
(2008) 08 OHC CK 0149

In the Orissa High Court

Case No : Writ Petition (C) No's. 5381 of 2002, 13770 and 13771 of 2003

Agani Charan Das and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 08-08-2008

Acts Referred:

Constitution of India, 1950 — Article 14(4), 16, 16(4), 162, 226
Orissa Ministerial Service O.M.S. (Method of Recruitment or Junior Assistants in the Office of Heads of Departments) Rules, 1975 — Rule 14
Orissa Ministerial Service Rules, 1951 — Rule 3, 30
Orissa Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Act, 1975 — Section 19, 9(4)

Citation : (2008) 08 OHC CK 0149

Hon'ble Judges : S.C. Parija, J; I.M. Quddusi, J

Bench : Division Bench

Advocate : G.A.R. Dora, G.R. Dora and J.K. Lenka, for the Appellant; P.P. Panda, A.S.C.. for O.Ps. 7 and 8, B.R. Sarangi and Manoj Mishra for Opp. Parties, for the Respondent

Judgement

I.M. Quddusi, J.—These are three writ petitions filed by the Petitioners, who belong to Scheduled Castes & Scheduled Tribes category, against the impugned judgment and order dated 21.10.2002 passed by the Orissa Administrative Tribunal in O.A. No. 1785 of 2002.

2. The brief facts of the case are that the Orissa Public Service Commission (hereinafter referred to as "O.P.S.C.") issued advertisement No. 16 of 1974-75 inviting applications in the prescribed form from the eligible candidates for admission to the Competitive Examination (1974-1975) for recruitment of about 300 Lower Division Assistants in different Departments of Orissa Secretariat. of these vacancies, 16 per cent of the posts were reserved for Scheduled Caste and 24 per cent for Scheduled Tribe. After conducting the written and viva voce examination, the Commission recommended to the State Government in the Home Department names of 714 successful candidates which included the

applicants in the O.A. and 20 candidates belonging to Scheduled Castes & Scheduled Tribes category. The said list was approved by the Home Department on 24.11.1977. As sufficient number of candidates belonging to Scheduled Castes & Scheduled Tribes could not be recommended by the O.P.S.C., the State Government decided to fill up the remaining vacancies reserved for Scheduled Castes and Scheduled Tribes category on ad hoc basis through candidates sponsored by Employment Exchange after conducting an interview by a duly constituted Selection Committee by Home Department resulting which 403 Scheduled Castes & Scheduled Tribes candidates including the Petitioners before this Court (instant writ Petitioners & Respondents 3 to 147 before the Tribunal) were selected. Their appointments were made in four batches between 15.5.1978 and 30.3.1980 with the stipulation that their services would be terminated as soon as P.S.C. passed S.C. and S.T. candidates were available. Later on, the State Government vide Resolution dated 25.5.1982 decided that the recruitment of the aforesaid 403 Scheduled Castes & Scheduled Tribes candidates made between the period 15.5.1978 and 31.10.1979 should be deemed as regular appointments and the 52 Scheduled Caste & Scheduled Tribe candidates who were appointed on 6.2.1980 i.e. after amendment of Orissa Ministerial Service Rules, 1951 (in short, "O.M.S. Rules") shall continue on a temporary basis until fresh competitive examination was held under Rule 3 of the OMS Rules, 1951, as amended. The gradation list of Lower Division Assistants (re-designated as Junior Assistants) indicating inter -se seniority of general and Scheduled Caste & Scheduled Tribe candidates of the recruitment year 1974-75 was ordered to be issued separately.

3. The above resolution was ordered to be published in the Orissa Gazette with a direction that the copies be forwarded to all Departments of Government and the Accountant General.

4. In the said resolution, the Government considered the provisions of Section 9(4) of the Orissa Reservation of Vacancies in Posts and Services (for Scheduled Caste and Scheduled Tribes) Act, 1975 (in short," the O.R.V. Act") and Articles 335, 320(4) and 14(4) of the Constitution of India. However, the State Government vide resolution dated 4.3.1983 decided that the inter se seniority of the 403 candidates who were recruited as Junior Assistants for appointment against the reserved posts lying vacant in different departments of the Secretariat in between the period from 15.5.1978 to 31.10.1979 would be regulated according to their dates of appointment as Junior Assistant and they would always be placed below the Public Service Commission passed candidates appointed in the same day. In the meantime, promotions were also made in accordance with the gradation list pursuant to resolution dated 4.3.1983.

