

REPORTABLE**IN THE SUPREME COURT OF INDIA****CIVIL APPELLATE JURISDICTION****CIVIL APPEAL NOS. 6305-6307 OF 2009****PRATAP KISHORE PANDA****.. APPELLANT****VERSUS****AGNI CHARAN DAS****.. RESPONDENT****JUDGMENT****VIKRAMAJIT SEN, J.**

1 The Orissa Public Service Commission (OPSC) issued an advertisement for a Competitive Examination (1974-1975) for recruitment of approximately 300 persons, of which 16% were reserved for Schedule Castes and 24% for Schedule Tribes. The OPSC recommended names of 714 successful candidates which included 20 in the reserved categories, which were approved by the Home Department on 24.11.1977. Since a substantially inadequate number of candidates in the reserved categories had been recommended by the OPSC, the State Government decided to fill these remaining seats on an *ad hoc* basis. Therefore, 403 reserved candidates including the Respondents were appointed in four batches between 15.5.1978 and 30.3.1980. The names of these candidates had been sponsored by the Employment Exchange and they were found suitable by a duly constituted Selection Committee which interviewed

them. However, they were appointed with the stipulation that their services would be terminated as soon as reserved candidates selected by the OPSC became available.

2 On 31.10.1979, the State Government amended Rule 3 of the Orissa Ministerial Service (Method of Recruitment and Conditions of Service of Lower Division Assistant in the Office of Department of Secretariat) Rules, 1951 empowering the OPSC to recruit candidates for the service by means of a competitive examination. Subsequently, vide State Resolution dated 25.5.1982, the *ad hoc* reserved candidates recruited between 15.5.1978 and 31.10.1979, including the Respondents, were deemed as regular appointments. 52 other reserved candidates who were appointed after the OMS Rules 1951 amendment was effected were deemed to be employed on a temporary basis until a fresh competitive examination was held under the amended Rule 3 of the OMS Rules 1951. Vide another State Resolution dated 4.3.1983, the regularization of the *ad hoc* appointees affected by the previous resolution was given retrospective effect from the date of initial appointment as Junior Assistants, with the stipulation that in terms of seniority, they were always to be placed below the OPSC selected candidates appointed on the same day. Promotions were made in accordance with the gradation list prepared by the government pursuant to this resolution dated 4.3.1983. As a result of this, 145 reserved category appointees (including the Respondents) who had not been recruited by the OPSC but through an alternate method of regular recruitment became senior to the Appellants, who are OPSC appointed general category candidates.

3 Some of the OPSC selected reserved category candidates challenged the fixation of their seniority in the cadre of Lower Division Assistant as well as the promotion of some of the regularized candidates to the rank of Senior Assistant in consequence of the alleged wrong fixation of seniority. These proceedings were transferred to the Orissa Administrative Tribunal, which, on 16.8.1989, declared the fixation of inter se seniority and promotions of regularized candidates over OPSC appointed recruits illegal and contrary to law. The Tribunal took note of the fact that the petitioners before it were appointed before the regularized candidates as well as the fact that as per the Resolution dated 4.3.1983, the seniority of the former was to be above the regularized candidates appointed on the same day. The Tribunal held that the gradation list made in consequence of the Government Resolution dated 25.5.1982 was illegal, and the petitioners were entitled to consideration for their promotion in view of their seniority.

4 Some others of the OPSC selected general category candidates also challenged the fixation of seniority. The Orissa Administrative Tribunal held that a combined reading of Rule 3 of the OMS Rules 1951 and Section 9(4) of the O.R.V. Act makes it clear that if a sufficient number of candidates belonging to the SC/ST candidates are not available, a fresh recruitment test is required and that no other mode of recruitment is provided for. Furthermore, it was of the opinion that services cannot be regularized by a Resolution, and accordingly recruitment made by the State Government contrary to the OMS Rules 1951 cannot be upheld. Vide order dated 23.11.1996, the Tribunal held that irregularly appointed candidates cannot have

seniority over regularly recruited candidates, and directed the Secretary, Home Department to reexamine and determine seniority according to law.

