

STATE OF ORISSA ETC.

v.

ARUN KUMAR PATNAIK & ANR. ETC.

April 15, 1976

[Y. V. CHANDRACHUD, V. R. KRISHNA IYER AND N. L. UNTWALIA, JJ.]

Orissa Service of Engineers Rules, 1941, r. 19(a) and (b)—Scope of—Temporary appointment on contract basis, if could be treated as temporary appointment for absorption in regular cadre.

Constitution of India, 1950, Article 226—Service matters—Exercise of jurisdiction by High Court after long delays of 12 years in abject disregard of consequences to service personnel—Propriety.

In December, 1958, the appellant was appointed by direct recruitment as 'temporary Assistant Engineer on contract basis' for a period of three years' and he took charge on January 19, 1959. On March 14, 1962, the Government, after consulting the Public Service Commission and obtaining its concurrence passed an order regularising the appellant's service by absorbing him into the regular cadre of an Assistant Engineer retrospectively from Jan 19, 1959, though temporarily. On Nov. 15, 1968, he was confirmed as Assistant Engineer with effect from Feb. 27, 1961; in 1969, he was confirmed as an Executive Engineer with effect from Dec. 2, 1967; and in 1973, he was promoted as Superintending Engineer. The respondent was appointed, also by direct recruitment, on provisional basis on April 14, 1960 to act as temporary Assistant Engineer. On Nov. 15, 1968, he was also confirmed as Assistant Engineer but with effect from May 2, 1962; and in 1970, he was confirmed as Executive Engineer with effect from December 2, 1967. The respondent challenged the appointment of the appellant as Assistant Engineer and his subsequent promotions and claimed seniority over him. The High Court quashed the order absorbing the appellant into the regular cadre and the subsequent promotions, holding the absorption to be contrary to the Orissa Service of Engineers Rules, 1941, and hence invalid.

Allowing the appeal to this Court,

HELD: (1) By r. 6 of the Rules, recruitment to the rank of Assistant Engineers can be made directly in compliance with rr. 8 to 15. The appellant satisfied everyone of the qualifications prescribed by these rules and was selected by the Public Service Commission in accordance with the rules. He was recommended by the Public Service Commission, under r. 13 and the recommendation was accepted by the Governor under r. 15. He was thereafter appointed as temporary Assistant Engineer on contract basis. But his appointment was, in terms, on a *temporary basis* and the fact that he held his post on contract did not make his tenure other than temporary. The subsequent course of his career, within the contractual period itself, shows that he was granted all the facilities and privileges which are available to employees in the *regular cadre*, temporary or permanent, which are generally *not available to contractual employees*. He drew the same pay as any other employee in the regular cadre of Assistant Engineers and he was fitted into the same pay scale. He drew no special benefits by reason of being on a contractual basis. [64 DG; 65 B-C]

(2) Under r. 19(a), persons appointed by direct recruitment are required to be on probation for two years, and under r. 19(b), notwithstanding anything in cl. (a), when a temporary Assistant Engineer is selected for a permanent appointment to the service, the whole or part of the period of his temporary service shall, if approved by the Governor, count towards the prescribed period of probation. In the present case, what the Government did was to count the appellant's temporary service from January 19, 1959 to March 14, 1962, as it was entitled to do towards his probationary period. The

A State Government selected him for permanent appointment as an Assistant Engineer and before doing so also obtained the concurrence of the Public Service Commission. [65 F-G; 64 F]

B (3) The appellant's appointment as an Assistant Engineer on a temporary basis was thus made on January 19, 1959, whereas the respondent's appointment to act was made on April 14, 1960. All along their respective service careers extending over 13 years, the appellant was recognised as senior. [66 C]

Narayan Chandra Parida v. State of Orissa and I.L.R. [1971] Cuttack 857, distinguished.

C (4) The respondent is guilty of laches. The appellant's appointment was gazetted on March 14, 1962. On November 15, 1968, the appellant and the respondent were confirmed as Assistant Engineers by a common Gazette Notification which showed the appellant's confirmation as on February 27, 1961, and that of the respondent as on May 2, 1962. And yet, till May 29, 1973, when the writ petitions were filed in the High Court, the respondent did nothing except to file a representation to the Government in June, 1970 and a memorial to the Governor in April, 1973. The High Court should not have exercised its extraordinary jurisdiction in favour of the respondent who was unmindful of his rights for 12 years and in utter disregard of consequences to other service personnel. In June, 1974, the High Court set aside an appointment of March, 1962, of a person who had, in meantime, risen to the rank of Superintending Engineer. [66 D-G].

D CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 1739 to 1742 of 1974.

E (Appeals by special leave from the judgment and order dated the 10-6-1974 of the Orissa High Court at Cuttack in O.J.C. Nos. 462 and 463 of 1973).

G. Rath, Advocate General, Orissa, *Gobind Das* and *B. Parthasarathi*, for the appellants and respondent-2 in CAs 1739-41/74.

V. S. Desai and *Vinoo Bhagat*, for respondent No. 1.

F The Judgment of the Court was delivered by

G CHANDRACHUD, J. This is a group of 4 appeals arising out of a judgment dated June 10, 1974 of the High Court of Orissa. Civil Appeals Nos. 1739 and 1740 are filed by the State of Orissa while Civil Appeals Nos. 1741 and 1742 are filed by one T. C. Krishna Moorthy. Two writ petitions were filed in the Orissa High Court, one by Arun Kumar Patnaik and the other by Niranjan Mishra for quashing certain orders and notifications issued by the Government of Orissa in regard to Krishna Moorthy's appointment as an Assistant Engineer and his subsequent promotions to higher posts. Patnaik and Mishra challenged Krishna Moorthy's appointment and prayed that in any event they ought to be accorded seniority over him.

H By an order dated December 11, 1958 Krishna Moorthy and two others were appointed as "temporary Assistant Engineers on contract basis for a period of 3 years". The appointments were made by direct recruitment on the recommendation of the Public Service Com-

mission which held a test and a *viva voce* examination in accordance with the Orissa Service of Engineers Rules, 1941. Krishna Moorthy took charge of the post on January 19, 1959. On September 13, 1960 which was during the currency of the contractual period of 3 years, the Government of Orissa informed him that the question of absorbing him in the regular establishment of the State's Engineering Service will be taken up for consideration on his completion of 2 years of service and in case he was absorbed, his absorption would be given retrospective effect from the date of his first appointment as an Assistant Engineer. The Government of Orissa thereafter consulted the Public Service Commission and after obtaining its concurrence, it passed an order dated March 14, 1962 regularising Krishna Moorthy's service by absorbing him in the regular cadre of an Assistant Engineer retrospectively from January 19, 1959. That order is Annexure II to the Writ Petitions. On September 21, 1962 Krishna Moorthy was promoted as an Executive Engineer (Annexure III); on November 15, 1968 he was confirmed as an Assistant Engineer with effect from February 27, 1961 (Annexure IV); on May 12, 1969 he was confirmed as an Executive Engineer with effect from December 2, 1967; and on November 23, 1973 he was promoted as a Superintending Engineer (Annexure VII), Patnaik and Mishra challenged the validity of the orders at Annexures II, III, IV and VII to the writ petitions.

These are the relevant dates in regard to Krishna Moorthy's appointment. In regard to the appointments of Patnaik and Mishra, it would be enough to recapitulate facts relating to Patnaik's appointment, because for the purpose of deciding these appeals there is no distinction between those facts and the facts of Mishra's case. On April 14, 1960 Patnaik was appointed "on provisional basis to act as temporary Assistant Engineer" by direct recruitment, which was about a year and 4 months after Krishna Moorthy's initial appointment as a temporary Assistant Engineer on contract basis. On November 15, 1968 Patnaik was confirmed as an Assistant Engineer with effect from May 2, 1962. (It may be recalled that by an order of even date Krishna Moorthy was confirmed as an Assistant Engineer with effect from February 27, 1961.) On October 31, 1970 Patnaik was confirmed as an Executive Engineer with effect from December 2, 1967. (It may be recalled that Krishna Moorthy was confirmed as an Executive Engineer with effect from the same date *viz.*, December 2, 1967 though by an earlier order dated May 12, 1969).

