
(1984) 01 OHC CK 0030

In the Orissa High Court

Case No : Original Jurisdiction Case No. 57 of 1980

Ananta Kumar Bose and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 11-01-1984

Acts Referred:

Constitution of India, 1950 — Article 309

Orissa Administrative Service Class II (Recruitment) (Amendment) Rules, 1959 — Rule 11

Orissa Administrative Service Class II (Recruitment) Rules, 1954 — Rule 1

Citation : AIR 1986 Ori 151

Hon'ble Judges : D. Pathak, C.J; P.K. Mohanti, J; J.K. Mohanty, J

Bench : Full Bench

Advocate : S.S. Basu and S.S. Rao, for the Appellant; Standing Counsel and G.Rath, N.C. Panigrathi, B.B. Mohanty, A. Mohanty, P.K. Misra, A.C. Mohanty, G.A.R. Dora, B. Pal, Devanand Misra and Deepak Misra, for the Respondent

Final Decision : Dismissed

Judgement

J.K. Mohanty, J.—The three petitioners, who were initially appointed as Sub-Deputy Collectors (members of Orissa Subordinate Administrative Service, for short O. S. A. S.-III) and were integrated into Orissa Administrative Service Class-II (for short O. A. S.-II) by Government Resolution dated 21-12-73 (Annexure-2), have prayed for quashing of the Government decision regarding their seniority as contained in Annexure-14 and for a direction that they should be placed over the direct recruits as well as the promotees of the years 1970 and 1971.

2. The petitioners' case is as follows: --

Prior to 7-1-1972 there were two cadres, namely, O. A. S.-II and O. S. A. S.-III. The members of O. A. S.-II were known as Deputy Collectors and those of O. S. A. S.-III as Sub-Deputy Collectors. Recruitment to O. A. S.-II was regulated by a set of rules known as Orissa Administrative Service Class-II (Recruitment) Rules,

1959 (in short the Recruitment Rules of 1959) and recruitment to O. S. A. S.-III was regulated by Orissa Subordinate Administrative Service (Recruitment) Rules, 1959. Petitioner No. 1 (who has retired from service in the meantime) was appointed as a Sub-Deputy Collector (O. S. A. S.-III) on 29-4-54. Petitioner No. 2 was similarly appointed on 31-8-1955 and petitioner No. 3 on 4-5-57. Opposite party Nos. 4 to 18 and Nos. 30 to 56 became members of O. A. S.-II on and from 21-12-1973 by virtue of the resolution (Annexure-2) along with the petitioners. Opposite party Nos. 19 to 29 and Nos. 57 to 80 are the direct recruits to O. A. S. II and they were treated as recruits of the years 1970 and 1971 respectively. (Opposite party Nos. 6, 64 and 77 died during the pendency of this writ petition). The petitioners were senior to opposite party Nos. 4 to 18 and Nos. 30 to 56 in O. S. A. S.-III cadre as also in O. A. S.-II (Junior Branch). According to the petitioners an artificial discrimination was being maintained before the O. A. S.-II and O.S.A.S. III cadres, there being no real difference between the officers inasmuch as they discharged identical duties. A persistent demand was being made to abolish the distinction to have a single cadre. A high power Committee was, therefore, constituted by the Government consisting of the Chief Secretary, Additional Development Commissioner, Secretaries of the Finance and Revenue Departments to consider the rationalisation of the two cadres. The Committee after its deliberations recommended to have a single cadre known as the O.A.S.-II with a senior branch (S. B.) and a junior branch (J. B.) so that all the existing O. A.S. officers should be absorbed in O.A.S.-II (S. B.) and all O.S.A.S.-III officers should be absorbed in O.A.S.-II (J. B.). It was decided that the total integration of the two branches was to be completed in a phased manner within a period of about ten years which would be achieved progressively by not filling up the vacancies in the junior branch that would arise on account of promotion to the senior branch as also on account of retirement etc. and that further recruitment to the O.A.S.-II (J. B.) would be completely stopped. In this context Government of Orissa (O. P. No. 1) in the Political and Services Department passed a resolution dated 7-1-72 (Annexure-1). The main features of Annexure 1 were that the aforesaid two separate cadres were abolished and single cadre of O.A.S.-II with a senior and a junior branch was constituted. The incumbents of the existing O.A.S.-II cadre were absorbed in O.A.S.-II (S. B.), and those of O.S.A.S.-III cadre were absorbed in O. A. S.-II (J. B.). The total integration of these two branches was contemplated to be completed in a phased manner in a period of about ten years. This was to be achieved progressively by not filling up the vacancies in the junior branch to be caused on account of promotion to the senior branch and also on account of retirement etc. The cadre strength in the senior branch was fixed at 698 and in junior branch at 412. In fact there were 441 officers in the O.A.S.-II (S. B.) and 621 officers in O.A.S.-II (J. B.). Thus there were 257 vacancies in O. A. S.-II (S. B.) and 209 officers in excess of the prescribed cadre strength in the O.A.S.-II (J. B.). Government's action in not filling up the 257 vacancies in the O. A. S.-II (S. B.) by promotion from O.A.S. II (J. B.) was from the very inception mala fide and motivated. Even after the resolution dated 7-1-72, a distinction was sought to be maintained within the

