

(1975) 08 OHC CK 0026
In the Orissa High Court
Case No : O.J.C. No. 1211 of 1974

Bira Kishore Das

APPELLANT

Vs

The State of Orissa and Others

RESPONDENT

Date of Decision : 05-08-1975

Acts Referred:

Bihar and Orissa Service Code, 1929 — Rule 1, 112, 36, 7, 71
Constitution of India, 1950 — Article 226, 227, 245, 246, 302
Government of India Act, 1935 — Section 241(2), 50(2), 59(2)

Citation : (1975) 41 CLT 1025

Hon'ble Judges : G.K. Misra, C.J.; P.K. Mohanti, J

Bench : Division Bench

Advocate : B.K. Mohanti and B.C. Mitra, for the Appellant; G. Rath, General, for the Respondent

Final Decision : Dismissed

Judgement

G.K. Misra, C.J.—The averments in the writ application may be stated in short Petitioner's date of birth is 12-7-1917. He entered into Government service as a ministerial servant on 24-1-1947 and retired as such on 11-7-1972 on the completion of his 55th year. The Bihar and Orissa Service Code (hereinafter to be referred to as the Bihar Code) continued in force in the State of Orissa by notification (Annexure-2) on 5-4-1937. The Orissa Service Code (hereinafter to be referred to as the Orissa Code) was drafted on 11-3-1939. Though it was published in the shape of a printed book it was not published in the Official Gazette. It was not authenticated in accordance with the rules for authentication of orders and instruments made u/s 59(2) of the Government of India Act, 1935 (hereinafter to be referred to as the Act). It was not approved by the Governor. Rule 1 of the Orissa Code prescribes that it would come into force with effect from 1-4-1939. The Orissa Code was not brought into force until 26-8-1950 when by Annexure-6 it was notified in the Orissa, Gazette that the Orissa Code shall be deemed to be a Code of Rules under Article 372, read with Article 309 of the Constitution of India. Thus by 24-1-1947 when the Petitioner entered into

Government service the Bihar Code was in force and not the Orissa Code. Petitioner is to be superannuated in accordance with Rule 75(b) of the Bihar Code which prescribes that a ministerial servant may be required to retire at the age of 55 years but should ordinarily be retained in service if he continues to be efficient up to the age of 60 years. Rule 71(a) of the Orissa Code has no application to the Petitioner's case and that the Petitioner shall be deemed to be continuing 10 service until he attains his 60th year. The writ application has been filed under Articles 226 and 227 of the Constitution for issue of an appropriate writ for quashing the order of retirement (Annexure-1).

Opposite parties 1 to 3 have filed a counter affidavit asserting that the Orissa Code came into force on 1-4-1939 after having been duly approved by the Cabinet and the Governor and that the Orissa Code has been duly authenticated. There is no provision that the Orissa Code should have been published in the Official Gazette to validly come into force. The Orissa Code was made applicable to Government servants with effect from 1-4-1939 and mutual rights and obligations of the Government servants have been worked out according to the Orissa Code with effect from 1-4-1939.

2. Petitioner's stand is that the Orissa Code came into force with effect from 15th of August, 1950 by Annexure-6 which is not retrospective. This notification may be extracted:

Government of Orissa Finance Department. Notification The 20th August 1950

No. 1171I-Estt. 126/49-F.- In exercise of the powers conferred by Article 309 of the Constitution of India, read with Article 302 thereof and in supersession of the Notification of the Government of Orissa in the Finance Department No. 2709.F. dated the 1st March 1950, the Governor of Orissa is pleased to direct that the Orissa Service Code shall be deemed to be a Code of Rules made under Article 309 and that following amendment shall be made in the said Code, namely:

Amendment

In the said Code the existing note and explanation appended to Rule 36 shall be omitted.

This amendment shall be deemed to have taken effect on and from the 28th January 1948.

BY ORDER OF THE GOVERNOR

Sd. B. Mukharji Chief Secretary to Government.

