and the two bifurcated cadres were again united and merged into one on and from 2-10-1967. There was, therefore, no justification at all in not considering the case of respondent No. 1 for promotion to the post of Joint Director as all persons in the combined cadre eligible for promotion had to be considered. Respondent No. 1 was senior to respondent No. 2 in the combined cadre and yet his claim was ignored on a ground which was not substantiated. The relevant rule was discriminatory and had no reasonable nexus with the object of the Rules.

The judgment of the High Court was handed down on the 30th November, 1972—long before the issuance of the notification dated 27th June, 1975 by the President of India under Article 359(1) of the Constitution. The rule was declared *ultra vires* on the ground of violation of Articles 14 and 16. The State of Orissa was the appellant before us. It was, therefore, agreed on all hands that this appeal was not a proceeding pending in this Court for the enforcement of the right under Article 14 of the Constitution and was, therefore, not suspended. The enforcement of the right was made by the delivery of the High Court judgment and the State merely wanted in this appeal a deletion of that enforcement.

Mr. Gobind Das, learned counsel for the appellant, submitted that the posts of the teachers in the Mining Engineering School in Orissa including the posts of the Principal have always been treated as ex-cadre posts in the Industries Department. The teachers and the Principal of the Mining Engineering School were not considered for promotion to the posts of Administrative Department because few persons

- A** were available to man the posts in the Mining Engineering School. It was because of this reason that the case of respondent No. 1 was not considered and the Rules were also framed with that object in view. In any view of the matter, counsel submitted, that the whole of Rule 3(1)(ii) ought not to have been declared as void and only the offending portion ought to have been struck down.
- B** The main part of the argument put forward on behalf of the appellant does not stand scrutiny and must be rejected. It could not be seriously disputed that respondent No. 1 was an officer of the Industries Department and appointed to the post of the Principal of the Mining Engineering School in that Department. There is nothing to indicate that the post of the Principal or of the teacher of any Engineering School or of the Mining Engineering School was an ex-cadre post.
- C** Then came the Resolution dated 21st April, 1964. The new scales of pay were fixed for the teachers in Engineering in the Engineering Schools including the Mining Engineering School in the State of Orissa. The contention of Mr. Das that this fixation of scales was only for the Engineering Schools and not for Mining Engineering School is not correct. Clearly all Engineering Schools were placed on the same footing and paragraph 3 of this Resolution runs as follows :
- D** "The teaching posts in Engineering Schools which till now were included in a common cadre with other posts in the Directorate of Industries will be placed in a separate cadre to which the above scale of pay will apply.
- E** Then came the merger resolution after about three years on the 2nd October, 1967 a copy of which was Annexure I to the writ application. The subject of the notification, Annexure I, is "formation of a combined cadre for the officers of the Industries Department". It was clearly mentioned in this notification that after the teaching posts were placed in a separate cadre "it was felt that the promotion prospects would be bleak due to the formation of a separate cadre for teachers in view of the limited posts available for promotion".
- F** Hence formation of separate cadre for teachers was considered not to be beneficial to them. So the combined cadre was brought into force with effect from the date of the issue of the Resolution dated 2nd October, 1967 in supersession of the earlier decision to have a separate cadre for teachers. Lastly it was stated in this Resolution "The conditions of service of all the officers will be governed by a set of cadre rules to be framed later on".
- G** No rules were framed until the framing of the Rules in 1971. As against a categorical statement in the Resolution dated 2-10-1967 there was nothing whatever to show that the post of a teacher or the Principal in the Mining Engineering School was treated as an ex-cadre post and on a separate footing for the purpose of promotion to the administrative posts. The non-consideration of the case of respondent No. 1 at the time respondent No. 2 was promoted to the post of Joint Director in or about the year 1969 was
- H** wholly arbitrary, unjustified and illegal. The High Court was right in making the order which it did on the writ application of respondent No. 1.

As against the purpose and object of the merger of the cadre mentioned in the Resolution dated 2-10-1967 we find Rule 3 of the Rules going contrary to them. Rule 9(1) of the Rules says :

“Promotions to the posts of Senior grade in Class I shall be made from among the members of the Junior grade in Class I :”

Constitution of the service is provided in Rule 3. We are concerned with Rule 3(1). It reads as follows :

“3(1) The cadre of the service shall consist of two branches, viz., Class I and Class II, the former comprising two grades, viz., the Senior grade and the Junior grade, as indicated below :—

- (i) The Senior grade shall include posts of Joint Directors and Officers of equivalent status as may be declared by Government from time to time.
- (ii) The Junior grade shall include the posts of Deputy Directors, Senior Lecturers in Engineering Schools and such other posts as may be declared by Government from time to time to be of equivalent status, besides the posts of Principal, Engineering Schools (except Mining Engineering) and Polytechnics which carry a special scale of pay.

Clause (ii) of the Rules when it says in the first part that the “junior grade shall include the posts of Deputy Directors, Senior Lecturers in Engineering Schools” it means clearly Senior Lecturers in Engineering Schools not excluding Mining Engineering School. But in the last part when in the junior grade were included the posts of Principals, Engineering Schools by the words “except Mining Engineering” given in the parenthesis, the post of the Principal of the Mining Engineering School was excluded. It was so done during the pendency of the writ application of respondent No. 1 and without any reasonable and sound basis for making a discrimination *à propos* the post of the Principal of the Mining Engineering School. We find no justification for making the distinction in the junior grade of Class I service in the case of the Principal of Mining Engineering School. The rule in that regard has rightly been held to be violative of Articles 14 and 16 of the Constitution by the High Court. But striking down of the whole of clause (ii) of Rule 3(1) of the Rules was not necessary. Only the words in parenthesis had to be deleted and struck down on that account. That would serve

**A** the purpose of making the posts of Principal of all Engineering Schools including the Mining Engineering School being the posts in the junior grade, Class I.

For the reasons stated above, we find no merit in this appeal. It is accordingly dismissed but subject to the clarification made above with costs payable to respondent No. 1.

**B**

V.P.S.

*Appeal dismissed.*