cadre itself between the senior branch and the junior branch. The continuance of the distinction was not very much to the liking of the "O.A.S.-II (J. B.) officers and their discontentment did not abate. The continuance of the distinction was considered irrational; since having accepted in principle that the two branches would be merged because of their inherent identity in all aspects it was no longer possible to have postponed the complete merger and put all officers in part in the unified cadre. This mistake was realised by the State Government and instead of waiting for the phased manner of integration for a period of ten years, a complete merger was effected by Resolution No. 119468-Gen. dated 21-12-1973 (Annexure 2). A complete integrated cadre was constituted which was known as O.A.S.-II. In view of this resolution all the officers holding posts borne in the cadre of O.A.S.-II (J. B.) or the posts treated as temporary addition to the said cadre were to be absorbed with immediate effect in the cadre to be styled as O.A.S.-II. The officer borne in O.A.S.-II (J. B.) and holding posts treated as temporary addition to the said cadre would be assigned positions in the gradation list in the new cadre of O.A.S. II below the last officer holding the post in O.A.S.-II (S. B.). It was, however, subject to the condition that the officers whose cases were before the Orissa Public Service Commission (for short O.P.S.C.) and who would be considered suitable for promotion to the O.A.S.-II (S. B.) against the promotion quota of 1970 and 1971 would be assigned appropriate positions later in accordance with rules. The inter se seniority of other officers borne in the cadre of O.A.S.-II (J. B.) as it stood on the date of merger would be maintained. It was further laid down that the officers borne in O. A. S.-II (S. B.) and O.A.S. II (J. B.) who had been confirmed in the respective cadres on the date of issue of the resolution would be deemed to have been confirmed in the new cadre of O.A.S.-II.

According to the petitioners, in the year 1970 the O.P.S.C. advertised two vacancies of O.A.S.-II and four vacancies of O.A.S.-III to be filled up by direct recruitment. For this purpose written examination was held in 1971 and viva voce in 1972, as would appear from the extract of the annual report of O.P.S.C. for the year 1971-72 (Annexure-3), Against the above notified vacancies, eleven Deputy Collectors and no Sub-Deputy Collectors were recruited directly vide Government notification dated 16-3-73 (Annexure-4). The above direct recruits are opposite party Nos. 19 to 29. They joined the O. A.S.-II (S. B.) service between 23-3-1973 and 7-4-73. Similarly, for the year 1971, ten vacancies of O.A.S.-II and five vacancies of O.S.A.S.-III were advertised to be filled up by direct recruitment for which written examination was held in 1972 and viva voce in 1973; as would appear from the extract of the annual report of the O.P.S.C for the year 1973-74 (Annexure-7). Against the above notified vacancies, twenty-seven Deputy Collectors and no Sub-Deputy Collectors were recruited directly. Out of them twenty-four direct recruits (opposite party Nos. 57 to 80) joined their service between 9-5-74 and 21-9-74.

The cases of 105 O.A.S.-II (J. B.) officers were referred to the O. P. S. C. on 6-9-73 for consideration and recommendation for promotion to O.A.S.-II (S. B.)

against the promotion quota of 1970 and 1971. The O.P.S.C. recommended the names of 52 O.A.S.-II (J. B.) officers as suitable for promotion to O.A.S.-II (S. B.), as would appear from the extract of the annual report of O.P.S.C. for the year 1975-76 (Annexure-13). The Government fixed the ranking of the officers, i.e. promotees of 1970 and 1971 (opposite party Nos. 4 to 18 and Nos. 30 to 56) and the direct recruits of the said years (opposite party Nos. 19 to 29 and Nos. 57 to 80) in the following manner: --

(i) Opposite party Nos. 4 to 18 were placed below the direct recruits of the year 1969.

(ii) Below the above officers were placed the eleven direct recruits of the year 1970 (opposite party Nos. 19 to 29).

(iii) Below the direct recruits of the year 1970 were placed twenty-seven officers promoted against the quota of 1971 (opposite party Nos. 30 to 56).

(iv) Below the officers promoted in 1971 were placed the twenty-four direct recruits of the year 1971 (opposite party Nos. 57 to 80).

This would be evident from the Government Resolution dated 11-11-1976 (Annexure-14).

The contention of the petitioners is that on and from 21-12-1973 there was a complete integrated cadre known as O.A.S.-II. According to Annexure-2 all the members then existing in O.A.S.-II (J. B.) were to be placed in the seniority list below the last man then existing in O.A.S.-II (S. B.). So the members of the junior branch got absorbed/appointed in O.A.S.-II. Hence, the promotees, i.e. O.P. Nos. 4 to 18 and numbers 30 to 56, having already been absorbed in O.A.S.-II as Deputy Collectors from 21-12-1973 must retain the position where they were on the date of absorption, i.e. 21-12-1973. These opposite parties cannot be made senior to the petitioners. According to the petitioners no formal appointment letters were issued to opposite parties Nos. 4 to 18 and Nos. 30 and 56 after their names were recommended by the O.P.S.C. and hence they cannot be treated as promotees of 1970 and 1971. Regarding opposite party Nos. 19 to 29 who were appointed to service on 16-3-1973 and opposite party Nos. 57 to 80 who were appointed to service on 1-5-1974 and 7-6-74, it is contended that they are direct recruits and cannot be placed above the petitioners in the seniority list. The direct recruits have been allotted 1970 and 1971 as their "year of allotment" even though they actually joined the service in 1973 and 1974. The Recruitment Rules of 1959 and the Orissa Administrative Service (Appointment by Promotion, Transfer and Selection) Regulations, 1959 do not provide for giving "year of allotment" to direct recruits different from their date of joining. According to the petitioners the resolution (Annexures 1 and 2) abolished old cadres, created new cadres and provided for fixation of seniority in the new cadres and laid down principles of general application relating to recruitment duly authenticated in the name of the Governor and they would amount to statutory rules under Article 309 of the Constitution of India. After

passing of the resolutions, the Recruitment Rules of 1959 ceased to have force. Broadly on the above grounds amongst others, the petitioners have prayed for quashing of Annexure-14 and granting of other consequential benefits.

