

ORISSA ADMINISTRATIVE TRIBUNAL. BHUBANESWAR

No... 1323... / Date 17-11-98

80 (7)

IN PERSC
BY REGD. P

Gautam Nandan & others
P. R. Gurusamy, Advocate...
75, Badajinagar
Bhubaneswar

APPLICANT
RESPONDENT

Herewith enclosed a free copy of the decision, dated 19.11.98
O. A. - S.F.C. of 1998 (Gautam Nandan & others vs. P. R. Gurusamy & others) as provided in Rule-21 of the Orissa Administrative (Procedure) Rules, 1986.

DEPUTY REGISTRAR
198

-MP-XI (O. A. T.) 5-10,000-29-9-1997-2

Deputy
Registrar

...
CORAM : HON'BLE SMT. C. NARAYANASWAMY, VICE-CHAIRMAN.
HON'BLE SRI P.C. PATRA, MEMBER (JUDICIAL)

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Original Application No.880 of 1998.

1. Goutam Ch. Nayak
2. Sasibhusan padhi
3. Manoranjan Patnaik

.. Applicants

Vrs.

1. Chief Secretary to Government of Orissa, Orissa Secretariat, Bhubaneswar.
2. Commissioner-cum-Secretary to Government of Orissa, Revenue & Excise Department, Orissa Secretariat, Bhubaneswar.
3. Sri Priyadarshi Mohapatra, Addl. Private Secretary to Hon'ble Dy. Chief Minister, (Water Resources), Orissa Secretariat, Bhubaneswar.

.. Respondents.

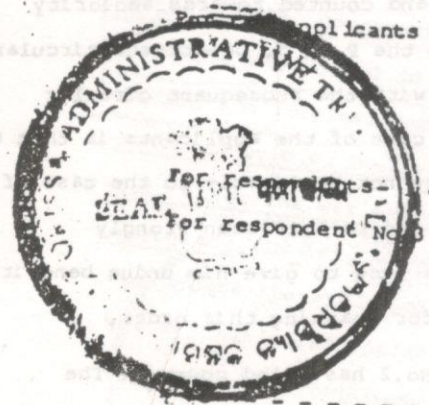
APPEARANCES

For Applicants

- .. M/s. Prasant Routaray, Ashok Pattnaik, K.K.Mishra, L.Samal, A.K.Samantaray. (Advocates)

Standing Counsel

- .. M/s A.K.Mishra, E.B.Acharya, J.Senagupta, D.K.Panda, P.R.J.Das, C.Mohanty. (Advocates)



Date of hearing: 22. 11. 98 Date of decision: 11. 11. 98

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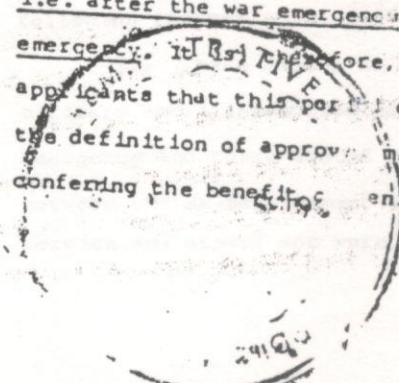
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ORDER

C. INDUWALAKSHMI, VICE-CHAIRMAN: The three applicants are direct recruits to Orissa Administrative Service belonging to 1980/1981 batches. C.P. No.3 is also a regular recruit to the same service of 1986 batch having been recruited against the quota reserved for ex-servicemen. The applicants are aggrieved by the order dated 17.3.98 at Annexure-3 issued by the Revenue and Excise Department, i.e. CP No.2, by which OP No.3 has been treated as a regular recruit of 1979, and granted consequential service benefits of seniority and pay. By virtue of this order he became senior to the applicants who had been recruited before him. While issuing the impugned order at Annexure-3, OP No.2 had taken into account the military service rendered by OP No.3 in the Air Force from 8.6.78 to 13.7.85 as "approved Military Service" and counted towards seniority in accordance with the P. & S. Department circular dated 2.5.63 read with the subsequent circular dated 9.6.76. The case of the applicants is that the above circulars are not applicable to the case of OP No.3 and these orders have been wrongly interpreted with a view to give him undue benefits. They have prayed for quashing this order.