5. In the meantime some of the S.C. and S.T. candidates recruited through O.P.S.C. challenged the fixation of their seniority in the cadre of Lower Division Assistants against opposite party Nos. 2 to 46 of the petition and also challenged the promotion to the rank of Senior Assistant in consequence of the Government

resolution dated 25.5.1982 by filing O.J.C. No. 2426 of 1984 in this Court which was +transferred to Orissa Administrative Tribunal and registered as Transfer Application No. 399 of 1986. The said Transfer Application No. 399 of 1986 was allowed by the Tribunal vide judgment and order dated 16.8.1989. By the said judgment, the Tribunal declared the fixation of inter se seniority between the Petitioners in the Transfer Application No. 399 of 1986 and the opposite parties 2 to 46, the ad hoc S.C. and S.T. candidates, so also their promotion as Senior Assistant as illegal and directed that the said Petitioners were entitled for consideration for the promotion in view of their seniority. The concluding paragraph of the judgment is quoted as under:

We, therefore, hold that the gradation list made in consequence of Government resolution dated 25.5.1982 is illegal in respect of fixation of inter se seniority between the Petitioners and the opposite parties Nos. 2 to 46. We further order that the promotion given to opposite parties 2 to 46 as Senior Assistants vide Annexure-5 is illegal and the Petitioners are entitled to consideration for the said promotion in view of their seniority.

6. Some of the general candidates recruited through O.P.S.C. filed O.J.C. No. 1631 of 1983 and O.J.C. No. 2459 of 1987 in this Court which was transferred to the Tribunal and registered as T.A. No. 224 of 1986 and T.A. No. 805 of 1987 against some of the S.C. and S.T. candidates, who were recruited through Departmental Selection Committee and whose seniority was directed to be fixed on the basis of dates of appointment vide Government resolution dated 4.3.1983. Both the transferred petitions were heard and disposed of together vide common judgment/order dated 23.11.1996. In those Teas, the Tribunal directed the Secretary, Home Department who was the authority to deal with the appointment of Junior Assistants in the Secretariat, to re-examine the question and determine the seniority in accordance with law. The operative part of the same is as under:

In view of my aforesaid discussion, I direct the Secretary, Home Department, who is now the competent authority to deal with the appointment of Jr. Assistants in the Secretariat to re-examine the question and determine the seniority in accordance with law.

7. Above order was not challenged by anyone and has become final.

8. The Original Application in question was filed by some of the candidates recruited through O.P.S.C. as general candidates to quash the relevant portion of the order dated 30th May, 2001 calling the C.C. Rs of the Respondents 3 to 147 of the O.A. for consideration of promotion to the post of Section Officer, Level-II in view of the judgment and order passed by the Tribunal in T.A. Nos. 224 of 2006 and 805 of 2007 and for a direction to exclude the name of Respondents 3 to 147 from common gradation list meant for Junior Assistants and Senior Assistants of the State Secretariat and to call for their C.C. Rs and that of others who were regularly recruited and came within the zone of consideration for

promotion to the post. The Tribunal allowed the O.A. and quashed Annexure-10 under which the list of Senior Assistants was sent with a request to send the required information/documents in prescribed proforma in respect of such Senior Assistants including Respondents 3 to 147 before the Tribunal for consideration of their promotion to the post of Section Officer (Level-II) as well as the recommendation made vide D.P.C. proceeding selecting some of them for promotion to the said post. The Tribunal further directed to exclude the names of Respondent No. 3 to 147 from the active common gradation list relied upon to call for their service particulars and C.C. Rs. and to call for the C.C. Rs. of the regularly appointed candidates including the applicants in the O.A. if they come within the zone of consideration to be considered for promotion after exclusion of those irregular recruits. Hence, these writ petitions.