3. Opposite party Nos. 1 (State of Orissa), 2 (Secretary, Political and Services Department), 11, 19, 22, 26, 36, 57, 60, 63, 66, 76, 78 and 79 have filed their counters. They have challenged the writ petition mainly on the following grounds amongst others: --

The resolution in Annexure-1 did not provide for abolition of O.A.S.-II cadre or repeal of the Recruitment Rules of 1959. It provided for the principle of integration of Sub-Deputy Collectors to O.A.S.-II. The name of the cadre was temporarily changed as O.A.S.-II (S. B.) and O.A.S.-II (J. B.) for maintaining distinction between the two classes. The ultimate object was to retain O.A.S.-II in which the Sub-Deputy Collectors were to be integrated. Despite the Government resolution, O.A.S.-II cadre continued to exist, though under a different name, i.e., O.A.S.-II (S. B.), Recruitment to O.A.S.-II continued to be made in accordance with the Recruitment Rules of 1959 until such Rules were repealed in 1978. By the resolution dated 21-12-1973 (Annexure-2) integration of O.S.A.S.-III (Sub-Deputy Collectors) into Q.A.S.-II was made and the O.A.S.-II (J. B.) was abolished. The operation of the Recruitment Rules of 1959 was not affected, except that a part of the said Rules dealing with recruitment to the service by promotion from among the members of O.S.A.S.-III became infructuous and inoperative. The provision in Rule 11 of the Recruitment Rules of 1959 that the promotees of any year should be placed above the direct recruits of the said year was maintained. The petitioners were not promoted to O.A.S.-II in accordance with the procedure prescribed in the Recruitment Rules of 1959 and the regulations made thereunder, i.e. Orissa Administrative Service Class-II (Appointment by Promotion, Transfer and Selection) Regulations, 1959, as such they were not classified as promotees. Their status cannot be equated with "promotees" or "direct recruits". Accordingly, their placement in Annexure-14 below all the officers who on applying the principle of "year of allotment" have been treated as direct recruits or promotees of the years 1970 and 1971 is correct. The provision that the promotees of a particular year should be placed above the direct recruits and the express provision for determining the year of allotment of the promotees clearly show that the "year of allotment" of the direct recruits should also be determined on the basis of vacancies that arise in the service. This practice of determining the year of allotment of direct recruits has been traditionally followed in all previous years. Similarly, the provisions of Orissa Administrative Service Class-II (Appointment by Competitive Examination) Regulations, 1959 and the Orissa Administrative Service Class-II (Appointment to the Selection Grade) Rules, 1967 go to prove the "year of allotment" assigned to the officers. In the civil list also it would be found that both in respect of the promotees and direct recruits, the date of appointment as well as the year of allotment is separately mentioned: Annexure-14 has been prepared giving due regard to Rule 11 of the Recruitment Rules of 1959 as well as the special

provision contained in the resolution (Annexure-2). Keeping in view the principles, opposite party Nos. 4 to 18, who were recommended by the O.P.S.C. for promotion for the year 1970, have been placed above the direct recruits of that year. Similarly, opposite party Nos. 30 to 56, who were recommended by the O.P.S.C. for promotion for the year 1971, have been placed above the direct recruits of that year. On applying the principle of "year of allotment", opposite party numbers 19 to 20 and Nos. 57 to 80 have been treated as the direct recruits of the years 1970 and 1971 respectively. The opposite parties, therefore, assert that the writ petition has no merit and should be dismissed.

4. The case was first heard by a Division Bench of this Court which referred the matter to a larger Bench

5. Prior to 7-1-1972 there were two cadres, namely O.A.S.-II and O.S.A.S.-III. The members of O.A.S.-II were known as Deputy Collectors and those of O.S.A.S.-III were known as Sub-Deputy Collectors. They were being recruited under the Recruitment Rules of 1959 and the Orissa Subordinate Administrative Service (Recruitment) Rules, 1959 respectively. Two regulations under each of the aforesaid rules were framed by the State Government known as Orissa Administrative Service Class-II (appointment by Competitive Examination) Regulations, 1959. Orissa Administrative Service Class-II. (Appointment by Promotion, Transfer and Selection) Regulations, 1959. Orissa Subordinate Administrative Service (Appointment by Competitive Examination) Regulations, 1959 and Orissa Subordinate Administrative Service (Appointment by Promotion, Transfer and Selection) Regulations, 1959. On and from 7-1-1972 these two cadres were integrated into a single cadre, i.e. O.A.S.-II, with two branches such as senior branch and junior branch as per the resolution in Annexure-1. On and from 21-12-1973 the two branches were abolished and a new cadre of O. A.S.-II was constituted as per Annexure 2. The contention of the petitioner is that on and from 21-12-1973 there was a complete integrated cadre known as O.A.S.-II. According to Annexure-2 all the members then existing in O.A.S.-II (J. B.) would be placed in the seniority list below the last man then existing in O.A.S.-II (S. B.). Accordingly, all the members of the junior branch were absorbed/appointed in the service of O.A.S.-II. As a result of this, opposite party Nos. 4 to 18 and Nos. 30 to 56 (the promotees) having already been absorbed in O.A.S.-II as Deputy Collectors from 21-12-1973, must retain their position where they were on the date of absorption, i.e. 21-12-1973. Hence these opposite parties cannot be made senior to the petitioners, as is sought to be done by Annexure-14. According to the petitioners, opposite party Nos. 4 to 18 and Nos. 30 to 56 were purported to have been promoted in the year 1976 on the recommendation of the O.P.S.C. vide Annexure-13. Though at the point of time they were considered fit for promotion, the scope of promotion was no more available as they were already, call it promotion or absorption, in O.A.S.-II since 21-12-1973. Assuming that the benefit of promotion should be given to them, then according to Rule 11 of the Recruitment Rules of 1959 it must be taken that they have been promoted to the service in the year 1976, hence they cannot be treated as promotees of