2. O.P. No.2 has filed counter. The circulars issued by the P & S. Department are at Annexures-1 and 2 to this counter. Annexure-1 is an

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order issued during the emergency arising out of the Chinese war and in order to encourage young people to join military service, it was decided that the service rendered in the Armed Forces and in the Territorial Army on mobilisation, Auxiliary Air Force, Indian Naval Reserve, Military Police etc. will be treated as "Approved Military Service" and this approved military service will count towards the service benefits which are laid down in the Annexures to that order. One such benefit is that the actual period of approved military service will count towards seniority which means that such a candidate will be allowed to ante-date his seniority by the total length of his actual military service. A war-service candidate will be treated as a directly recruited candidate and will be placed above the direct recruits of the year and will be given seniority accordingly. vide Annexure-2 dated 9.6.76, Government extended the concessions to those who joined in approved military service during the internal emergency. The military service rendered by D.P. No. 3 was from 8.6.78 to 13.7.85 i.e. after the war emergency and the internal emergency. It is therefore, submitted by the applicants that this period cannot be brought within the definition of approved military service for conferring the benefits of seniority and higher pay



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on him.

3. The reply filed by the OP No.2 clarifies that on release from military service, CP No.3 appeared in the competitive examination for O.A.S. in the year 1986 and on being selected, he joined the Orissa Administrative Service, Class-II on 19.6.89. It is clearly mentioned in the counter that the two circulars of the erstwhile P & S. Department at Annexures-1 and 2, were of course, issued during the period of emergency and were intended to encourage young people to join military service. But it is contended that nevertheless the concessions can also be extended to such young and dedicated officers who opt. for military service and subsequently return to the civil service and taking into consideration, the representation of OP No.3, it was decided to antedate his seniority and confer consequential benefits on him.

4. C.P.No.3 has filed counter and a detailed note of submissions. He has sought to make out a case that he is entitled to these concessions for the following reasons.

(1) There should be no distinction between the military service rendered before emergency and after emergency and there should be no discrimination between the ex-servicemen, who were in active war service and others who were in the defence service.

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(ii) While Article 14 of the constitution forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. All that is required is that such classification should be founded on an intelligible differentia and that differentia must have a rational relation to the object sought to be achieved by the statute in question. According to OP No.3 he stands as a class by himself. For this reason, Annexure-3 does not violate Article-14 of the Constitution.

(iii) Those recruited before the emergency and after the emergency stand on the same footing.

(iv) When those ex-servicemen who are recruited on emergency commission, are released from the army after 5 years and get all the concessions as per Annexure-1, it would amount to discrimination if those who are recruited otherwise and are released from military service after longer periods are denied those concessions. Respondent No.3 is a class by himself and there is a clear presumption of constitutional enactment in his favour. The Tribunal has no jurisdiction to sit in judgement over the actions taken by the executive or interfere with the conscious policy decision of the Government as per Annexure-3. Accordingly to him the Tribunal can intervene only on the following grounds.

- (a) When the decision-making authority exceeded its power
- (b) Committing an error of law.

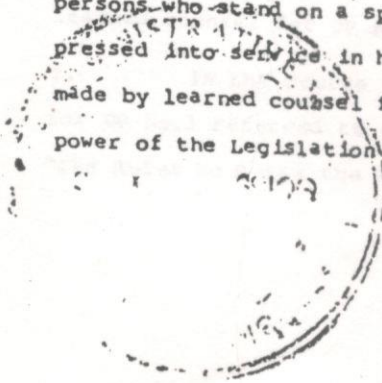
- (c) Committed a breach of rules of natural justice.
- (d) Abused its powers.

The constitution lays down the procedure according to which the Government machinery will function and in this case a conscious decision was taken in consultation with the Finance Department and hence the Tribunal cannot interfere with it.

4. We have carefully gone through the averments in the Original Application and the replies and note of submissions filed by the State and OP No.3. OP No.2 has admitted in the counter that the concessions as per Annexure-1 are meant for those who rendered military service during the emergency. They only argue that these concessions can also be extended to those who have opted for military service because they also need encouragement. If this is the conscious view of the Government, then it is not clear why another circular was not issued to that effect. OP No.3 has not rendered military service during emergency. The Internal emergency was lifted in December '76 or January '77, before O.P.No.3 joined the military service in June 1978. The military service rendered by him, therefore, cannot come within the definition of "Approved Military Service" by any stretch of imagination. A clear distinction must be made between those who served in the Defence Services during war time and those who did not have to do that.

It is true they are defending the borders of the country throughout the year, emergency or no emergency. But when there is a war, they are actually fighting in the front facing the bullets of the enemy and taking the risk of sacrificing their lives. It would be a case of gross injustice if some additional concessions are not extended to them. This is not to say that the dedication and patriotism which prompts a young person to join the defence services should go unrecognised. Keeping this in mind, a quota has been earmarked for them with relaxation of age in all posts ^{and} Services under Government. Thus by providing substantial incentives to those who are in the Army, Navy or Air Force during the emergency and by providing a quota for those who had not been required to render such emergency service by earmarking a quota for them in all cases of recruitment, a delicate balance has been struck which should not be disturbed.

