

(2013) 10 OHC CK 0027
In the Orissa High Court
Case No : W.P. (C) No. 2254 of 2002

Chitaranjan Sahoo

APPELLANT

Vs

State of Odisha

RESPONDENT

Date of Decision : 22-10-2013

Acts Referred:

Citation : (2014) 1 ILR (Ori) 473

Hon'ble Judges : M.M. Das, J; Akshaya Kumar Rath, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Dr. A.K. Rath, J.—The petitioners have called in question the legality and propriety of the order dated 10.12.2001 passed by the learned Orissa Administrative Tribunal, Cuttack Bench, Cuttack (hereinafter referred to as "Tribunal") in O.A. No. 3414(C) of 1999 vide Annexure-14. By the said order, learned Tribunal came to hold that the Office Memorandum dated 16.12.1992 shall hold the field in the matter of recruitment of the Officers of Orissa Soil Conservation Service and the quota of direct recruitment shall be worked out according to the provisions laid down in the said Office Memorandum, within one year from the date of receipt of the order after which the merit list prepared by Orissa Public Service Commission (in short "OPSC") shall outlive its validity. This case has a chequered history. Several cases were filed by different employees at different point of time before the learned Tribunal. Some of the cases had travelled from this Court to the Hon'ble Supreme Court. But then, the subject matter of dispute still remains quandary. Initially under the Agriculture Department, there was only one Directorate, namely, Director of Agriculture and Food Production. Thereafter, the Directorate of Horticulture and Directorate of Soil Conservation were created in the year 1977 and 1978 respectively. With regard to the recruitment to the Class-II (present Group-B) posts under the Directorate of Soil Conservation, no rule under proviso to Article 309 of the Constitution of India has been framed till yet. On 13.07.1976, the Government

had issued a letter to the Director of Agriculture and Food Production prescribing the guidelines with regard to the method of recruitment to the posts of Asst. Soil Conservation Officers (hereinafter referred as "ASCOs"). After creation of Directorate of Soil Conservation, on 30.03.1982 another letter was issued by the Government to the Director of Soil Conservation (hereinafter referred as "1982 instructions") prescribing the method of recruitment to the post of ASCOs vide Annexure-1. The said letter provides that 50% of the vacancies arising in a year on the 1st day of August of the year in which the vacancy arises, shall be filled up by direct recruitment by persons having qualifications prescribed therein and the remaining 50% of the vacancies shall be filled up by promotion from amongst the Senior Soil Conservation Assistants on fulfilling the requisite criteria mentioned therein. Clause 2 of the notification provides that the principles enumerated therein shall remain in force till the recruitment rules in pursuance of the proviso to Article 309 of the Constitution of India are framed or till any further instructions are issued by the Government, whichever is earlier. The said letter was issued in supersession of the earlier letter dated 13.07.1976, A group of Asst. Soil Conservation Assistants filed O.A. No. 131/1988 before the learned Tribunal praying therein that the entire recruitment should be done by way of promotion from the rank of Soil Conservation Assistants. A challenge was made to the prescription of 1:1 ratio between the direct recruits and promotees in the grade of ASCOs as fixed by 1982 instructions. By order dated 6.5.1991, learned Tribunal dismissed the said O.A.

2. While the matter stood thus, the State Government issued an Office Memorandum dated 16.12.1992 (hereinafter referred to as "1992 Office Memorandum") vide Annexure-2 for regulating the matters of recruitment to the posts and conditions of service of the persons appointed to the Orissa Soil Conservation Services. On a conspectus of the 1992 Office Memorandum, it is evident that pending framing of rules for regulating the matters of recruitment to the posts and conditions of service of the persons appointed to the Orissa Soil Conservation Service under proviso to Article 309 of the Constitution of India, the Government have decided to issue the said executive instructions.

3. Clause 4(2) of the 1992 Office Memorandum provides that the recruitment to the posts in Soil Conservation Service, Class-II shall be made by direct recruitment in accordance with rule 5; and by promotion from among the Junior Soil Conservation Officers in accordance with rule 6.