1970 and 1971 and senior to the petitioners. It is submitted by the petitioners that Rule 11 of the Recruitment Rules of 1959 does not contemplate fixation of seniority inter se by "year of allotment". It is also submitted that after the resolution in Annexure-2 came into force, the Recruitment Rules of 1959 ceased to operate.

6. In reply, on behalf of the opposite parties it is contended that admittedly opposite party Nos. 4 to 18 and Numbers 30 of 56 have been treated as promotees of the years 1970 and 1971 respectively. An analysis of the Government Resolution dated 7-1-1972 (Annexure-1) would show that the resolution did not provide for the abolition of O.A.S.-II cadre or the repeal of the Recruitment Rules of 1959 or the discontinuance of recruitment of Deputy Collectors. Pending finalisation of the scheme of integration, only the following decisions were taken: --

- (i) Principle of integration of Sub-Deputy Collectors in O.A.S.-II was accepted.
- (ii) Name of the cadre was temporarily changed to O.A.S.-II (S. B.) and O.A.S.-II (J. B.) for maintaining the distinction between the two classes.
- (iii) There was to be no further recruitment to the cadre of Sub-Deputy Collector (renamed as O.A.S.-II (J. B.)).
- (iv) Cadre strength of the senior branch was fixed at 698 and that of the junior branch at 412.
- (v) The excess number of officers in the junior branch over and above the fixed strength of 412 were to be treated as temporary addition to the cadre.
- (vi) Ultimate object was to retain O.A.S.-II in which the Sub-Deputy Collectors were to be integrated.

This was basically a temporary arrangement to facilitate the integration of the two cadres and was not intended to give the members of O.A.S.-III (Sub-Deputy Collectors) a higher status or higher pay scale except such service benefits as admissible under Rule 74(b) of the Orissa Service Code. The status, emoluments and service conditions of O.A.S.-II, subsequently called O.A.S.-II (S. B.), were not altered or modified.

The Government Resolution dated 21-12-1973 brought about integration of O.S. A. S. III (Sub-Deputy Collector) into O.A.S.-II. All the officers borne in the cadre of O.A.S.-II (J. B.) or who had been holding posts which were temporary addition to the said cadre were integrated to the cadre and the so-called junior branch was abolished. The integration brought about by Annexure-2 did not affect the constitution of O.A.S.-II or the operation of the Recruitment Rules of 1959, except that a part of the said Rules dealing with recruitment to the service by promotion from among the members of O.S.A.S.-III (Sub-Deputy Collectors) became infructuous and inoperative. The original name of the cadre "O.A.S.-II" was restored. The provision in Rule 11 of the Recruitment Rules of 1959 that the

promotees of any year would be placed over the direct recruits of the said year was not modified: The problem of seniority arising out of the integration was solved as follows: --

(i) All officers borne in the junior branch of holding posts treated as temporary addition thereto would be assigned positions in the gradation list of O.A.S.-II below the last officer holding the post.

(ii) Officers of junior branch (Sub-Deputy Collectors) whose cases were then before the O.P.S.C. and who were ultimately considered suitable for promotion against the promotion quota of 1970 and 1971 would be assigned appropriate places in accordance with rules. In other words, the promotees of 1970 and 1971, though appointed subsequently, were to be placed above the direct recruits of those years as provided in Rule 11 of the Recruitment Rules of 1959.

The resolution also clearly indicates that the Government did not lose sight of "year of allotment" of the officers, for fixing the seniority. The right of the promotee Sub-Deputy Collectors whose cases had been referred to the O.P.S.C. against the promotion quota of 1970 and 1971, though they had not been finally selected by the O.P.S.C. or appointed by the date of integration, was expressly preserved to have their year of allotment fixed. It may be mentioned here that the petitioners' names were not recommended by the O.P.S.C. for promotion.

Despite the Government Resolution dated 7-1-1972 the O.A.S.-II cadre continued to exist though under a different name, i.e., O.A.S.-II (S. B.). Even after the change of nomenclature of the two cadres, recruitment to O.A.S.-II continued to be made in accordance with the Recruitment Rules of 1959 until such Rules were repealed in 1978 by Orissa Administrative Service Class-II (Recruitment) Rules, 1978. The resolution did not provide that the O.A.S. II cadre would be abolished or that the recruitment rules would cease to operate or that no recruitment would be made to O.A.S. II (S. B.). Annexure-2 specifically referred to "rules", obviously meaning the set of 1959 Rules. Even Annexure-14 notes the requirement of promotion in terms of relevant rules, thus underscoring the fact that the resolutions were distinct from the set of relevant 1959 Rules and the regulations framed thereunder.