5. We are unable to understand how respondent No.3, who belongs to one common category ^{of those} who did not render military service during emergency stands as a class by himself and how the special dispensation in Article 14 for groups/class of persons who stand on a special footing, can be pressed into service in his case. The submissions made by learned counsel for OP No.3 regarding the power of the Legislature to enact special statutes



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even for an individual, are also totally irrelevant in the case of the applicant as the impugned order at Annexure-3 is not an act of Legislators.

It is an executive order issued by a Department of Government which suffers from the following infirmities.

(i) Recruitment to O.A.S., Class-II is governed by a set of statutory rules, i.e. Orissa Administrative Service Class-II (Appointment by Competitive Examination) Regulations, 1978 which do not contain any provision for relaxation of the provisions to confer a benefit on one candidate.

(ii) The concessions as per Annexure-1, a circular which was issued by the P. & S. Department (now designated as G.A. Department) have been extended by the Revenue Department without consulting the G.A. Department which has to be consulted in all matters pertaining to the service conditions even otherwise, in accordance with the Instructions of Business and the Orissa Secretariat.

O.P.No.2 thus acted in excess of their authority and committed an error of law. Hence the action is not outside the purview of the law. Any by the Tribunal going by the submissions by learned counsel for OP No.3 himself.

7. In the course of hearing learned counsel for OP No.3 referred to a set of rules entitled "The Rules to Relax the Hardship of any Rule, 1955."

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According to these where the Government of Orissa is satisfied that the operation of any rule regulating the conditions of service of State Government servants or any class of such Government servants causes undue hardship in any particular case, it may dispense with or relax the requirements of that rule to such extent and subject to such conditions as it may consider necessary for dealing with the case in a just and equitable manner.

7. It is not known whether this Rule is still in force. Assuming it does exist, such wide power of relaxation is to be invoked when Government is satisfied that operation of some statutory provision has caused undue hardship to any employee. But Annexure-3 does not state that it was issued invoking this extraordinary power nor has such a stand been taken in the govt. counter. We cannot read reasons into an order issued by the State on the submissions made by private respondents when the impugned order does not indicate any such reason and the State respondent have not claimed that they were guided by such reasons. Besides such a decision could not have been taken by the Revenue Department without consulting the departments of G.A. and Law.

8. Learned counsel for OP No. 3 refers to certain decisions to justify the impugned order. He relied upon the following Supreme Court decisions,
(a) J.C. Yadav vs. State of Haryana (SC) (1990) (1)

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Speed post Judgments S.C.107), which was with reference to the Haryana Service of Engineers Class I Public Works Department (Public Health Branch) Rules, 1961, in which it was held that the scope of rule 22 of those Rules was wide enough to confer powers on the State Government to relax the requirement of rules in respect of an individual or class of individual. This decision is not relevant to the facts of the case, as the impugned order has not been issued in relaxation of any rule and the rules applicable to the case, namely the Orissa Administrative Service Class-II (Appointment by Competitive Examination) Regulations, 1978 do not contain such a relaxation provision.

(b) Tarlok Singh Asst. Superintendent, Jail vrs. the Chief Secretary to Government, Punjab (1985(2) SLR S.C.177) which was with reference to the Punjab Government National Emergency (concession) Rules, 1965 and certain other rules. The petitioner in that case had joined the Indian Army on 9.7.57 and fought in the war against China and Pakistan in 1962 and 1965 and joined medical service on release from the Army. It was held that he was entitled to count his military service towards increment, seniority and pension.

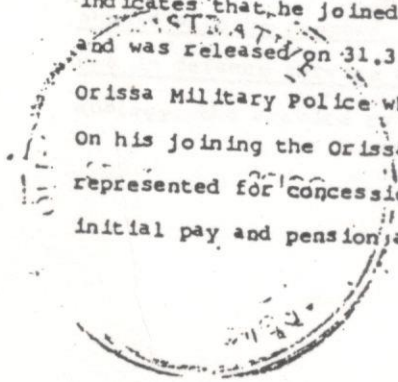
Independent of the rules referred to therein, this decision is also not applicable to this case because the petitioner in that case had actually fought in the Army during two wars though he was recruited prior to 1962. The present petitioner

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was not in military service during any war and joined the Air Force long after the emergency.