Clause 5(1) provides that recruitment in any year to the Soil Conservation Service, Class-II shall be made by way of direct recruitment and promotion in the ratio of 1:2. Clause 5(2) provides that the number of direct recruits and promotees in the Orissa Soil Conservation Service, Class-II shall be reviewed every three years and upon such review necessary adjustment shall be made to maintain the ratio mentioned in sub-rule (1). Clause 17 provides that all rules, orders and instructions hereto in force pertaining to and in conflict with subject matter of any of the provisions of these rules are hereby repealed.

4. The 1992 Office Memorandum was challenged by one Rusi Guman Singh, working as Assistant Soil Conservation Officer, Khurda in O.A. No. 27/93 before the learned Tribunal. By an interim order dated 11.11.1993, learned Tribunal granted interim stay on the operation of the 1992 Office Memorandum. However, by an interim order, learned Tribunal directed that the authorities might give ad hoc appointment. Finally, the said O.A. was disposed of as withdrawn with liberty to file a fresh application. Pursuant to the interim order passed in O.A. No. 27/93, the State Government had promoted 18 JAOs and 5 JAEs to the rank of ASCOs on ad hoc basis. Challenging such ad hoc appointments to the rank of ASCOs, two Jr. Soil Conservation Officers filed O.A. No. 931/96 before the learned Tribunal. As the term of the ad hoc appointees had expired, learned Tribunal disposed of the said O.A. along with other O.As., such as O.A. Nos. 932/96, 943/96, 963/96 and 981/96 respectively as infructuous on 2.4.1997 with the observation that the draft rules should be sent to the OPSC for finalisation within a fortnight. It was further observed that the existing 24 vacancies ought to be filled up in consultation with the OPSC in accordance with 1982 instructions. It was also observed that pending selection of candidates in consultation with the OPSC, ad hoc appointments were to be made following the provisions of ORV Act.

5. While the matter stood thus, one Laxman Kumar Barik and others filed O.A. No. 1148/97 before the learned Tribunal praying for a direction to carry out the stipulation in the 1992 Office Memorandum with regard to the direct recruitment and promotion in the rank of ASCOs. Learned Tribunal directed the applicants therein to make representations to the State Government in that behalf and disposed of the aforesaid O.A. Again another Original Application being O.A. No. 756/1999 was filed before the learned Tribunal challenging inter alia the appointment of one Bipin Bihari Mallick, an I.A.S. Officer to the post of Director, Soil Conservation. Challenge was made on the ground that there was no provision for posting of an I.A.S. Officer as Director of Soil Conservation. There was no statutory rules governing the method of recruitment, but in the 1992 Office Memorandum, the State Government have issued certain executive instructions. The said O.A. was disposed of on 29.6.1999 holding inter alia that the executive instructions were issued pending framing of rules governing the matters relating to recruitment of Soil Conservation Officers and since the 1992 Office Memorandum are in the nature of executive instructions under Article 166 of the Constitution of India, they are binding on all concerned until rules under Article 309 of the Constitution of India are framed. The learned Tribunal held that the 1992 Office Memorandum embodied certain executive instructions governing the method of recruitment, conditions of service etc. of Soil Conservation Officers in the State and these would remain binding till these were repealed by an Act or Rules made under Article 309 of the Constitution of India or the proviso there to.

6. At this juncture, one Hemanta Kumar Das and others, who were working as Jr. Soil Conservation Officers filed O.A. No. 2473/1999 before the learned Tribunal praying for a direction to the State Government to apply the provisions contained