7. There is considerable force in the above argument of the learned counsel for the opposite parties. The contention of the petitioners that the Government Resolution (Annexures 1 and 2) did away with the Recruitment Rules of 1959 is not tenable. Annexure-1 did not provide for the abolition of O.A.S.- II cadre or repeal of the Recruitment Rules of 1959 or discontinuance of recruitment of Deputy Collectors. Pending finalisation of the scheme of integration, certain decisions were taken as mentioned in paragraph-6 of this judgment. The Government Resolution dated 21-12-1973 (Annexure-2) brought about the integration of O.S.A.S.-III into O.A.S.-II. The so-called O.A.S.-II (J. B.) was abolished and the original name of the cadre "O.A.S.-II" was restored. The provision in Rule 11 of the Recruitment Rules of 1959 that the promotees of any

year would be placed over the direct recruits of the said year was not modified. In Annexure-2 it was specifically provided that officers of junior branch (Sub-Deputy Collectors) whose cases were before the O.P.S.C. and who would be ultimately considered suitable for promotion against the promotion quota of 1970 and 1971 would be assigned appropriate places in accordance with rules. This has obvious reference to the promotees like opposite party Nos. 4 to 18 and Nos. 30 to 56 whose cases were pending before the O.P.S.C. at the time of passing of Annexure-2. The Sub-Deputy Collectors including the petitioners, except those whose cases were pending before the O.P.S.C., could not be treated" as promotees of any earlier years. They were not promoted to O.A.S.-II in accordance with the procedure prescribed in the Recruitment Rules of 1959 and the regulations, i.e., Orissa Administrative Service (Class-11). (Appointment by Promotion, Transfer and Selection) Regulations, 1959, made under Rule 6 of the said Rules. Under the aforesaid regulations, Sub-Deputy Collectors are promoted to the rank of O.A.S.-II on the recommendation of the O.P.S.C. after taking into account various other factors such as age, experience, seniority etc., as prescribed therein. The encadrement of the Sub-Deputy Collectors as members of the O.A.S.-II with effect from 21-12-1973 was not made in accordance with the aforesaid statutory rules and regulations and as such they could not be classified as promotees of the year 1970, 1971, 1972 or 1973. The relevant rules of the Recruitment Rules of 1959 are as follows; --

"4. Method of Recruitment-- Recruitment to the Service shall be made by the following methods, namely: --

- (a) direct recruitment by competitive examination;
 - (b) promotion from amongst the members of the Orissa Subordinate Administrative Service; and
 - (c) transfer from such other services or posts as are comparable with the Orissa Administrative Service as may be specified by Government from time to time;
- (Explanation-- Comparable service or post means any service or post specified by Government from time to time, responsibilities and emoluments attached to which are declared by Government to be comparable in nature to that of a post of Deputy Collector)
- (d) selection; and
 - (e) transfer or promotion of persons who are considered suitable for appointment to the service in accordance with the provisions of Rule 9.

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10. Percentage of recruitment: --

XX XX XX XX XX XX XX XX XX (7) For recruitment to the Service by promotion or transfer or selection, under these rules, the State Government shall consult the Commission before appointment.

11. Seniority:-- (1) The seniority of officers appointed to the service under Clauses (a), (b), (c) and (d) of Rule 4 in any year shall be in the following order, namely: --

(a) officers appointed to the Service by promotion under Clause (b) of Rule 4, ranked inter se in the order in which their names are arranged by the Commission;

(b) officers appointed to the Service by transfer from other service or services of posts under Clause (c) of Rule 4, ranked inter se in the order in which their names are arranged by the Commission:

(c) officers appointed to the Service by selection under Clause (d) of Rule 4 ranked inter se in the order in which their names are arranged by the Commission;

(d) officers appointed to the Service on the results of a competitive examination in accordance with Clause (a) of Rule 4, ranked inter se in the order in which their names are arranged by the Commission.

XX XX XX XX XX XX XX XX XX XX

Thus, from the above rules it would be clear that the absorption of the petitioners in O.A.S. II was not a promotion and was not in accordance with the procedure prescribed above or after consultation with the O.P.S.C. They constituted a class by themselves, i.e., the integrated or merged members of the service. So their status cannot be equated with the promotees or direct recruits.

8. On behalf of the petitioners reliance was placed on a decision reported in 48 Cut LT 547 : (1980 Lab IC 926), Shri Khanoo Charan Sahoo v. State of Orissa. In the aforesaid decision the points raised in the present case were not considered or answered. The point considered therein was regarding the applicability of Rule 74(b) of the Orissa Service Code. No contention was raised or decided therein as to the effect of the resolutions (Annexures 1 and 2). It was confined to the question whether after the absorption of the petitioners (in that case) in the O.A.S. II (J. B.) the provisions of Rule 74(b) of the Orissa Service Code were applicable to them. The petitioners in that case claimed higher emoluments under Rule 74(b) of the Orissa Service Code and this Court held that they were entitled to the same and the provisions of Rule 74(b) were applicable to them. So, this decision has no application to the present case.

9. The resolutions (Annexures 1 and 2) did not provide that the Recruitment Rules of 1959 would cease to operate. There was no provision repealing the Recruitment Rules of 1959 in the said resolutions. Annexure-2 specifically referred to "rules" obviously meaning the Recruitment Rules of 1959. Even Annexure-14 mentions about the requirement of promotion in terms of the relevant rules, thus leaving no doubt about the fact that the resolution was distinct from the Recruitment Rules of 1959 and the regulations framed thereunder. The reference in Annexure-2 "the cases pending for consideration

before the O.P.S.C." refers to the Recruitment Rules of 1959 for promotion of Sub-Deputy Collectors to Deputy Collectors. In 1978 O.A.S.-II Recruitment Rules and Regulations for Promotion and Competitive Examination were framed, Rule 12 of the above rules provides for repeal of the corresponding rules in force immediately before commencement of these Rules and also for saving of any order made or action taken under the rule so repealed. This conclusively establishes that the Recruitment Rules of 1959 were still in force till 1978 rules come into operation as there were no other rules operating in the field.