On June 19, 1970 Patnaik filed a representation to the State Government claiming seniority over Krishna Moorthy. On April 16, 1973 Patnaik filed a memorial to the Governor of Orissa for restoration of his seniority. On May 29, 1973 Patnaik and Mishra filed writ petitions in the High Court questioning the validity of Krishna Moorthy's absorption in the regular cadre by the order of March 14, 1962 as also his subsequent promotions and seniority. By a Judgment dated June 10, 1974 the High Court declared Krishna Moorthy's absorption by the notification of March 14, 1962 as invalid and quashed the notifications at Annexures II, III, IV and VII, thereby

A also rendering his promotions as Executive Engineer and Superintending Engineer and his confirmation as an Assistant Engineer illegal. Krishna Moorthy's seniority fell with his appointment. The correctness of the High Court's judgment is challenged in these appeals by special leave.

B In exercise of the powers conferred by clause (b) of sub-sections (1) and (2) of section 241 of the Government of India Act, 1935, the Governor of Orissa made rules for the regulation of recruitment to and the conditions of service, pay, allowances and pension of the Orissa Service of Engineers. These rules are called the Orissa Service of Engineers' Rules, 1941. Rule 3(b) defines a "Member of Service" to mean a servant of the Crown (now the State Government), appointed in a substantive capacity under the provisions of the Rules to a post in the cadre of the service. The sanctioned strength of this Service consists under Rule 4 of one Chief Engineer, 2 Superintending Engineers, 7 Executive Engineers, 20 Assistant Engineers and 4 Assistant Engineers in leave and training reserve. By rule 5 all first appointments to the service are ordinarily to be made to the rank of an Assistant Engineer. Appointments to the rank of Chief Engineer, Superintending Engineer and Executive Engineer are to be made ordinarily by the Governor after consultation with the Public Service Commission by promotion from the next lower post. Promotion is made by selection on the basis of merit and seniority but seniority of itself can confer no claim to promotion. Rule 6 provides that recruitment to the rank of Assistant Engineers shall be made partly by direct recruitment in accordance with rules 8 to 15 and partly by promotion in accordance with rules 16 to 18. Rule 8 prescribes basic qualifications for appointment to any post in the Orissa Service of Engineers while Rule 9 prescribes further qualifications for appointment by direct recruitment. Rule 10 requires the Public Service Commission to announce the number of vacancies to be filled by direct appointment and to invite applications from candidates eligible for appointment to the service. Under the proviso to rule 10, temporary Assistant Engineers appointed on the recommendation of the Public Service Commission are not required to compete with other candidates for permanent appointments when such vacancies arise. By the same proviso temporary Assistant Engineers can, without further reference to the Public Service Commission, be appointed to permanent posts according to their seniority and record of service unless the Commission expressly specifies in any particular case that a candidate's case may be referred to them before the question of his permanent appointment is taken up. Rule 12 requires the Public Service Commission to interview suitable candidates while rule 13 requires the Commission to prepare a list of selected candidates arranged in order of preference, the number of such candidates being ordinarily $1\frac{1}{3}$ times the number of vacancies to be filled by direct recruitment. The final selection of the candidates is to be made by the Governor under Rule 15(a) from amongst those who have been included in the list submitted by the Commission or in respect of whom a report has been submitted in accordance with rule 14. The candi-

dates selected by the Governor are required by rule 15(b) to submit themselves for examination by a Medical Board.

Rule 19(a) provides that persons appointed by direct recruitment shall be on probation for 2 years while those appointed by promotion shall undergo a probation for one year, provided that the Governor may extend the period of probation in any particular case. At any time during the probationary period, the Governor can dispense with the service of any officer appointed by direct recruitment after a month's notice and he can likewise revert the promoted officer to his substantive appointment. Rule 19(b) reads thus :

“Notwithstanding anything in sub-rule (a) when a temporary Assistant Engineer is selected for a permanent appointment to the service the whole of the period of his temporary service or a portion thereof, as the case may be shall if approved by the Governor for this purpose, count towards the prescribed period of probation.

Provided that such approval shall be given only in respect of a continuous period of temporary service under the Government of Orissa followed without a break by appointment in permanent service.”

Rule 20 prescribes conditions for confirmation by providing that a probationer shall be confirmed in his appointment if he completes the prescribed period of probation, if he has passed the prescribed departmental examination and if the Governor is satisfied that he is fit for confirmation. Rule 22 prescribes the pay scale for direct recruits to the cadre of Assistant Engineers. Under this rule, the period of probation counts for the purpose of increment unless the probation is extended on account of the probationer's failure to give a satisfactory performance. Under rule 26(i), if officers are recruited by promotion and by direct recruitment in the same calendar year, the promotees are considered as senior to direct recruits irrespective of the dates on which they were appointed. Rule 26(ii) provides that subject to provisions of sub-rule (i), seniority of officers shall be determined in accordance with the order in which their names appear in the list prepared by the Commission.