5 Subsequently, the Government re-examined the question of appointment of Junior Assistants and determined the seniority by placing the Respondents and other reserved candidates selected by the Selection Committee below the OPSC selected candidates, in the rank of Junior and Senior Assistants.

6 On 30.5.2001, a Government Order was passed calling for the Respondents' CCRs for consideration of their further promotion to the rank of S.O. (Level II). The general category OPSC recruits filed an application seeking to quash this Order. The Orissa Administrative Tribunal, on 21.10.2002, quashed the Order dated 30.5.2001 insofar as it related to calling for service particulars and CCRs for consideration for promotion. It directed that the Respondents' names be removed from the active common gradation list and that the OPSC candidates including the Appellants be considered instead, if they had come within the zone of consideration for promotion.

7 Aggrieved by this order, three groups of regularized Selection Committee appointees filed writ petitions before the High Court. The High Court, vide common impugned judgment dated 8.8.2008, allowed all three writ petitions. The Tribunal's order dated 21.10.02 was set aside, and the Resolutions dated 25.5.1982 and 4.3.1983 were upheld, albeit with some modifications. The High Court observed that Rule 30 of the OMS Rules 1951 postulated that notwithstanding anything contained in the said Rules, reservation of vacancies for direct recruitment are to be filled in the manner prescribed by the O.R.V. Act, Section 9(4) whereof contemplates that in the event that

sufficient numbers of reserved category candidates are not available to fill-up the reserved vacancies, fresh recruitment for only reserved category should take place. Reliance was placed on *Ashok Kumar Uppal v. State of J&K* AIR 1998 SC 2812, according to which the power to relax the Recruitment Rules or any other Rules made by State Government under Article 309 of the Constitution is conferred upon the Government to meet any emergent situation where injustice might have been caused to any individual employee or class of employees. Since the State Government possesses the power to relax the requirement when it is just and equitable to do so, especially in cases of non-availability of candidates in the reserved quotas, the State Government was justified in relaxing the requirement for recruitment to these classes. Furthermore, the provisions of Article 320 of the Constitution regarding recruitment to Civil Service through the Public Service Commission is directory and not mandatory in nature. The High Court observed that Article 16(4) of the Constitution of India provides that nothing in that Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. The Court held that since the quota for SC & ST was fixed but not fully filled, if the State Government had devised ways of recruitment for filling up the reserved quota by relaxing requirements, thereby causing some disadvantage or discrimination as vis-à-vis recruits belonging to general category, the same cannot be termed as illegal. The High Court also held that reserved candidates are in a distinct class from general candidates and therefore the general category has no *locus standi* to

challenge the mode of recruitment employed to fill the quota meant for the others class, and reiterated the dictum that unequals cannot be treated as equals. However, the High Court also held that candidates of the reserved class were competent to challenge the decision of the government superseding them by appointing candidates of the same category through another mode of recruitment, as that would amount to discrimination. The High Court relied on *State of Mysore v. P. Narasing Rao* AIR 1968 SC 349, stating that there is no denial of equal opportunity unless the person who complains of discrimination is equally situated with the person or persons who are alleged to have been favoured. The High Court observed that the Resolution dated 25.5.1982 issued by the State Government can be termed as a rule under the proviso to Article 309 of the Constitution and held that the Resolution was legal. According to the Resolution dated 4.3.1983, if the reserved category candidate selected by the OPSC joined or was appointed on a date later than the reserved category candidates selected by the Selection Committee, the former would become junior. The High Court held that this situation would not be proper as the OPSC issued Merit List of selected candidates cannot be disturbed in respect of the same class i.e. SC & ST. The High Court thus partly modified the resolution, directing that the candidates selected by Selection Committee and subsequently regularized should be kept below the candidates selected by the OPSC under the reserved category quota, but should be placed in the Seniority List according to the then roster in accordance with the O.R.V. Act and Rules framed thereunder. The High Court ordered that in case incumbents have already been promoted and are found to be adversely affected by such correction,

they shall not be reverted to their respective positions until their turn for promotion comes in accordance with the corrected gradation list.