As already mentioned above, the case of opposite parties Nos. 4 to 18 and Nos. 30 to 56 was pending before the O.P.S.C. at the time of passing of Annexure-2. A specific provision was made in Annexure-2 for the purpose. After the recommendation of the O.P.S.C. was received, these opposite parties were assigned their respective positions in the seniority list (Annexure-14) in conformity with the Recruitment Rules of 1959.

10. The petitioners have challenged the placement of opposite party Nos. 19 to 29 and Nos. 57 to 80, who are the direct recruits of the years 1970 and 1971 respectively, in the seniority list. It is argued on behalf of the petitioners that opposite party Nos. 19 to 29 were appointed by notification dated 16-3-73 (Annexure-4) and were considered to have filled the vacancies of 1970. Similarly, opposite party Nos. 57 to 80, who were appointed as per notifications of May and June, 1974 (Annexure 8, 10 and another (not filed)), were considered as the direct recruits of the year 1971. The notifications (Annexures 4, 8 and 10) do not indicate that they were recruited for filling the vacancies of the years 1970 and 1971. By virtue of Annexure-2 there was a complete integrated cadre known as O.A.S.-II from 21-12-73 and all the members of O.A.S. II (J. B.) were placed before the last man then existing in O.A.S.-II (S. B.). So, the question of placing the direct recruits above the petitioners in the seniority list does not arise and it is absolutely illegal and unjust. Since the, Recruitment Rules of 1959 were not in operation, the question of appointing the above opposite parties under Rule 4(a) of the said Rules does not arise. Even assuming that the Recruitment Rules of 1959 were still in operation, there is nothing in the said Rules regarding "year of allotment". The contention of opposite party Nos. 19 to 29 and Nos. 57 to 80 that this Court should hold that the principle of "year of allotment" is available to them for fixation, of their seniority is absolutely untenable. With respect to opposite party Nos, 57 to 80 it is contended that they were appointed in the year 1974, much after the total integration as per Annexure-2 dated 21-12-1973. By the date of their appointment there was no senior or junior branch in O.A.S. II as by then all the members of the junior branch had already lost the character of being the officers of the said branch and they all had become the members of O.A.S.-II. These opposite parties having been appointed to the service in the year 1974, they must be put in the gradation list below the last officer then existing in O.A.S.-II after complete integration. Hence their placement in the seniority list above the petitioners is in complete violation of the Recruitment Rules of 1959 as well as the Government Resolutions (Annexures 1 and 2). It is

further argued by the learned counsel for the petitioners that whenever the authorities wanted to specify "year of allotment" for the purpose of seniority, specified provisions were made in the rules in pursuance of which an officer entered into service or appointed to service. Advertisement might have been issued in a particular year and some time might have been taken for completing the process of recruitment but the date which would be reckoned for entering into service or appointment to service would be the date when one actually is appointed and not the year in which the advertisement was issued, unless the rules by virtue of which one is appointed contemplate such a thing. Normally seniority is reckoned from the date of appointment to service. Reliance was placed on an unreported decision of this Court in O.J.C. Nos. 1130 and 1493 of 1978 (Surasen Jena (1130 of 1980), Pravakar Satapathy (1493 of 1980) v. State of Orissa, (in both) disposed of on 28-9-1981. It is also contended on behalf of the petitioners that the advertisement issued by the O.P.S.C. in 1970 indicated that there were only two vacancies in O.A.S.-II. But Annexure-4 would show that eleven officers were appointed. Similarly, the advertisement issued in 1971 indicated that there were ten vacancies, but in fact twenty-seven officers were appointed as would appear from Annexures 8 and 10. Since the number of appointment was in excess of the posts advertised, the appointment of the officers in excess cannot be sustained and they cannot also get the benefit of the principle of "year of allotment". In any view of the matter, the petitioners should be treated as the promotees of the year 1973 and should be ranked above the opposite parties who are direct recruits.

11. In reply, on behalf of the opposite parties it is contended that after determining the vacancies in O.A.S.-II (S. B.) for the years 1970 and 1971 and after taking into account the quota to be reserved for promotees in accordance with Rule 10 of the Recruitment Rules of 1959, the State Government requested the O.P.S.C. to publish necessary advertisements for holding the competitive examinations of the respective years. For the vacancies of 1970, advertisement was issued in 1970, examination was conducted in 1971 and viva-voce test was held in 1972. On the basis of the results of examination formal appointment orders under Rule 4(a) of the Recruitment Rules of 1959 were issued to opposite party Nos. 19 to 29 vide Annexure-4. Similarly, for the vacancies of the year 1971, advertisement was issued in Sept. 1971, examination was held in August, 1972 and viva-voce test was held in April, 1973. On the basis of the results of the examination, appointment orders were issued to opposite party Nos. 57 to 80 as per Annexures 8 and 10. On the basis of the aforesaid facts and taking into account the principle of "year of allotment", the Government have treated opposite party Nos. 19 to 29 and Nos. 57 to 80 as the direct recruits of the years 1970 and 1971 respectively. Reliance was placed on Rule 4 of the Recruitment Rules of 1959 and Regulation 3 of the Orissa Administration Service Class-II (Appointment by Competitive Examination) Regulations, 1959. According to the aforesaid provisions, number of vacancies likely to arise in a particular year is initially determined by the Government, number of persons to be recruited and