in the 1992 Office Memorandum governing the matters relating to recruitment to Soil Conservation Service, that the instructions laid down in the 1982 instructions had no application and to quash the advertisement No. 2 of 1998-99 dated 27.5.1998 for recruitment to the post of ASCOs. The learned Tribunal dismissed the aforesaid O.A. holding inter alia that the OPSC rightly followed the 1982 instructions and recommended 43 names and therefore, the selection of the candidates made by the OPSC for direct recruitment to the posts of ASCOs was legal and valid. While coming to the finding, learned Tribunal relied upon the earlier directions made in O.A. No. 931/96 and similar other cases and the order dated 12.5.1998 passed by this Court in O.J.C. No. 6012/98. Be it noted that the order passed in O.A. No. 931/96 was confirmed by this Court by the aforesaid order. The learned Tribunal further observed that this Court directed that the orders shall operate, even if any order contrary to the order was passed by any authority including the learned Tribunal. The matter went to Hon"ble Supreme Court. The Supreme Court dismissed the SLP.

7. It is apt to state here that while disposing of O.J.C. No. 6012 of 1998, this Court observed that the ad hoc appointments are creating problems and against the spirit of the order passed by the learned Tribunal and directed that till final decision is taken by the OPSC, no ad hoc appointment shall be made. In Misc. Case No. 5017 of 1999 arising out of O.J.C. No. 6012 of 1998, this Court passed an order on 2.7.1999 that the State Government is free to make appointment from the select list prepared by the OPSC and the order shall operate even if any order to the contrary has been passed by any authority including the learned Tribunal. Challenging the order dated 30.4.1999 passed in Misc. Case No. 5017 of 1999, two SLP Nos. 12317 & 12318 of 1999 were filed by Sashi Bhusan Pani and others before the Supreme Court. On 19.11.1999 the Supreme Court, not being inclined to interfere with the order passed by this Court, disposed of the said SLPs with an observation that the impugned order of this Court does not in any way affect the jurisdiction of the Tribunal to decide the pending O.A. on its own merit. Again another writ petition was filed before this Court being O.J.C. No. 15026 of 1999 by the opposite parties with a prayer to dispose of the O.A. expeditiously. The said writ petition was disposed of on 3.2.2000 with a direction to the learned Tribunal to dispose of the O.A.

8. While the matter stood thus, the opposite party No. 4 filed O.A. No. 3414(C) of 1999 before the learned Tribunal for a direction to the State of Orissa to fill up the posts of ASCOs according to the 1992 Office Memorandum by recasting the number of vacancies meant for direct recruits. A further direction was sought for to direct the State of Orissa not to fill up 28 posts in the cadre of ASCOs by way of direct recruitment as per advertisement No. 2 of 1998-99 issued by the OPSC. The case of the applicant is that he is a Junior Soil Conservation Officer and is an aspirant to the post of ASCO by direct recruitment, but his candidature as an in-service candidate was rejected at the time of verification. There is no statutory rules for regulating the method of recruitment and conditions of service of employees of the Directorate. In supersession of the earlier instructions dated

13.7.1976, the Government had issued fresh instructions on 30.3.1982. In 1998, the OPSC had issued an advertisement on 27.5.1998 inviting applications for recruitment to the posts of ASCOs. According to the said advertisement, out of 28 posts, 18 posts were reserved. The 1982 instructions were repealed to the extent of inconsistency with the 1992 Office Memorandum. The earlier ratio 50:50 between direct recruits and promotees was changed to 1:2. The total posts of ASCOs were 73, out of which 6 were abolished. So there remained a cadre strength of 67 posts. According to the 1992 Office Memorandum, there should be 22 direct recruits and 45 promotees. Since there were 13 direct recruits and 20 promotees in the cadre, the balance 34 posts would be filled up in accordance with the 1992 Office Memorandum, i.e., 9 by direct recruits and 25 by promotees, by maintaining the ratio of 1:2 between the direct recruits and promotees. Therefore, the advertisement to fill up 28 posts by direct recruitment is illegal.

9. A counter affidavit was filed by the State of Orissa contending inter alia that in O.A. No. 931/96, the learned Tribunal misinterpreted the order dated 2.4.1997 that the 1992 Office Memorandum draft rules and gave direction to forward the said draft rules within a fortnight to the OPSC and to follow the 1982 instructions in making appointment to the post of ASCOs. The 1992 Office Memorandum was challenged in O.A. No. 27/93 in which learned Tribunal granted interim stay on the said Office Memorandum. Ultimately, the said O.A. was withdrawn. Furthermore, in the said Office Memorandum, the 1982 instructions were repealed to the extent of repugnancy.