Mr. Mohanti's contention is that the Orissa Code came into Force with effect from 20th August, 1950 and was not given retrospective effect. The contention is negated by Rule 1 of the Orissa Code which runs thus:

1. This Code of Rules may be called the Orissa Service Code. Except where otherwise provided, the rules contained herein shall come into force with effect

from the 1st April 1939.

Annexure-6 in terms did not say that the Orissa Code shall come into force with effect from 1-4-1939. As the Orissa Code itself embodied a rule that it shall come into force with effect from 1-4-1939 the notification has retroactive operation and by it the Orissa Code shall be deemed to have come into force with effect from 1-4-1939.

3. To get over this difficulty Mr. Mohanti urged that the Constitution having come into force with effect from 26th January, 1950 Annexure-6 cannot have retrospective operation beyond 26th of January, 1950. This contention is equally unsound. It is now well settled that the Governor can make statutory Rules under Article 309 of the Constitution with retrospective effect see *B.S. Vadera Vs. Union of India (UOI) and Others*, . By virtue of that power the Governor can make Rules under Article 309 covering any period prior to the commencement of the Constitution..

In *A.H. Abdul S. and Co. v. State of Madras* AIR 1964 S.C. 1729, their Lordships made the following observation in paragraph 33:

.... The State Legislature is free to enact laws which would have retrospective operation. Its competence to make a law for a certain past period, depends on its present legislative power and not on what it possessed at the period of time when its enactment is to have operation.

This observation was made with reference to examination of the validity of the Madras General Sales Tax Act.

Under Article 309 the Governor regulates the recruitment and conditions of service of persons appointed to the public services of the State subject to the provisions of the Constitution and Acts of the appropriate Legislature. Just as a Legislature having plenary power over a particular subject can pass retrospective legislation the Governor having power to make Rules under Article 309 can make rules retrospectively to be effective in respect of a period prior to t be coming into force of the Constitution.

The power exercised by the Governor under Article 309 exercised u/s 241(2)(b) of corresponds to the power he the Act which runs thus:

2.a.(2) Except as expressly provided by this Act, the conditions of service of persons serving His Majesty in a civil capacity in India shall, subject to the provisions of this section, be such as may be prescribed

(b) in the case of persons serving in connection with the affairs of a Province, by rules made by the Governor of the Province or by some person or persons authorised by the Governor to make Rules for the purpose:

Similar observation was made in *The Union of India Vs. Madan Gopal Kabra*, .

While it is true that the Constitution has no retrospective operation, except

where a different intention clearly appears, it is not correct to say that in bringing into existence new Legislatures and conferring on them certain powers of legislation, the Constitution operated retrospectively. The legislative powers conferred upon Parliament under Article 245 and Article 246 read with List I of the Seventh Schedule could obviously be exercised only after the Constitution came into force and no retrospective operation of the Constitution is involved in the conferment of those powers. But it is a different thing to say that Parliament in exercising the powers thus acquired is precluded from making a retroactive law. The question must depend upon the scope of the powers conferred, and that must be determined with reference to the "terms of the instrument by which affirmatively, the legislative powers were created and by which, negatively, they were restricted.

Just as a Legislature can exercise powers retrospectively, the Governor can make Rules under Article 309 retrospectively and it is to govern cases in respect of a period prior to the coming into force of the Constitution.

4. On the aforesaid analysis we are clearly of opinion that even if the Orissa Code was not duly approved by the Governor and duly authenticated prior to its coming into force on 1-4-1939 it has come into force from that date by virtue of the notification (Annexure-6) issued in exercise of the powers conferred by Article 309 of the Constitution read with Article 372 thereof whereby the Governor of Orissa was pleased to direct that the Orissa Code shall be deemed to be a come of Rules made under Article 309. The Orissa Code came into force with effect from 1-4-1939 and the Petitioner was rightly retired on the completion of his 55th year by application of Rule 71(a) of that Code.

5. We now proceed to examine the first question whether the Orissa Code came into force on 1-4-1939 otherwise than under Annexure-6. This Code purports to have been made by the Governor of Orissa u/s 241(2)(b) of the Act.

Section 50(2) of the Act provides that the Governor in his discretion may preside at meetings of the Council of Ministers.