9. Sri. G.A.R. Dora, learned Counsel appearing for the writ Petitioners submitted that Employment Exchange had sponsored the names of the Petitioners, who were interviewed by a Committee and found suitable and were appointed as Junior Assistants on ad-hoc basis in between 15.5.1978 and 31.10.1979 with the condition to be replaced by O.P.S.C. selected candidates. But the condition was wrong, because Rule 30 of O.M.S. Rules, 1951 says that notwithstanding anything contained in these rules, reserved vacancies for direct recruitment shall be filled up in the manner prescribed in the O.R.V. Act. Section 9(4) of O.R.V. Act lays down that if the required number of Scheduled Caste and Scheduled Tribe candidates are not available for filling up the reserved vacancies, a fresh recruitment should be made only from candidates belonging to the Scheduled Castes or the Scheduled Tribes for filling up the remaining reserved vacancies. He has further argued that Article 320(4) provides that nothing in Clause (3) relating to methods of recruitment to civil services and for civil posts shall require a Public Service Commissioner 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 Government realized the mistake of the condition making the appointment ad hoc to be replaced by O.P.S.C. selected candidates and passed a resolution dated 25.5.1982 and regularized the Petitioners' appointment as Junior Assistants referring to Section 9(4) of the O.R.V. Act and Articles 320(4) and 16(4) of the Constitution, and 714 O.P.S.C. selected candidates joined simultaneously in 1978 and 1979. Some reserved candidates joined earlier and their inter-se seniority was determined as per dates of joining. As the Petitioners were selected subsequent to 714 candidates, they were made junior to all 714 O.P.S.C. selected candidates in the rank of Junior Assistants and also Senior Assistants to which they were promoted in 1984. He has further submitted that the Petitioners' selection and appointment as Junior Assistants against reserved posts was and is not irregular. Though they were not selected by O.P.S.C., they were selected by the Selection Committee after their names were sponsored by the Employment Exchange. Further 9 Petitioners have been promoted to the rank of Section Officer, Level-II since September, 2003 and they have been

continuously working for more than 26 years. He has further contended that the Petitioners being reserved candidates, they were not required to be selected by O.P.S.C. and there was no provision in O.M.S. Rules, 1951 for which reason Rule 3 was amended empowering the O.P.S.C. to select reserved candidates. This amendment proves that prior to it, O.P.S.C. was not required to select reserved candidates. The amendment is expressly prospective and the Petitioners having been appointed prior to it, they were not required to be selected by O.P.S.C. and, hence, Government rightly regularized them as per the resolution dated 25.5.1982. Moreover, amendment being in the nature of rule is sub-ordinate and cannot run counter to Section 9(4) of O.R.V. Act and Articles 16(4) and 324(4) of the Constitution of India.

10. Sri. Jagannath Patnaik, learned Senior Advocate appearing for the Petitioner in W.P. (C) No. 13770 of 2003 submitted that the Respondents other than the contesting Respondent Nos. 8, 15, 35, 62, 84, 92, 98, 114 and 121 in the O.A. had not entered their appearance. The O.A. was taken up for hearing before the Single Bench with a view to dispose of the same as per order of the Hon'ble High Court dated 22.8.2002 passed in O.J.C. No. 2186 of 2002. The Respondent No. 1 and other contesting private Respondents in their respective counters have strongly opposed the stand taken by the applicants for depriving the Respondents Nos. 3 to 147 to be considered for promotion to the rank of S.O. (Level-II). As such the Respondents who have not appeared to contest the claim of the applicants will not be prejudiced in any manner even though they are not represented in the O.A. He further submitted that if fresh recruitment of reserved candidates due to nonavailability of required number of S.C. and S.T. candidates was required to be made by O.P.S.C. prior to 31.10.1979 amendment, then there was no necessity of the said amendment giving power to O.P.S.C. for fresh recruitment of such candidates. The said amendment is prospective and the Petitioners were selected and appointed prior to the said amendment. Therefore, selection and appointment of the Petitioners by the Government was legal.

11. Sri. B. Ray, learned Senior Advocate appearing for opposite parties 2 to 6 has submitted that the candidates irregularly appointed can not have seniority over a regular recruit and the services of the Petitioners could not have been regularized by a Government resolution necessitating a statutory provision and, hence, resolution dated 4.3.1983 can not be effective. Since the appointments of the Petitioners were not in accordance with law, they are not entitled to any service benefit. He has relied upon the case of D.R. Yadav and Anr. v. R.K. Singh and Anr. (2003) 7 see 110 in which the Hon'ble apex Court held that mere continuance even for a long period does not confer any right of seniority on the Petitioners. He has also relied upon the case of Satchidananda Mishra v. State of Orissa AIR 2004 SC 4639, in which advertisement inviting applications for appointment of Junior teachers in various disciplines/specialities was issued by the Director of Medical Education and Training without constituting the Selection Board as per 1979 Rules. The appointments were made in 1980, i.e. after the 1979 Rules were enforced. The Supreme Court held that the State Government