10. After hearing the matter in extenso, learned Tribunal by order dated 10.12.2001 allowed the O.A. holding inter alia that the 1992 Office Memorandum issued pending framing of rules under the proviso to Article 309 of the Constitution are executive orders or executive instructions or at best administrative rules and not the draft rules and these will hold the field in the matter of recruitment etc. of the officers of the Orissa Soil Conservation Service and their service conditions, till laws are made by the State Legislature under Article 309 of the Constitution or the Governor makes rules in exercise of the power conferred by proviso to Article 309 of the Constitution. The learned Tribunal further came to hold that these executive instructions or administrative rules repealed the 1982 instructions by Clause 17 to the extent of its repugnancy and these rules cannot, therefore, be applicable to the matters of recruitment and service conditions of Orissa Soil Conservation Officers. The learned Tribunal further observed that the OPSC has already prepared a list of 43 candidates in order of merit for recruitment pursuant to advertisement No. 28 of 1998-99 and notified the same on 27.5.1999. Since the 1992 Office Memorandum shall hold the field, the quota of direct recruitment shall be worked out according to the provisions laid down in the executive instructions or administrative rules and appointments be given to direct recruits to the extent of their quota only, within one year from the date of receipt of the order, after which the list shall outlive its validity. The said order is impugned in the present writ petition.

11. Pursuant to issuance of notice, one Braja Mohan Rout, Deputy Secretary to Government, Agriculture Department has filed counter affidavit on behalf of opposite party No. 1 reiterating its stand taken before the learned Tribunal.

12. The OPSC-opposite party No. 3 filed a counter affidavit. The case of the opposite party No. 3 is that on the basis of requisition (with draft advertisement) and clarification submitted by the State Government of Orissa in its Agriculture Department letter dated 15.5.1996, 30.4.1997 and 13.5.1998 respectively, advertisement No. 2 of 1998-99 was issued by the OPSC for filling up 28 posts of ASCOs. There was no recruitment rule for filling up the aforesaid post in question. The advertisement was issued prescribing the eligibility conditions as per the Government Letter No. 30.3.1982. In response to the said advertisement, 375 applications including the applications of the petitioners were received. After completion of recruitment process, it submitted the recommendation in respect of 43 candidates in its letter dated 29.05.1999.

13. Opposite party No. 4, applicant before the learned Tribunal, also filed a counter affidavit reiterating the facts mentioned in O.A. No. 3414 (C) of 1999.

14. We have heard Mr. Manoj Mishra, learned Senior Advocate for the petitioners, Mr. J.P. Patnaik, learned Additional Government Advocate for the State, Mr. A.K. Mishra, learned Senior Advocate for opposite party No. 4 and Mr. B. Routray, learned Senior Advocate for opposite party No. 10.

15. In course of hearing, Mr. Manoj Mishra, learned Senior Advocate submitted that the 1992 Office Memorandum is a draft rule, which has been conclusively held by the learned Tribunal as well as this Court and the 1982 instructions still hold the field. He further submitted that the 1992 Office Memorandum having not been acted upon by the Government, the same has been repealed quasily in view of law of desuetude. He further submitted that opposite party No. 4 having taken a calculative chance of appearing at the interview, cannot challenge the selection process, merely because the result is not palatable to him. There is gross delay and latches on the part of opposite party No. 4 in approaching the learned Tribunal. He further submitted that the select list prepared by the OPSC is still valid and necessary direction may be issued by this Court to appoint the persons, who are in the select list.