Rule 7 of the Rules of Business which was in force in 1939 is as follows:

The agenda for the meeting of the Council of Ministers and the place and time of the meeting of the Council shall be submitted to the Governor by the Chief Minister, and shall be subject to approval by the Governor in his individual judgment. In the absence of the Governor, the Chief Minister (or in his absence a Minister nominated by the Governor) shall preside at meetings of the Council.

6. We would now refer to the notings in File No. Code 13 of 1937 of the Finance Department.

On 20th of October, 1938 the draft of the Orissa Code was submitted to the Hon"ble Minister. Finance, for approval. Shri B. Dubey, Minister, Finance, noted on 24th of October, 1938 thus:

Should it not be decided in a meeting of the Council of Ministers?

On 31-10-1938 Mr. P.T. Mansfield, the then Chief Secretary, directed as hereunder:

"Please prepare a brief note for the Cabinet and I will take H. Eo's Order to put it on the agenda:"

On 8-11-1938 the then Governor Mr. G.T. Boag ordered as follows:

I have no objection to the going before the Cabinet now. But I foresee difficulty if there is any discussion with only one copy of the draft Code to refer to. It would have been more convenient if each Minister could have been supplied with a proof of the draft and it may be necessary to adjourn discussion of the subject for this purpose, if any controversial questions are raised.

On 9-1.1939 the Chief Secretary noted as follows:

H.C.M.

Your wished to see this file regarding the Service Code. The note prepared for the Cabinet will be found below under draft for approval. Orders have been already taken on all important points and I suggest either that the file be put up in an early Cabinet meeting or that it be disposed of without the Cabinet meeting after approval by H C.M. and H.E. Notes of pre-page may be seen.

On 15-1-1939 the Chief Minister Shri Biswanath Das asked the file to be placed before him after five days.

On 25.2.1939 the Chief Secretary recorded his minutes as follows:

H.E.

This file is regarding the Service Code. His Excellency Mr. Boag saw it at page 19. With H. M's approval I am putting down for discussion at the Cabinet on 1st March and the circulating note is being submitted separately together with the proof of the Service Code.

Sd. P.T. Mansfield

25.2.1939

Sd. Illegible

Governor?

26_2.

Thus the notice of the Chief Secretary was seen by the Governor on 26-2-1939. That the matter was placed before the Cabinet is manifest from the following notification:

Government of Orissa

Finance Department

No. 12

Memo No. 1754,58 F. Cuttack, the 25th Feb., 1939.

All Hon''ble Ministers

Secretary to Governor

Secretary to the Council of Ministers

The enclosed note is forwarded to his Excellency and all Hon''ble Ministers regarding the draft Orissa Service Code, which under the orders of Hon''ble Chief Minister is to be considered at the next meeting of the Cabinet on 1st March, 1939. The draft Code was accepted by Hon''ble Mr. Dubey as Minister of Finance subject to formal approval by the Cabinet and subject to consideration of certain points which are dealt with in the note below. Hon''ble Mr. Kanungo, as H.M. Home, also agreed that the draft should be placed before the Cabinet.

Sd. P.T. Mansfield

Chief Secretary to Government.

That the draft Code was accepted by the Cabinet would be evident from the following extract from the minutes of the Cabinet meeting dated 1st March, 1939.

The draft Code is accepted, with the amendments recommended In the note submitted to the Cabinet. If necessary, correction slips will be issued later. In Rules 80 and 112, no change will be made at present. Other suggestions will be taken up for examination later.

The aforesaid extract from the minutes of the meeting of the Council of Ministers was forwarded to the Secretary, Finance. The forwarding letter is extracted hereunder:

Government of Orissa

Council of Ministers.

No. 13

Memo No. 862/60 Cuttack, the 9th March, 1939.

As required under Rule 17(6) of the Subsidiary Rules of Business, the undersigned is directed to forward extracts from the Minutes of the meeting of the Council of Ministers held on the 1st March, 1939, for

information and necessary action.

Sd. P.T. Mansfield

Secretary to the Council of

Ministers....