wanted to by-pass the OPSC and the Selection Board comprising of a member of OPSC as its Chairman was never constituted and the selections were sought to be made by the Board constituted under the 1973 Rules. The Supreme Court held the same to be an illegality, which strikes at the root of the appointment and cannot even be validated by a Validation Act as proposed by the government. In respect of the relaxation clause under Rule 14 of O.M.S. Rule, 1975, Sri. B. Ray has contended that the same has been interpreted by the Hon''ble apex Court in the case of State of Orissa and others Vs. Smt. Sukanti Mohapatra and others, in which the Hon''ble apex Court held that relaxation of "any of the provisions of the Rules" does not speak of regularization and that illegal appointments cannot be regularized to dislodge the seniority of regularly appointed persons. We will deal with the aforesaid three decisions later.

12. Learned Additional Standing Counsel on behalf of the State has argued that the Petitioners and the private opposite parties are their employees and they treated them equally and, as such, whatever would be decided by this Court, they will abide by the same.

13. Sri. R.K. Rath, learned Counsel who appeared for the O.P.S.C. selected candidates has submitted that no appointment could have been made contrary to the O.M.S. Rule, 1951 and, therefore, the appointments of the Petitioners were illegal.

14. Sri. B.R. Sarangi, learned Counsel appearing for the interveners opposite parties 9 to 12 has submitted that gradation list prepared in the year 1984 for those who were recruited between 28.9.1966 and 5.9.1973 reached its finality in view of the direction of the Hon''ble Supreme Court in the case of Sarat Chandra Mishra and Others Vs. State of Orissa and Others, in which it has been held as under:

This Court moreover, as noticed hereinbefore, granted liberty to approach the appropriate forum only in the event any distinct cause of action arises therefore, presumably meaning thereby, when an error had been committed by the State in implementing the said order in individual cases. This Court by its order, in our considered opinion, had no intention to give liberty to the Appellants herein to reopen the question as regards the validity or otherwise of the gradation list of 1984 which, as noticed hereinbefore, became final and binding. Once the said order attained finality, this Court could not have allowed the parties to approach the Tribunal once again indirectly as it could not have done so directly. As the principle of *res judicata* was applicable," the Tribunal had no jurisdiction to reopen the issue. This Court could not and did not confer a jurisdiction upon the Tribunal which it did not have.

15. Shri Sarangi further submitted that pursuant to the recruitment made in accordance with the O.M.S. Rules, 1951, the employees have acquired certain status or seniority. The same could not have" been wiped out or extinguished by issuing any Resolution regularizing the irregular recruits de hors the O.M.S.

Rules, 1951, even by not amending the Rules. If at all it should apply prospectively. He has further submitted that the State cannot invoke the power of Article 162 of the Constitution to regularize the appointment of ad hoc persons de hors the rules.

16. The facts to be noticed in this case are that the candidates sponsored by the employment exchange and selected in the special drive to fill up unfilled post of Scheduled Castes & Scheduled Tribes were appointed on ad hoc-basis between 15.5.1978 and 31.10.1979. Rule 30 of the Orissa Ministerial Service Rules provides that notwithstanding anything contained in the said rule, reservation of vacancy for the direct recruitment shall be filled up in the manner prescribed in the O.R.V. Act. Clause (4) of Section 9 of the O.R.V. Act provides that in case sufficient number of candidates from among the Scheduled Castes and Scheduled Tribes are not available for filling up the reserved vacancies, fresh recruitment should be made from among Scheduled Caste & Scheduled Tribes candidates only," 8. Since the Legislature was conscious of the fact that sufficient number of Scheduled Caste and Scheduled Tribe candidates may not be available, they have provided for recruitment under Sub-section (4) of Section 9 of the O.R.V. Act with specific provision in Section 19 about the overriding effect of the Act. Section 19 is quoted as under:

19. Overriding effect of the Act-The provisions of this Act shall have effect notwithstanding anything to the contrary in any other law or in any rules, order or resolution made by the State Government.

17. As regards the power of the State Government to relax the Recruitment Rules or any other Rule, the Hon"ble apex Court in the case of Ashok Kumar Uppal and Others Vs. State of Jammu & Kashmir and Others, held as under:

Power to relax the Recruitment Rules or any other Rule made by the State Government under Article 309 of the Constitution of which the corresponding provision is contained in Section 124 of the Constitution of Jammu and Kashmir is conferred upon the government to meet any emergent situation where injustice might have been caused or is likely to be caused to any individual employee "or class of employees or where the working of the Rule might have become impossible. Under service jurisprudence as also the Administrative Law, such a power has necessarily to be conceded to the employer particularly the State Government or the Central Government who have to deal with" hundreds of employees working under them in different departments including the Central or the State Secretariat.