16. Per contra, Mr. A.K. Mishra, learned Senior Advocate supported the order passed by the learned Tribunal and submitted that the 1992 Office Memorandum is an Executive Instruction, which supersedes 1982 instructions. In absence of recruitment rule framed by the State Government, the 1992 Office Memorandum governs the field, so far as matters relating to recruitment to Orissa Soil Conservation Service. He further submitted that the advertisement for filling up 28 posts of ASCOs is not in consonance with 1992 Executive Instructions in as much as only 9 posts could have been filled up by way of direct recruitment. He further submitted that validity of selection list prepared by the OPSC is one year, as would be found from Clause 10.5 of the 1992 Office Memorandum and by

efflux of time, the same has expired.

17. Mr. J.P. Patnaik, learned Additional Government Advocate submitted that order of the learned Tribunal holding that 1992 Executive Instructions are not draft rule, is perfectly legal and valid. He further submitted that in an application under Article 227 of the Constitution of India, this Court, in its supervisory jurisdiction should not interfere with the order of the learned Tribunal, even if a different view is possible, since there is no infirmity/illegality in the order.

18. Mr. B. Routray, learned Senior Advocate appearing for opposite party No. 10 adopted the argument made by Mr. Manoj Mishra, learned Senior Advocate. He submitted that Rule-11 of the Orissa Government Rules of Business clearly provides that all orders or instruments made or executed by the order or on behalf of the Government of Orissa shall be expressed to be made by order of or executed in the name of the Governor of Orissa. He further submitted that since 1992 Office Memorandum has not been issued by the order of the Governor nor placed before the Cabinet as per the procedure in part-III of the Rules of Business, the same cannot be treated as an Executive Instruction and as such, 1982 instructions still hold the field.

19. On the rival pleadings and submissions made by the learned counsel appearing for the respective parties, the following points emerge for our consideration:-

(1) Whether the 1992 Office Memorandum is a draft rule or Executive Instruction governing the matters relating to recruitment to Orissa Soil Conservation Service?

(2) Whether the select list prepared by OPSC is still valid or have lapsed?

(3) Whether the opposite party No. 4 has any locus standi to file Original Application before the learned Tribunal?

(4) Whether the petitioners are entitled to any relief? Point No. 1

20. In the case of Sant Ram Sharma Vs. State of Rajasthan and Another, , a Constitution Bench of the Supreme Court held that the Government cannot amend or supersede the statutory rules by administrative instructions, but if the rules are silent on any particular point, the Government can fill up the gap and supplement the rules and issue instructions not inconsistent with the rules already framed. The same view has been reiterated by another Constitution Bench in the case of Naga People's Movement of Human Rights Vs. Union of India (UOI), . In the said case, the Supreme Court held that the Executive Instructions are binding, provided the same have been issued to fill up the gap between the statutory provisions and are not inconsistent with the said provisions. Admittedly, no rule is framed under proviso to Article 309 of the Constitution of India. The 1982 Executive Instructions have been issued by the Agriculture and Cooperation Department providing method of recruitment to the post of ASCOs. Clause 2 of the said instructions provide that the principles enumerated therein shall remain in force till the recruitment rules in pursuance

of the proviso to Article 309 of the Constitution of India are framed or till any further instructions are issued by Government, whichever is earlier. While the matter stood thus, the Government of Orissa in the Department of Agriculture issued the 1992 Office Memorandum. The same provides that pending framing of rules for the purpose of governing the matters relating to recruitment to Soil Conservation Service under proviso to Article 309 of the Constitution of India, Government have decided to make Executive Instructions for regulating the matters of recruitment to the posts and conditions of service of the person appointed to the Orissa Soil Conservation Service, which means pending framing of rules under proviso to Article 309 of the Constitution of India, the Executive Instruction contained in the said Office Memorandum would regulate the matters of recruitment to the posts and conditions of service of the persons appointed to the Orissa Soil Conservation Service. Though Mr. Routray, learned Senior Advocate submitted that since the 1992 Office Memorandum has not been executed in the name of Governor of Orissa, the same cannot be treated as an Executive Instruction in view of the Rule-11 of the Rules of Business, with profound respect to the learned Senior Advocate, it is difficult to comprehend the said contention. Both the 1982 Executive Instructions and the 1992 Office Memorandum have been issued by the Agriculture Department, Government of Orissa. Merely because the 1982 Executive Instructions, which have been amended in the year 1998 and the amending instruction was issued by the Under Secretary to Government of Orissa by the order of the Governor, by no stretch of imagination, it can be said that the 1992 Office Memorandum have not been issued in accordance with Rule-11 of the Rules of Business. At the cost of repetition, we reiterate that the 1982 Executive Instructions and the 1992 Office Memorandum have been issued by the Agriculture Department, Government of Orissa.