(c) State of Himachal Pradesh and another Vs. Kailash Chand Mahajan and others (AIR 1992 SC 1277) in which it was held that statute does not become invalid on the ground that it was with reference to a single person. Since the impugned action in this case is not a statute but an executive order of a department of Government, the above decision does not apply to the present case. It goes without saying that an executive order cannot be equated with a statute and the powers of the executive are not the same as the powers of the Legislature.

10. Lastly learned counsel for OP No.3 referred to a judgement of this Tribunal by two members in T.A.110/98 (Bhaskar Padhi Vrs. State of Orissa and others). Referring to that case it was submitted by him that the concessions as per P. & S. Department circular at Annexure-1 are applicable to his case also. However, the applicant Bhaskar Padhi in that case was not similarly placed like the applicant. The judgement produced for our perusal indicates that he joined the Indian Navy on 1.4.1957 and was released on 31.3.67 and was appointed to the Orissa Military Police which he joined on 1.4.1967. On his joining the Orissa Military Police, he represented for concessions regarding seniority, initial pay and pension as per Annexure-1. But his



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representation was rejected on the ground that the benefit would apply only to those recruits of the Armed Forces who were recruited between 26.10.62 to 10.1.68 when there was national emergency. The Tribunal took a view that it was unreasonable and discriminatory to limit the benefits as per Annexure-1 to those who joined the Armed Forces after issue of Annexure-1 and to deny them to those who were already in military service when it was issued. This was the appropriate view because young men had not joined the armed forces during the emergency because of the incentives as in Annexure-1. In fact by the time Annexure-1 was issued on 2.5.63 the Chinese war was already over. When the war broke out in October 1962 those who were already in the Armed Forces fought with the enemy giving their lives to defend the borders of the country. The earlier application was disposed of by the Tribunal with the direction that military service rendered by the applicant from 26.10.62 to 31.3.67 should be counted for his service benefits. This decision certainly does not apply to the case of the applicant. He was not in military service during the above period. The Tribunal did not direct that the service rendered by Bhaskar Padhi from 1.4.57 when he joined the Indian Navy till 26.10.62 should also be counted, in spite of the fact that he was in defence service during the war. On the same analogy, the service rendered by the applicant

Dependent No 3
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from 8.6.78 to 13.7.85, when there was no emergency at all cannot count towards service benefits in terms of the Government orders at Annexures-1 and 2.

For the above reasons, we hereby quash the order at Annexure-3. Original Application is allowed. No costs.

(RAYANASHAMY)
VICE-CHAIRMAN

PER P.C.PATRA, MEMBER (JUDICIAL): I have the advantage of perusing the order rendered by the Hon'ble Vice Chairman and while concurring the reasons indicated in the order, I wish to add a few words by way of an additional approach. On bare perusal of the pleadings of the parties and the reply filed on behalf of Respondent No.3, it appears that Respondent No.3 had not joined the Military Service during the first emergency, i.e. emergency declared during Indo-China War or during second emergency declared during Indo-pakistan War. When Respondent No.3 joined the Military Service, there was no state of emergency in the country and as such he was directly recruited to one of the wings of Indian Armed Forces. He had rendered military service before his retirement. When admittedly Respondent No.3 joined the military service during the period when there was no state of emergency

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either external or internal, the only question that falls for consideration is whether the benefit of increments and seniority on appointment to Government service can be granted to Respondent No.3 in pursuance of Annexure-3. A similar case was carried to the Hon'ble Apex Court in the case of Punjab State Electricity Board, Patiala and another vrs. Surjit Singh Brar, reported in AIR 1997 SC 3271 wherein their Lordships of the Apex Court have held that person joining military service during the period of first emergency, i.e. emergency declared during Indo-China War and continuing during second emergency (Indo-Bangla. War) the service rendered during the first emergency can only be considered for granting benefits as per the Rules 3 and 4 of Punjab Government National Emergency (Concession) Rules, 1965. If the observation of the Hon'ble Apex Court is applied to the facts and circumstances of the case, we have no hesitation to hold that Respondent No.3 having joined military service during the period when there was no emergency he is not entitled to get benefit in respect of antedating seniority on the basis of Annexure-3 for which a threadbare discussion has been made by the Hon'ble Vice-Chairman in the order. When the applicant was appointed against ex-servicemen quota and as per recruitment rules the seniority of members of the service shall be determined from the date of

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their substantive appointment in the post, the Respondent No.3 who has been appointed to the post of O.A.S. Class-II by direct recruitment against the post would get the benefit of military service only from the date of his substantive appointment and his seniority cannot be antedated as has been made under Annexure-3.

(P. C. MITRA)
MEMBER (JUDICIAL)



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19-11-5
Deputy Registrar