Referring to the case of J.C. Yadav and others Vs. State of Haryana and others, in which in paragraph 6 it was held as under:

The relaxation of the rules may be to the extent the State Government may consider necessary for dealing with a particular situation in a just and equitable manner. The scope of rule is wide enough to confer power on the State Government to relax the requirement of rules in respect of an individual or class

of individuals to the extent it may consider necessary for dealing with the case in a just and equitable manner. The power of relaxation is generally contained in the Rules with a view to mitigate undue hardship or to meet a particular situation. Many a time strict application of service rules create a situation where a particular individuals or a set of individuals may suffer undue hardship and further there may be a situation where requisite qualified persons may not be available for appointment to the service. In such a situation the Government has power to relax requirement of rules. The state Government may in exercise of its powers issued a general order relaxing any particular rules with a view to avail the services of requisite officers. The relaxation even if granted in a general manner would ensure to the benefit of individual officers.

the Supreme Court held as under:

In view of the above, the Government can exercise the power to relax the Rules in all those cases in which hardship is caused in the implementation of those Rules to meet a particular situation or where injustice has been caused to either individual employee or class of employees. of course, this power cannot be exercised capriciously or arbitrarily to give undue advantage or favour to an individual employee.

18. In view of the decision of the apex Court as mentioned above, the State Government has power to relax the requirement of the rule in respect of individual or class of individuals to the extent it may consider necessary for dealing with the case in just and equitable manner. No fulfillment of the quota of Scheduled caste and Scheduled Tribe would have been be an undue hardship to that class and as such if the Government relaxed the rules and decided to make recruitment by special drive initially on ad hoc basis later on to regularize the services it can very well be within the domain of the State Government under the powers to relax the recruitment rules; moreso when Section 9 (4) of the O.R.V. Act prescribes for special recruitment through a special drive. The reserved class, Le. Scheduled Castes & Scheduled Tribes, was distinct class from the general candidates.

19. Therefore, the persons who belonged to the general category had no locus standi to challenge the mode of recruitment of the other class to fulfill the quota meant for that class. However, in case the candidates belonging to the reserved class selected by the O.P.S.C. in a particular year are superseded by the reserved category candidates recruited in that year through special drive being sponsored by employment exchange, such candidates who belonged to the same reserved class can challenge the decision of the government superseding them by subsequently appointed/recruited candidates of the same category through other mode of recruitment as it would amount to discrimination but those who form distinct class or recruited or appointed on the basis of subsequent recruitment cannot claim parity with those candidates.

20. Now we come to the provisions of Article 309 of the Constitution of India,

which is reproduced hereunder:

Article 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.

21. The proviso to Article 309 as quoted above, in the case of State Government, empowers 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 Article 309 and any rules so made shall have effect subject to the provisions of any such Act. In the instant case, it is not disputed that recruitment rules were framed by the State Government under the proviso to Article 309. But as the relaxation clause was already made and the State Government decided to recruit only reserved category candidate by special drive relaxing the rules of recruitment, it cannot be said that any illegality was committed by the State Government. Further the Government through a resolution decided to regularize the services of those persons appointed through a special drive to fill up the quota of Scheduled caste and Scheduled Tribe. The Full Bench of the Bombay High Court in Chandrakant Sakharam Karkhanis and Others Vs. State of Maharashtra and Others, held as under:

Circulars, Orders or Resolutions or parts thereof laying down the rules or principles of general application, which have to be observed in the recruitment of fixation of seniority of Government servants generally or a particular class of them, and which have been duly authenticated by a signature under the endorsement "By order and in the name of the Governor of Maharashtra" and intended to be applicable straightway can amount to rules framed in exercise of the powers conferred under the proviso to Art 309 of the Constitution, although the said Circulars, Orders or Resolutions do not expressly state that the same are made or issued in exercise of the powers conferred under the proviso to Article 309 of the Constitution of India and are not published in the Government Gazette.

Therefore, the impugned resolution dated 25.5.1982 issued in this case can be termed as rule under the proviso to Article 309 of the Constitution.