21. Next we will examine as to whether the 1992 Office Memorandum stood repealed quasily in view of law of desuetude. Desuetude is a legal process by which, through disobedience and lack of enforcement over a long period, the statute loses its force without express or implied repeal. In the case of Municipal Corporation for City of Pune and another Vs. Bharat Forge Co. Ltd. and others, , the Supreme Court in paragraph-34 of the report held that though in India the doctrine of desuetude does not appear to have been used so far to hold that any statue has stood repealed because of this process, there is no objection in principle to apply the said doctrine to the statute of India. The Supreme Court further came to hold that this is for the reason that a citizen should know whether, despite a statute having been in disuse for long duration and instead a contrary practice being in use, he is still required; to act as per the "dead letter". In the said case, the Supreme Court was called upon to decide as to whether 1918 notification issued by the Government of India imposing tax mentioned in the said notification or 1963 new Octroi Rules will hold the field. While coming to the aforesaid conclusion, their Lordships held that from the materials available on record, 1918 notification has not been implemented till date and in fact

contrary practice has been followed for a long period. In the said context, it is held that 1918 notification stood repealed quasily by the time new Octroi Rules came to be framed in 1963. The said doctrine has no application in the facts and circumstances of the present case. It is true that 1982 Executive Instructions have been amended in the year 1998, but then several appointments have been made, such as, Director of Soil Conservation, in accordance with the 1992 Office Memorandum. Since no contrary practice has been followed, we hold that the doctrine of desuetude has no application in the instant case.

22. Thus, the findings of the learned Tribunal that the said Office Memorandum issued pending framing of rules under the proviso to Article 309 of the Constitution of India, are the executive orders or Executive Instructions or at best administrative rules and not the draft rules and these will hold the field in the matter of recruitment etc. of the Officers of the Orissa Soil Conservation Service and their service conditions cannot be faulted. Clause 17 of the 1992 Office Memorandum provides that all rules, orders and instructions hereto in force and pertaining to and in conflict with subject matter of any of the provisions of these rules would stand repealed. Thus, the 1992 Office Memorandum expressly repealed the 1982 instructions by Clause 17 to the extent of their repugnancy and 1982 Executive Instructions cannot, therefore, be applicable to the matters of recruitment and service conditions of ASCOs. Thus in the absence of any rule framed under proviso to Article 309 of the Constitution of India, the 1992 Office Memorandum is still holding the field pertaining to the matters of recruitment and service conditions of ASCOs.

Point Nos. 2 and 4

23. The submission of Mr. A.K. Mishra, learned Senior Advocate is that the select list prepared by OPSC is valid for one year as per Clause 10.5 of the 1992 Office Memorandum, and no direction can be issued to appoint the selectees from the list prepared by OPSC on 27.05.1999. He submitted that Clause 10.5 of the 1992 Office Memorandum provides that in case of initial recruitment through competitive examination, the recommendation of the Commission shall remain valid for a period of one year from the date of its approval by the Government or till the next list is prepared by the Commission, whichever is earlier. He cited decisions of the Supreme Court in the case of *Shankarsan Dash Vs. Union of India*, , the *State of Orissa and Another Vs. Rajkishore Nanda and Others* etc. etc., and *Government of Orissa through Secretary, Commerce and Transport Department, Bhubaneswar Vs. Haraprasad Das and Others*, . The Constitution Bench in the case of *Shankarsan Dash (supra)* held that appearance of the name of a candidate in the select list does not give him a right for appointment. In the case of *Rajkishore Nanda (supra)*, the Supreme Court held that a person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for the purpose of appointment and by itself does not amount to select or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in