8 It would be apposite to reproduce the relevant legal provisions for the facility of reference. The relevant provision of the OMS Rules 1951 are:

3. Recruitment to the service shall be made by means of a competitive examination to be held once every year.

Rule 3 was subsequently amended by way of an Amendment dated 31.10.1979 which was to apply prospectively. The amended version is reproduced below for the benefit of comparison:

3. Recruitment to the service shall be made by means of a competitive examination to be held at such intervals as the State Government may, in consultation with the Commission from time to time determine. In case requisite number of Schedule Castes and Schedule Tribes candidates are not available in the list of successful candidates of such examination for filling up the reserved vacancies a fresh competitive examination may be held only for candidates belonging to Schedule Castes and/or Schedule Tribes, as the case may be, for filling up the remaining reserved vacancies.

Rule 11, which was set aside by the Government Resolution dated 25.5.1982, is as follows:

11. In case a vacancy occurs after the list of successful candidates supplied by the Commission has been exhausted before announcement of the result of the next examination, such vacancy may be filled up by a successful candidate of the previous year, provided that his age does not exceed the maximum age limit laid down in the rules and failing that, by any candidate who has the qualification prescribed in rule 20 of Part III. In the latter event the appointment shall be made temporarily and shall not continue beyond the date when the result of the next year's examination is declared.

The relevant Section of the O.R.V. Act is as follows:

9 (4). If the required number of Scheduled Caste and Scheduled Tribe candidates are not available for filling up the reserved vacancies, a fresh recruitment may be made only from candidates belonging to the Scheduled Castes or the Scheduled Tribes, as the case may be, for filling up the remaining reserved vacancies.

Various Articles of the Constitution have also been referred to by the High Court which we have extracted for convenience.-

16 (4). Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

309. Recruitment and conditions of service of persons serving the Union or a State: Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.

320(4). Functions of Public Service Commissions.- Nothing in clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in clause (4) of Article 16 may be made or as respects the manner in which effect may be given to the provisions of Article 335

The relevant part of the Government Resolution dated 25.5.1982 regularising the *ad hoc* candidates recruited under the OMS Rules also deserves reproduction.

3. Government have been advised that Section 9(4) of the Orissa Reservation of Vacancies in Posts and Services (For S.C. & S.T.) Act, 1975 which is intended to confer benefits exclusively on S.C. & S.T. candidates should prevail over rules 11 of the O.M.S. Rules, 1951. But

recruitment made after 31.10.79 i.e. when Rule 3 of the O.M.S. Rules 1951 was amended for bringing about consistency with Section 9 of the Reservation Act, are to conform to the provisions of the amended rules. Accordingly Government have been pleased to decide that the recruitment of 403 S.C. & S.T. candidates made in between the period from 15.5.78 to 31.10.79 should be deemed as regular appointments. 52 S.C. & S.T. candidates who were appointed on 6.2.80 i.e. after amendment of the O.M.S. Rules, 1951 shall continue on a temporary basis until fresh competitive examination is held under Rule 3 of the OMS Rules, 1951 as amended.

The relevant portion of the Resolution dated 4.3.1983 read as follows:

The Services of 403 S.C. & S.T. candidates who were recruited as Junior Assistants for appointment against the reserved posts lying vacant in different Departments of Secretariat in between the period from the 15th May 1978 to the 31st October 1979, were regularized in Home Department Resolution referred to above. The question of fixation of their inter se seniority vis-à-vis the P.S.C. passed general and S.C. & S.T. candidates of the recruitment year 1974-1975 in order to regulate their future promotion, was under consideration for some time past. After careful examination, it has been decided that inter se seniority of these candidates would be regulated according to their dates of appointment as Junior Assistant. But they will always be placed below the P.S.C. passed candidates appointed in the same day.

9 Two questions of law have been raised by the Appellants in these Civil Appeals. The first is whether the High Court erred in not following the proposition that regularisation of unsustainable *ad hoc* appointments made in violation of Service Rules is not possible. The second is whether the High Court has erred in ignoring the proposition that a power of relaxation does not tantamount to power of putting the entire Recruitment Rules on the shelf. These two questions, we might clarify, have been raised by the group of OPSC recruits belonging to the general category. The few employees from the SC/ST quota who had succeeded in qualifying the OPSC examinations and have been placed above other SC/ST candidates whose names had

been forwarded by the Employment Exchange and who were recruited via the Selection Committee had no subsisting grievances and that is why have not filed any Appeal. The third group probably resigned themselves to the relatively minor setback to their seniority and has also not taken the matter further, presumably because the High Court has directed that they are not to be reverted to their earlier positions if they have already been promoted, and they are thus marginally affected by the impugned decision.