promoted in accordance with the quota fixed under Rule 10 of the Recruitment Rules of 1959 is ascertained and a combined competitive examination is held by the O.P.S.C. in respect of the direct recruitment to the service of the year. The forecast made at the inception may vary and invariable larger number of persons are appointed at the time of actual appointment. There is also express provision in Orissa Administrative Service Class-II (Appointment by Promotion, Transfer and Selection) Regulations, 1959, for determining the "year of allotment" of members of O.S.A.S. Similarly, in Orissa Administrative Service Class-II (Appointment to Selection Grade) Rules, 1967, specific provision has also been made for determining the "year of allotment" in relation to the Deputy Collectors. It is further contended that after the Government decided to fill up the vacancies on the basis of the results of the combined competitive examination of a particular year, it must be presumed that the vacancies were said to be filled up for that year. The appointment letters (Annexures 4, 8 and 10) show that on being successful in the combined competitive examinations of 1970 and 1971 held by the O.P.S.C., the opposite parties were appointed. Accordingly, their "year of allotment" has been rightly fixed as 1970 and 1971. The principle of fixing the date of appointment on the basis of "year of allotment" has been continuously and traditionally followed. This would be evident from the civil (list) published after 1950 onwards. Opposite party Nos. 19 to 29 were appointed to the service by March, 1973 as per Annexure-4, before passing of the integration resolution (Annexure-2) dated 21-12-1973. Hence they should be placed above the petitioners. The petitioners by no stretch of imagination can be called as the promotees of the year 1973. The unreported decision relied upon by the petitioners has no application to the facts and circumstances of this case.

12. According to the petitioners, the concept of "year of allotment" is a myth whereas the opposite parties (Nos. 1, 2 and 4 to 80) contend that the principle of "year of allotment" has been continuously followed and this is according to the relevant rules and regulations. Rule 4 of the Recruitment Rules of 1959 provides for different methods of recruitment of O.A.S. II. Direct recruitment by competitive examination is one of such methods. Under Rule 5(2)" the competitive examination is to be conducted by the O.P.S.C. in accordance with the regulations as the State Government may, after consultation with the Commission, make in this behalf. Rule 10 provides that the percentage of persons that shall be recruited by way of promotion under Clause (b) of Rule 4 in any year shall be fifty of the total number of vacancies. Rule 11 provides for fixation of seniority of officers appointed to the service under Clauses (a), (b), (c) and (d) of Rule 4 in any year. Regulation 3 of Orissa Administrative Service Class-II (Appointment by Competitive Examination) Regulations, 1959 provides as follows: --

"3. Holding of examination.-- (1) A combined competitive examination shall be conducted by the Commission having regard to the likely number of vacancies each year in the manner prescribed in Schedule I for direct recruitment to the service....."

The aforesaid rules and regulations clearly indicate that the number of vacancies likely to arise in a particular year is initially determined by the Government, the number of persons to be recruited and promoted in accordance with the quota fixed under Rule 10 of the Recruitment Rules of 1959 is ascertained and thereafter a combined competitive examination is held by the Commission in respect of the direct recruits for the year. Rule 7 of the Recruitment Rules of 1959 provides that the number of persons to be recruited shall be determined by the State Government as and when occasion arises. The forecast made at the beginning may vary and invariably larger number of persons are appointed at the time of actual appointment. There is no restriction in the rules or the regulations that recruitment in excess of the forecast of the vacancies cannot be made. The use of words "as and when occasion arises" makes it abundantly clear. Moreover, in this case though the petitioners contend that larger number of officers were recruited than the vacancies advertised, they have not produced anything to come to finding that in fact more number of vacancies did not occur in those years. The process of recruitment by competitive examination takes considerable time and some times years together. Therefore, a notional year of allotment is fixed and unless that is fixed the quota as mentioned in Rule 10 of the Recruitment Rules, 1959 shall be rendered nugatory. It is only in respect of the vacancies of a particular year that the quota rule is applied. In the Orissa Administrative Service Class-II (Appointment by Promotion, Transfer and Selection) Regulations, 1959, express provision has been made for determining the "year of allotment" of the members of O.S. A.S.

Regulation 5(2) of the said regulations is as follows: --

"5. (2) Promotion.-- No person being a member of the Orissa Subordinate Administrative Service shall be considered for promotion to the service unless-

(a) his year of allotment in the cadre of the Orissa Subordinate Administrative Service must have been at least seven years preceding the year in which the Commission meets.

Explanation: -- For the purpose of this Sub-clause "year of allotment in relation to a member of the Orissa Subordinate Administrative Service mean the year in respect of which Government has decided to fill up a vacancy in that Cadre of the Orissa Subordinate Administrative Service against which the member is shown.

In Orissa Administrative Service Class-II (Appointment to the Selection Grade) Rules (sic) specific provision has been made for determining the "year of allotment". The relevant portion of rule of the said rules is as follows: --

"4. Condition of eligibility of appointment to Selection Grade. -- (1) No Deputy Collector shall be eligible for appointment to the Selection Grade unless his year of allotment is at least nine years preceding the year in which the appointment is made.

Explanation. -- For the purpose of this rule, the year of allotment in relation to a

Deputy Collector means the year in respect of which Government decided to fill up a vacancy in the cadre of the Orissa Administrative Service. Class-II against which the Deputy Collector is shown:

XX XX XX XX XX XX XX XX XX XX"

The expression "Deputy Collector" has been defined in Rule 2(a) of the said Rules. Deputy Collector means a member of the Orissa Administrative Service Class II. Thus, from the above it is clear that the "year of allotment" of the members of O.A.S.-II is to be fixed keeping in view the year in respect of which the Government decided to fill up the vacancies in the cadre.