We are unable to accept the High Court's view which was also pressed upon us by the learned counsel appearing on behalf of Patnaik and Mishra that Krishna Moorthy's appointment under the notification of March 14, 1962 was contrary to the rules and therefore he cannot be said to be a member of any of the cadres of the Orissa Service of Engineers. By rule 3(b), “Member of Service” means a servant of the Government appointed in a substantive capacity under the provisions of the rules to a post in the cadre of the service. The first question to be considered is whether on March 14, 1962 Krishna Moorthy was appointed in a substantive capacity to a post in the cadre of the Orissa Service of Engineers and secondly, whether the State Government had the power under the rules to appoint him retrospectively with effect from the date of his initial appointment *i.e.* from January 19, 1959.

A The impugned notification dated March 14, 1962 reads thus :

“Shri T. C. K. Murty, Assistant Engineer, P. H. who was appointed as such on contract basis with effect from 19-1-1959 is appointed as a temporary A.E. in the regular Establishment of the P.H. Wing until further orders with effect from the same date.”

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The terms of this notification are too direct and simple to admit of more than one construction and accordingly we must proceed on the footing that on March 14, 1962 Krishna Moorthy was in fact appointed as an Assistant Engineer in the regular cadre of Assistant Engineers, though with effect from January 19, 1959 being the date on which he had taken charge of his initial appointment as a temporary Assistant Engineer on contract basis. The meaning and effect of the notification was never in doubt nor indeed the intention of the Government to regularise Krishna Moorthy's appointment so as to place him in one of the regular cadres of the Orissa Service of Engineers.

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But then, did the State Government have the power under the rules to regularise Krishna Moorthy's appointment retrospectively? That is the real focus of controversy. While resolving this controversy one must disabuse one's mind of the apparently weighty consideration that Krishna Moorthy was appointed initially on a 'contract basis'. By rule 6, recruitment to the rank of Assistant Engineers can be made directly but such recruitment must comply with rules 8 to 15. Krishna Moorthy satisfied everyone of the qualifications prescribed by this fasiculous of rules and that is undisputed. He was qualified under rule 6 and was eligible under rule 9 to be appointed as an Assistant Engineer in the regular cadre of the Orissa Service of Engineers. Applications were duly invited by the Public Service Commission under rule 10 and Krishna Moorthy's application fulfilled the requirements of rule 11. The Commission considered all the applications and interviewed candidates who were suitable for the posts, as required by rule 12. Krishna Moorthy appeared for the test and the *viva voce* examination and was selected by the Public Service Commission. His name appeared in the list of selected candidates prepared by the Commission under rule 13. Rule 14 has no relevance. The final selection of the candidates was made by the Governor, as required by rule 15, from amongst those who were included in the list submitted by the Commission under rule 13. On his selection by the Governor, Krishna Moorthy was examined by the Medical Board as required by rule 15 and was found medically fit. It was after due and full compliance with everyone of the conditions and formalities that his appointment as a temporary Assistant Engineer on contract basis was notified on Dec. 11, 1958.

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The initial appointment of Krishna Moorthy being within the scope of and in conformity with the rules governing direct recruitments to the cadre of Assistant Engineers, the only question that requires consideration is whether the rules permit retrospective regularization of an appointment. The terms of the initial appointment are relevant in

this behalf because though the appointment was on a 'contract basis', it was also expressly described as 'temporary'. In common parlance it may be incongruous to describe a contractual appointment as temporary, because the appointment is intended in the normal circumstances to last during the currency of the contract. But Service regulations have their own semantics and not unoften, not only are service rules technical but they have their own technical vocabulary. Krishna Moorthy's initial appointment must be construed on its own terms and therefore the adjective 'temporary' cannot be dismissed as a mere adjunct. He was unquestionably and in terms appointed as an Assistant Engineer on a "temporary" basis and the fact that he held his post on a contract did not make his tenure other than temporary. The subsequent course of his career, within the contractual period itself, shows that he was granted all the facilities and privileges which are available to employees in the regular cadre, temporary or permanent, and which are generally not available to contractual employees. He drew the same pay as any other employee in the regular cadre of Assistant Engineers and he was fitted into the same scale of pay. He drew no special benefits by reason of being on a contractual basis. And when during the currency of the contract he wanted to apply for a post under the Union of India, his application was not forwarded by the State Government for the reason that there was a "shortage of technical personnel in the State". His appointment was thus made truly on a temporary basis and the question for consideration resolves itself into this : Can an appointment made on a temporary basis after compliance with the relevant rules be regularized retrospectively ?