22. It is well settled that the provisions of Article 320 of the Constitution (prior to its amendment in the year 2000) regarding recruitment to Civil Service through Public Service Commission is directory and not mandatory in nature. However, Clause (4) of Article 320 provides that nothing mentioned in Clause (3) shall require the 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.

23. Article 335 (prior to its amendment in 2000) of the Constitution provided that the claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.

24. Clause (4) of Article 16 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. Since the quota "for-Scheduled Castes & Scheduled Tribes -was fixed and was not fulfilled, therefore if the State Government has devised the ways of recruitment for filling up the Scheduled Castes quota relaxing the rules making discrimination with the candidates belonging to general category, the same cannot be termed as illegal.

25. In the case of *Indra Sawhney and Ors. v. Union of India and Ors.* 1992 Supp. (3) SCC 217, while considering the question "Whether reservations are anti-meritarian 1", the apex Court in paragraph 836 held as under:

We do not think it necessary to express ourselves at any length on the correctness or otherwise of the opposing points of view referred to above. (It is, however, necessary to point out that the mandate-if it can be called that-of Article 335 is to take the claims of members of S.C./S.T. into consideration, consistent with the maintenance of efficiency of administration. It would be a misreading of the article to say that the mandate is maintenance of efficiency of administration.) Maybe, efficiency, competence and merit are not synonymous concepts; maybe, it is wrong to treat merit as synonymous with efficiency in administration and that merit is but a component of the efficiency of an administrator. Even so, the relevance and significance of merit at the stage of initial recruitment cannot be ignored. It cannot also be ignored that the very idea of reservation implies selection of a less meritorious person. At the same time, we recognize that this much cost has to be paid, if the constitutional promise of social justice is to be redeemed. We also firmly believe that given an opportunity, members of these classes are bound to overcome their initial disadvantages and would compete with -and may, in some cases, excel-members of open competition. It is undeniable that nature has endowed merit upon members of backward classes as much as it has endowed merit upon members of other classes and that what is required is an opportunity to prove it. It may not, therefore, be said that reservations are anti-meritarian. Merit there is even

among the reserved candidates and the small difference, that may be allowed at the stage of initial recruitment is bound to disappear in course of time. These members too will compete with and improve their efficiency along with others.

26. In the case of All India Station Masters" and Assistant Station Masters" Association, Delhi and Others Vs. General Manager, Central Railway and Others, , the Constitution Bench of the Apex Court has inter alia held that equality means equality as between members of the same class of employees, and not equality between members of separate, independent classes.

27. In the case of the State of Mysore and Another Vs. P. Narasing Rao, , the Apex Court has inter alia held that it is well settled that though Article 14 forbids class legislations, it does not forbid reasonable classification for the purposes of legislation and when any impugned rule or statutory provision is assailed on the ground that it contravenes Article 14, its validity can be sustained if two tests are satisfied, namely, that" classification on which it is founded must be based on an intelligible differentia which distinguishes persons or things grouped together from others left out of the group; and the second test is that the differentia in question must have a reasonable relation to the object sought to be achieved by the rule or statutory provision and in other words there must be some rational nexus between the basis of classification and the object intended to be achieved. It has also been held that Articles 14 and 16 form part of the same constitutional code of guarantees and supplement each other. In other words Article 16 is only an instance of the application of the general rule of equality laid down in Article 14 and it should be construed as such and, therefore, there is no denial of equality of opportunity unless the person who complains of discrimination is equally situated with the person or persons who are alleged to have been favoured.

28. Further in the case of Union of India (UOI) and Others Vs. No. 664950 IM Havildar/Clerk SC Bagari, , the apex Court has held as under:

Situated thus, broadly speaking, the concept of equality has an inherent limitation arising from the very nature of the guarantee under the Constitution and those who are similarly circumstanced are entitled to equal treatment. If there is a rational classification consistent with the purpose for which such classification was made, equality is not violated. Article 16 of the Constitution does not bar a reasonable classification of employees or reasonable tests for selection. Equality of opportunity of employment means equality as between the members of the same class of employees and not equality between the members of separate independent classes.