13. On behalf of the petitioners it is argued that "year of allotment" principle is not a part of the Recruitment Rules of 1959. The principle is contained in the promotion regulations for Sub-Deputy Collectors and selection grade rules for Deputy Collectors. So, the principle is applicable only for the limited purpose of promotion and selection. This contention is not tenable. Even in the I.A.S. Recruitment Rules of 1954 there is, no provision dealing with the assignment of "year of allotment". The provision is contained in I.A.S. (Regulations of Seniority) Rules, 1954. The recruitment rules and regulations are consistent with the scheme that recruitment shall be made against the vacancies of a particular year. The principle of fixing the "year of allotment" has been continuously and traditionally followed. In the civil list of earlier years (at least from the year 1965 were placed before us) it was found that both in respect of promotees and direct recruits the "date of appointment" and "year of allotment" are separately mentioned A long standing practice which has been acted upon and acquiesced in for years resulting in rights accrued and benefits conferred and/or derived by assigning "the year of allotment" to thousands of recruits to the said cadre should not be disturbed. The gradation list (Annexure-14) has been prepared having due regard to the principle contained in Rule 11 of the Recruitment Rules of 1959 as well as the special provision contained in the resolution dated 21-12-1973 (Annexure-2). Basing on the aforesaid principles, opposite party Nos. 4 to 18 who were recommended by the O.P.S.C. for the year 1970 have been placed above the direct recruits of the said year. Similarly, opposite party Nos. 30 to 56 have been placed above the direct recruits of 1971. The recommendation was received after the passing of the integration resolution. Hence issue of formal appointment letters was not necessary. Applying the principle of "year of allotment" opposite party Nos. 19 to 29, who were appointed to service under Rule 4(a) of the Recruitment Rules of 1959 on the basis of the results of the combined competitive examination of 1970, have been treated as the direct recruits of 1970. These opposite parties entered the service in March, 1973 as per Annexure-4 much before passing of Annex. 2. As already held, the petitioners cannot be treated as promotees. Hence the above opposite parties should be placed above the petitioners. Similarly, opposite party Nos. 57 to 80 were appointed to service under Rule 4(a) of the Recruitment Rules of 1959 basing on the results of the competitive examination of 1971 and they have

been treated as the direct recruits of 1971. The petitioners, who were Sub-Deputy Collectors, were integrated to O.A.S.-II by virtue of the Government Resolution dated 21-12-1973 (Annexure-2) and not in accordance with the procedure prescribed in the Recruitment Rules of 1959. So, they have been placed below the direct recruits of the years 1970 and 1971.

14. Reliance has been placed by the petitioners on an unreported decision of this Court in O. J. C. Nos. 1130 and 1493 of 1978. In that decision this Court was considering the provisions of the Orissa Finance Service Rules, 1951. As it appears from the decision, the question of "year of allotment" was not available under the concerned rules for the cadre. Reliance was also placed on a decision reported in Chandrakant Sakharani and Others Vs. State of Maharashtra and Others, and it was contended that the resolutions (Annexures-1 and 2), which have been duly authenticated by a signature under the endorsement "By order of the Governor", and intended to be applicable straightway, can amount to rules framed in exercise of the powers conferred under the proviso to Article 309 of the Constitution, although the said 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. In the very same decision it has been held : --

"There is no particular charm in the expression "By order and in the name of the Governor" and its absence in any particular Circular, Order or Resolution would not be conclusive one way or the other for, even if such expression is absent it is well settled that the fact the instrument has been issued under the authority of the Governor can be proved by other evidence if necessary and if it is so proved, there would be no question of the relevant Circular, Order or Resolution getting vitiated by reason of its absence. Its presence also cannot be regarded as decisive on the point as to whether the contents of the instrument should be regarded as amounting to Rules under Article 309 or as containing executive instructions and the same will have to be regarded as of no consequence."

As it appears, the Rules of Business of Maharashtra specifically refer to Article 309 and provide for "persons appointed to the Public Service and posts in connection with the State" (proviso to Article 309) whereas there is no such corresponding provision in the Rules of Business of Orissa. In absence of any such indication in the Rules of Business, no inference can be drawn that the resolutions (Annexures 1 and 2) have the force of law, particularly when there is no indication in the resolutions themselves of overriding the statutory rules. On the contrary, there is clear indication in the resolutions that they are only executive instructions. Reliance was also placed on a decision reported in State of Uttar Pradesh and Another Vs. Dr. M.J. Siddiqui and Others, . This decision has no application to the facts and circumstances of the present case.

15. Before parting with this case we may mention that the direct recruits who have been assigned 1972 as their "year of allotment" were originally made

opposite party Nos. 81 to 90, but their names were deleted by order No. 11 dated 13-5-1981 in view of the petition filed by the petitioners on 15-4-1981. By resolution No. 41239/R dated 3-6-1980, though originally treated as seniors to the petitioners, they were made juniors. So, these opposite parties had filed a case numbered as O. J. C. No. 1366/80 challenging the aforesaid resolution of the Government. But subsequently by a resolution of the Government published in August, 1983, they have again been made senior to the petitioners. So the case filed by them (O. J. C. No. 1366/80) was not pressed. Now, after this case was over, they have filed application for intervention and have submitted written argument. But in view of the position indicated above, it is not necessary to consider their case in this writ petition.

16. After careful consideration of the facts and circumstances of the case and the argument of both sides, we are of the view that there is no merit in this writ petition. The writ petition is, therefore, dismissed. There would be no order as to costs.

Pathak, C.J.

I agree.

Mohani, J.

I agree.