10 The impugned Judgment dated 8.8.2008 makes a reference a number of cases, but surprisingly its attention had not been drawn to the decision of the Constitution Bench in Secretary, State of Karnataka v. **Umadevi** (2006) 4 SCC 1 which had already been pronounced on 10.4.2006 and which is the conclusive authority on the subject. Had reference been made to **Umadevi** it would have obviated the need to refer to any earlier decisions. We shall briefly discuss some of the decisions of this Court that were considered by the High Court. A two Judge Bench in State of Orissa v. Smt. **Sukanti Mohapatra** (1993) 2 SCC 486 approved the striking down of the regularisation of illegal entry into service contrary to the extant Rules. J&K Public Service Commission v. **Dr. Narinder Mohan** (1994) 2 SCC 630 reached the same conclusion even without adverting to **Sukanti Mohapatra**. Dr. Surinder Singh Jamwal v. State of J&K (1996) 9 SCC 619 is an Order of this Court which decided the dispute before it and did not even attempt to or intend to expound the law and is therefore not in the nature of a binding precedent, as will be evident from the fact that the Court has actually applied **Dr. Narinder Mohan**. In **Ashok Kumar Uppal v.**

State of J&K (1998) 4 SCC 179, this Court allowed the relaxation of the prevailing recruitment rules to prevent hardship and injustice to the appellants therein. With exponential increase in the decisions delivered by this Court it has become an imperative for Advocates to distinguish between orders and judgments and to correctly cull out the ratio of a judgment. Learned Senior Counsel for the Appellants has sought support from the observations of the Constitution Bench in Direct Recruit Class II Engineering Officers Association v. State of Maharashtra (1990) 2 SCC 715 without appreciating that the dispute therein revolved around the never-ending disharmony between Direct recruits and promotees as regards *inter se* seniority. The conundrum before us is essentially different making it untenable to read every statement made therein automatically applicable.

11 These decisions, however, need not be adverted to in the exposition of the aspect of the law which arises before us. The prevailing law is now discernable from **Umadevi**, which has correctly been cited before us *in extenso*. The **Umadevi** doctrine is that if employment of persons is contrary to or *de hors* the statutory provisions and/or Rules and Regulations, then equities will not have any play even if such persons have been rendering services for several years. The most that can be done for such employees is for the State Government to devise a scheme, as a one-time measure, for their absorption so long as the Governing Statute or the Rules and Regulations are not infringed. In the words of the Constitution Bench – “When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognised by the relevant rules or

procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.” Reliance on paras 33, 36 and 47 however does not advance the case of the Appellant since the State Government in the present case has carried out recruitment in a regular manner, albeit beyond the OPSC which had presented a panel containing negligible number of SC/ST candidates. The subject challenged recruitment was neither capricious nor arbitrary but on the contrary was carried out in consonance with a known method of selection, viz. Rule 9(4). This was not a case of *ad hoc* employees being selected in a whimsical, inconsistent or haphazard manner or in order to favour some individuals. The incumbents were sponsored by the Employment Exchange and over 400 candidates were found suitable by a duly constituted Selection Committee which interviewed them. It was not a relaxation of the Rules in order to favour a few, but was the consequence of following an alternate method of selection intended to remedy a malady in the recruitment of SC/ST candidates. It is well within the powers

of the State to organise an alternative recruitment drive when insufficient SC/ST candidates are available, and under Article 320(4) of the Constitution the OPSC was not required to be consulted.