There is no provision either in the Rules of Business or otherwise for maintaining a Minute Book of the proceedings of the Cabinet in detail as to who presided over the meeting or who moved a particular resolution. Rule 7 of the Rules of Business made it clear that it would be presided over by the Governor and in his absence by the Chief Minister and in then absence by any other Minister nominated by the Governor. As there was a meeting of the Cabinet obviously it must be in accordance with the rules and the draft Orissa Code was accepted by the Cabinet legally constituted.

Rule 14 of the Subsidiary Rules of Business prescribes that the Chid Secretary shall be the Secretary to the Council of Ministers.

Rule 17(6) provides that the-Secretary to the Council shall send to the Governor and the Secretary in the department or departments concerned a copy of the record of the decisions.

Under Rule 16 no case, except one of extreme urgency shall be discussed at, a Cabinet meeting unless the papers have been previously supplied to the Governor and the Ministers.

Under Rule 17(2) no case shall without the special order of the Governor be placed on the agenda of a meeting unless all the papers relating to it have already been issued to the Governor and the Ministers or are issued with the agenda paper.

The Governor and the Ministers are-not to sign the minutes of the Cabinet meeting. The resolution would be drafted by the Chief Secretary who is the Secretary to the Council of Ministers.

7. In this case all the rules were observed. The draft Code was circulated to the Council of Ministers and me Governor gave assent to the consideration of the draft Code being included on the agenda for Cabinet decision.! In the Cabinet meeting the draft Code was accepted and the Chief Secretary who is the Secretary to we Council of Minister sent information to all departments-that the draft Code was accepted and it came into force with effect from 1-4-1939.

8. The preface to the first edition of the Orissa Code published on 11th March, 1939, so far as relevant, runs thus:

The rules in the Orissa Service Code are those issued by the Governor of Orissa under Clause (b) of Sub-section (2) of Section 241 of the Government of India Act, 1935 to regulate the conditions of service relating to the pay allowances, leave, etc of.the Provincial Services, Special Officers and Subordinate Services under the rule making control of the Provincial Government.

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3. From the date on which this Code takes effect, it supersedes the rules in the Bihar and Orissa Service Code and those in the Fundamental Rules and the Subsidiary Rules of the Madras "Government, as the case may be.

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The very preamble of the Orissa Code is as follows:

Being rules made by the Governor of Orissa under Clause (b) of Sub-section (2) of Section 241 of the Government of India Act, 1935.

There is no rule that the Orissa Code would come into force only after it is published in the Orissa Gazette. The Orissa Code came into force from 1-4-1939, by virtue of its being accepted by the Cabinet. No further assent of the Governor was necessary when it was accepted in the Cabinet in which the Governor was to preside. In the absence of any proof to the contrary given by the Petitioner the presumption would be that the Governor presided over the meeting or in his absence the Chief Minister presided. Whoever might have presided, the approval of the Cabinet was the approval of the Governor and the resolution finally accepting it communicated to the Secretary to the Governor was merely incidental. The authentication was duly made by the Chief Secretary by his letter to all departments of the Government that the Orissa Code was a Code of rules formed under Clause (b) of Section 241(2) of the Government of India Act, 1935 which has been incorporated as the preamble to the Orissa Code. There is, therefore, no force in the contention that the Governor did not give approval to the Orissa Code and that it was not duly authenticated.

9. Both the contentions raised by Mr. Mohanti are untenable. We are clearly of opinion that the Orissa Code came into force on 1-4-1939 and the Bihar Code was not in force after 1-4-1939. In what case the Bihar Code or the Orissa Code would apply has been discussed in *Lingaraj Patnaik v. District Judge of Cuttack* and Ors. I.L.R 1971 Cutt 121 and *Bhagirathi Shaw v. Member, Board of Revenue* and Anr. 1972 (1) C.W.R. 750. On the admitted position that the Petitioner entered into Government service in 1947 he is governed, by the Orissa Code and was rightly retired on the completion of his 55th year under Rule 71(a) of the Orissa Code.

10. The writ application has no merit and is accordingly dismissed. But in the Circumstances, there will be no order as to costs.

P.K. Mohanti, J.

11. I agree