If Krishna Moorthy had not been recommended by the Public Service Commission, different considerations might have arisen. But he was recommended by the Commission, the recommendation was accepted by the Governor and the State Government appointed him as an Assistant Engineer on a temporary basis in pursuance of the Commission's recommendation and the Governor's selection. This is where Rule 19 plays an important part. Under clause (a) of that rule, persons appointed by direct recruitment are required to be on probation for 2 years. Under clause (b) of Rule 19, notwithstanding anything in clause (a), "when a temporary Assistant Engineer is selected for a permanent appointment to the service, the whole of the period of his temporary service or a portion thereof, as the case may be shall if approved by the Government for this purpose, count towards the prescribed period of probation". Krishna Moorthy was selected by the State Government for a permanent appointment as an Assistant Engineer and before implementing that decision, the State Government had obtained the concurrence of the Public Service Commission. On such concurrence being obtained, the State Government issued the impugned notification dated March 14, 1962 appointing him as an Assistant Engineer, though temporarily and until further orders, with effect from January 19, 1959. The Government had the power under rule 19(b) to count any part of Krishna Moorthy's temporary service towards the prescribed period of probation and what it did was to count his temporary service from January 19, 1959

A till March 14, 1962 towards the probationary period. He had by then put in more than three years' service whereas rule 19 stipulates a normal probationary period of 2 years only.

B In view of these facts and considerations, it is impossible to accept the submission made on behalf of Patnaik and Mishra that Krishna Moorthy's appointment under the notification of March 14, 1962 is in any sense invalid. Consequently, his subsequent promotions and the seniority accorded to him must also be upheld. The decision in *Narayan Chandra Parida v. State of Orissa and Ors.*,⁽¹⁾ on which reliance is placed to deprive Krishna Moorthy of his seniority has no application, as in that case the petitioner was ranked as a junior to a person who was not at all in Government service when the petitioner was appointed. In the instant case, Krishna Moorthy was appointed as an Assistant Engineer on a temporary basis on January 19, 1959 whereas Patnaik and Mishra were appointed on April 14, 1960 to act as Assistant Engineers on a provisional basis. All along their respective service careers, extending over 13 years, Krishna Moorthy was recognized as senior to the other two.

C It is unnecessary to deal at length with the State's contention that the writ petitions were filed in the High Court after a long delay and that the writ petitioners are guilty of laches. We have no doubt that Patnaik and Mishra brought to the Court a grievance too stale to merit redress. Krishna Moorthy's appointment was gazetted on March 14, 1962 and it is incredible that his service-horoscope was not known to his possible competitors. On November 15, 1968 they were all confirmed as Assistant Engineers by a common Gazette notification and that notification showed Krishna Moorthy's confirmation as of February 27, 1961 and that of the other two as of May 2, 1962. And yet till May 29, 1973 when the writ petitions were filed, the petitioners did nothing except to file a representation to the Government on June 19, 1970 and a memorial to the Governor on April 16, 1973. The High Court made light of this long and inexplicable delay with a casual remark that the contention was "without any force". It overlooked that in June, 1974 it was setting aside an appointment dated March 1962 of a person who had in the meanwhile risen to the rank of a Superintending Engineer. Those 12 long years were as if writ in water. We cannot but express our grave concern that an extraordinary jurisdiction should have been exercised in such an abject disregard of consequences and in favour of persons who were unmindful of their so-called rights for many long years.

D For these reason we allow the appeals, set aside the judgment of the High Court and direct that the writ petitions shall stand dismissed. Patnaik and Mishra will pay to Krishna Moorthy the costs of the petitions and of these appeals which we quantify at Rs. 2000. They will each pay a sum of Rs. 1,000. There will be no order as to the costs of the Government.

E V.P.S.

Appeals allowed.

(1) I.L.R. 1971 Cuttack 857.