29. Subsequent to the resolution dated 25.5.1982, another resolution was made by the State Government on 4.3.1983, in which the matter of seniority of the Scheduled Castes and Scheduled Tribes candidates selected in the special drive vis-a-vis the P.S.C. passed general and S.C. & ST. candidates was considered and it was decided that the inter se seniority of 403 S.C. & S.T. candidates recruited

between the period from 15.5.1978 to 31.10.1979 by way of special drive 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. As the recruitment was made by the O.P.S.C. and some candidates belonging to S.C. & ST. were selected and due to non-availability of sufficient number of S.C. & ST. candidates through O.P.S.C., a special drive was conducted and the Departmental Selection Committee was constituted," therefore, the candidates belonging to S.C. & S.T. selected by the O.P.S.C. (through merit list) cannot be kept below the candidates belonging to S.C. & S.T. appointed through the special drive. The words "appointed in the same day" in that Government Resolution denote that if the candidates selected by O.P.S.C. belonging to S.C. & ST. joined or appointed on a later date than the joining/appointment of S.C. & S.T. candidates selected by the Departmental Selection Committee they would become junior. This situation would not be proper as the O.P.S.C. issued the merit list of selected candidates, which cannot be disturbed in respect of the same class, i.e. S.C. & S.T. Therefore, the merit list declared by the Departmental Selection committee would come below the merit list declared by the O.P.S.C. relating to S.C. and S.T. candidates and they are to be kept in the then existing roster according to the O.R.V. Act and the rules framed there under. Therefore, a direction is liable to be issued to the State Government to keep the candidates selected by the Departmental Selection Committee below the candidates selected by the O.P.S.C. under the S.C. and S.T. quota and place their names according to the roster in between the candidates selected by the O.P.S.C. under general quota in accordance with the O.R.V. Act and the rules framed there under.

30. The following three cases referred to by Shri Bijan Ray, learned Senior Counsel appearing for opposite party Nos. 2 to 6 in W.P. (C) No. 5381 of 2002 are not applicable to the instant matter. In the case of D.R. Yadav and Anr. v. R.K. Singh and Anr. (supra) emphasis has been given on the criterion that inter se seniority must be determined on the basis of continuous" length of service in the same and similar posts for which date of initial appointment would be relevant. Shri Ray submitted that the Petitioners appointment being irregular, their continuance for a long period does not give any right of seniority. In this regard it is important to indicate here that the Petitioners are not claiming their seniority or fixation hereof on the basis of long continuous service. They are claiming seniority on the basis of their recruitment made in the special drive by the Selection Committee constituted by the Department to fill up the remaining vacancies reserved for S.C. and S.T. candidates for which sufficient number of S.C. and S.T. candidates could not be recommended by the O.P.S.C. and the posts were filled up following the O.R.V. Act and the rules framed there under which were subsequently treated as regular appointments by Government resolution dated 25.5.1982. In the case of Satchidanand Mishra v. State of Orissa (supra) relied upon by Shri Bijan Ray, an advertisement was issued by the Director inviting applications for appointment as Junior Teachers in various

disciplines without constituting the Selection Board as per 1979 Rules. The appointments were made in 1980, i.e. after 1979 Rules came into force. In that case the Supreme Court held that the State Government wanted to bypass the O.P.S.C. and the Selection Board comprising of a member of O.P.S.C as its Chairman was never constituted and the selections were sought to be made by the Board constituted under the 1973 Rules. But in the instant case the concerned authorities had never bypassed the O.P.S.C but when O.P.S.C failed to select required number of S.C. & S.T. candidates and sent a letter that it has failed to recommend names of sufficient number of S.C. & S.T. candidates, a special drive was conducted, as already mentioned above and the ORV Act and the rules framed there under were followed which have overriding effect on any other law including the OMS Rules. In *State of Orissa and Ors. v. Smt. Sukanti Mohapatra and Ors.* (supra), the third case relied upon by Shri Ray, the State was pleased to relax the appointment of: nine irregular L.D. Assistants of Directorate of Mining and Geology under provisions of Rule 14 of the O.M.S. (Method of Recruitment or Junior Assistants in the Office of Heads of Departments) Rules, 1975 on compassionate grounds in public interest. The regular recruits challenged the same before the Tribunal. The Tribunal held that those nine L.D. Assistants did not form a class or category except for the fact that they were irregular recruits. The Tribunal though did not see any public interest in the said regularization, held that the regularization had been done on compassionate ground. The action of the State amounted to regularization of irregular recruits although there" was no such provision of regularization of irregular recruits in the said rules or any other rule pointed "out to the Tribunal. Holding that there was" difference between regularization and relaxation, the Tribunal came to the conclusion that Rule 14 did not permit regularization of irregular recruits. In that case the Tribunal found that many of the nine appointees did not have the minimum prescribed qualification of Intermediate Arts, Science or Commerce. However, without striking down the regularization, the Tribunal declared that such irregular recruits be treated as junior to the regular recruits. The State and those whose entry in service was regularized preferred appeals before the Hon"ble Supreme Court. The question which arose for consideration before the Hon"ble Supreme Court was whether the appointments of candidates made dehors the O.M.S. Rules could be "regularised" in exercise of the power of relaxation conferred on the Government by Rule 14 of the O.M.S. Rules. The Hon"ble Supreme Court held that though Rule 14 of the OMS Rules permits relaxation of "any of the provisions of the rules" but it does not speak of regularization and that the order passed by the State Government cannot have the protection of Rule 14 nor can the appointments be regularized as having been made under the rules so as to dislodge the seniority of regularly appointed persons. The Hon"ble apex Court"s concluded as under:

Now even though the Tribunal came to the conclusion that Rule 14 did not permit regularization made under the impugned orders of January 3, 1985 and February 14, 1985, it, having regard to the long service put in by the employees named in

the said two orders and on compassionate considerations has supported the regularization under Article 162 of the Constitution. It has moulded the relief on such considerations. Since that part of the order has not been assailed and since the Appellants cannot be worse off by appealing, we cannot interfere with that part of the order. It will, therefore, be worked out as directed by the Tribunal but we may clarify that it will not have the effect of disturbing the seniority of regular appointees who will rank senior to the irregular appointees.

31. It is to be mentioned here that the facts of the instant case are quite different from the facts of that case as in the instant case only candidates belonging to S.C. & S.T. were given appointment following the ORV Act and the rules framed there under which were having overriding effect on any other law or any rule.

32. It is well settled that there can be estoppel against the facts but there cannot be any estoppel against the law. The law laid down by the State Administrative Tribunal is not binding upon this Court and, therefore, if the Tribunal has not correctly laid down the law, it cannot be said that the law has become final and, as such, this Court can lay down the correct law in exercise of its powers conferred to it under Articles 226 and 227 of the Constitution.

33. The person belonging to the general category cannot be treated equal to the persons belonging to Scheduled Castes & Scheduled Tribes i.e. reserved category. It is well settled principle of law that unequals cannot be treated as equals and equals cannot be treated as unequals. Therefore, the candidates belonging to the Scheduled Castes & Scheduled Tribes category selected by the Public Service Commission in the recruitment in which sufficient number of S.C. and S.T. candidates could not be made available by the Public Service Commission for appointment and unfilled posts were filled up by special drive appointing persons belonging to S.C./S.T. on the basis of selection from amongst candidates sponsored by the Employment Exchange in a particular year were entitled to be declared as senior to those who were appointed on the basis of selection under the special drive to fill up the quota. The remaining unfilled posts were filled up by different mode under the special drive and, therefore, the candidates selected by the Public Service Commission under the reserved quota cannot be treated unequal to those who were selected under the same quota in different mode of selection holding a special drive to fill up the quota. There was a roster given under the O.R.V. Act at the relevant time and as such the Government was bound to follow the roster and maintain the same according to the candidates available in reserved category as well as unreserved category. We are, therefore, of the view that similarly circumstanced persons under the S.C. & S.T. quota selected by the O.P.S.C. should be treated as senior to those who were selected by the special drive as sufficient number of S.C. & S.T. candidates could not be recommended by the O.P.S.C.

34. In view of the above mentioned facts and circumstances, we allow the writ petitions, quash the impugned order passed by the Tribunal and direct as under:

(i) The resolution dated 25.5.1922 deeming the services of candidates appointed on ad hoc basis in special drive to fill up the unfilled vacancies reserved for Scheduled Caste and Scheduled Tribe due to non-availability of the reserved candidates in the recruitment made through O.P.S.C. for the purpose of same recruitment as regular is valid.

(ii) The candidates selected by the Departmental Selection Committee in the special drive shall be kept below the candidates selected by the O.P.S.C. under the S.C. and S.T. quota and be placed in the seniority list according to the then roster in accordance with the Q.R.V. Act and the rules framed there under. The resolution dated 4.3.1983 shall be modified accordingly.

(iii) The position of the candidates in the gradation list if found contrary to the above shall be corrected accordingly and in case the incumbents who have already been promoted are found to be affected adversely by such correction, they shall not be reverted from their respective position till their turn for promotion comes according to the corrected gradation list as per the order above.

35. There shall be no order as to costs.

S.C. Parija, J.

36. I agree.