12 It would be pertinent to discuss the amendment made to Rule 3 of the OMS Rules 1951. It was only on 10.10.1979 that the Rule was amended, introducing the requirement that in case the requisite number of SC/ST candidates are not available for filling up reserved vacancies, a fresh competitive examination must be held only for SC/ST candidates. The implication that can be drawn from the amendment to this Rule especially because it has prospective effect, is that prior to 10.10.1979, it was not mandatory to carry out recruitment only through the aegis of the OPSC for filling up vacancies even in the reserved categories. This furthers the case of the Respondents that the recruitment process through the Selection Committee was not violative of any existing Rule, in that the Rule it may be perceived to have violated did not exist at the time of their appointment. It seems to us that the reason this amendment was given prospective effect is that the State did not want to detrimentally affect the status of employees already recruited in a fair, transparent and regular manner albeit *de hors* to OPSC, or destabilize the legitimacy of that recruitment. This seems to have been the purpose sought to be achieved by the State Government in its Resolution dated 25.5.1982, which we find imparted permanence to the Respondents' valid recruitment rather than regularized their hitherto *ad hoc* character.

13 Till 31.10.1979, the method of filling up vacancies when successful candidates were not available was laid out in Rule 11, which required that the vacancies be filled

up by successful candidates from the previous year who are within the age limit. The Government Resolution dated 25.5.1982 which regularized the *ad hoc* candidates set aside Rule 11, allowing Section 9(4) of the O.R.V. Act to prevail over it. The Government cannot be faulted for placing reliance on the Act as opposed to the contradictory Rules, as the latter is merely delegated legislation and deals with all vacancies, as opposed to the Section of the Act which specifically pertained to SC/ST candidates.

14 Rule 30 of the OMS Rules 1951 deals with scenarios where a sufficient number of successful SC/ST candidates are not available. It directs that in such a situation, the vacancies be filled up as unreserved vacancies and also be carried forward for the subsequent years. Once again, this Rule is in the face of Section 9(4), which prescribes a fresh recruitment drive. Section 9(5) holds that if this fresh recruitment fails to fill up the available seats, the vacancies should be filled by general candidates. Rule 30 thus skips one of the steps postulated by statute, and in light of the rules of statutory interpretation, must be cast aside in favour of the method of recruitment laid down by the O.R.V. Act.

15 It is thus clear that at the time of appointment of the Respondents, the prevailing law regarding appointment of SC/ST candidates to surplus vacancies was contained in Section 9(4) of the O.R.V. Act. This Section does contain or prescribe any limitation regarding the method of fresh recruitment except that it be restricted to SC/ST candidates. The sponsorship of names by the Employment Exchange and the subsequent interview by a duly constituted Selection Committee was thus a valid

alternative to recruitment by way of the OPSC competitive examination. In fact, a fresh recruitment would not have been possible by means of a competitive examination as Rule 3 required that these be conducted once a year, and the examination for 1974-75 had already been conducted, yielding a meager number of 20 SC/ST candidates. We therefore find the method of appointment of the Respondents to be valid in the eyes of the law; their regularization with effect from the date of appointment cannot be faulted.

16 The other question to which we must turn our attention is whether the Appellants had the *locus standi* to challenge the mode of recruitment of the Respondents. The High Court has held that since they were not of the reserved class, they did not have the *locus standi* to challenge mode of recruitment of the Respondents who were of the reserved class, on the principle that unequals cannot be treated as equals. While we accept the principle itself, we do not find it pertinent to the factual scenario before us. The unrefuted factual position is that by virtue of their retrospective regularization, several of the Respondents gained seniority over the Appellants. In light of the direct impact on them, the Appellants would have the *locus standi* to challenge the validity of the appointment of the Respondents. However, for the reasons discussed above, the challenge while allowed is not successful.

17 It also seems to us that the High Court may not have been justified in allowing the challenge by the OPSC reserved category candidates. In light of the fact that the Respondents were appointed in a legal and legitimate manner, the Merit List should not have been disturbed to protect the rights of the OPSC recruits. It is certainly arguable that there was no justification to destabilize seniority by departing from the general

principle of service law that seniority is determined by the date of joining. However, this contention has not been raised before us, so we shall refrain from any further discussion on the matter, which hereafter stands closed for not having been pressed till date.

18 We see it fit to uphold the impugned Judgment. We dismiss the Appeals before us, but with no order as to costs.

.....J.
(VIKRAMAJIT SEN)

.....J.
(PRAFULLA C. PANT)

New Delhi,
October 16, 2015.

JUDGMENT