conformity with the constitutional mandate. The Supreme Court further held that a select list cannot be treated as a reservoir for the purpose of appointments, that vacancy can be filled up taking the names from that list as and when it is so required and no relief can be granted to the candidate if he approaches the Court after expiry of the select list. Further, if the selection process is over, select list has expired and appointments had been made, no relief can be granted by the court at a belated stage. In the case of Haraprasad Das (supra), it is held that if the Government decides to make further appointments for a valid reasons, it cannot be said that it has acted arbitrarily by not appointing those whose names are included in the select list. It is further held that whether to fill up a post or not is a policy decision and unless it is shown to be arbitrary, it is open to the Tribunal to interfere with such decision of the Government and direct it to make further appointments.

24. The instant case is required to be examined on the anvil of the decisions cited supra. Immediately after preparation of select list by the OPSC, opposite party No. 4 approached the learned Tribunal. As would be evident from the facts narrated in the preceding paragraphs, several O.As. were filed at different points of time and spate of orders were passed in the said original applications. In view of pendency of several cases before the learned Tribunal at different points of time and spate of orders passed by the learned Tribunal, no appointment could be made. In the case of State of U.P. Vs. Ram Sawrup Saroj, , the U.P. Public Service Commission, on a requisition made by the Allahabad High Court, held an examination in the year 1990 for selecting suitable candidates for appointment of Munsifs. The respondent, who belongs to a Scheduled Caste, appeared in the written examination and was declared having passed the same. He was also called for an oral interview on 17.10.1994. The result of the selection was declared on 25.11.1994. He had secured 432 out of 950 marks. The last two candidates appearing in the list of successful candidates belonging to the Scheduled Caste category were Shambhu Nath and Rahul Kumar Katyal, who had secured 433/950 marks each. From out of the list of successful candidates belonging to the Scheduled Caste category, all excepting one Narendra Pratap Singh joined the service. In the month of October 1997, the respondent filed a writ petition before the Allahabad High Court seeking a direction to the State of Uttar Pradesh to offer the vacancy created by non-joining of Narendra Pratap Singh. The High Court of Allahabad held that it would serve the interest of justice, if the respondents were directed to fill in the vacancy available in the category of Scheduled Caste candidates in the order of merit from out of the waiting list by appointing one who was willing to join the post. The said judgment was challenged by the State of U.P. before the Supreme Court. In paragraph-10 of the report, their Lordships held that select list was finalized in the month of November 1996 and the writ petition was filed by the respondent in the month of October 1997, i.e., before expiry of one year from the date of the list. Their Lordships further held that merely because period of one year had elapsed during the pendency of litigation, the respondent could not be denied any relief which

he was entitled to. The ratio of the said decision applies with full force to the facts and circumstances of the present case. On a conspectus of Clause 10.5 of the 1992 Office Memorandum, it is evident that the select list is valid for a period of one year from the date of its approval by the Government or the next list is furnished by the Commission, whichever is earlier. The said clause further provides that in extraordinary circumstances, when for any reason, appointments have not been completed and the list recommended has not been exhausted, Government by special order, may extend the validity period as necessary, but not later than the date of the next recommendation of the Commission. If the said Clause is read as whole, it is crystal clear that recommendation of Commission is valid for a period of one year from the date of its approval by the Government or the next list is furnished by the Commission whichever is earlier, but then in extraordinary circumstances, when for any reason, appointments have not been completed and the list so recommended by the Commission has not been exhausted, the Government by special order may extend validity of the period, but not later than the date of next recommendation of the Commission. From the list prepared by the Commission, in view of the pendency of several cases and spate of orders passed by the learned Tribunal as well as this Court, no appointment could be made. Though the selectees, have appeared at the interview and became successful, have no indefeasible right to be appointed to the post of ASCOs, merely because their names found place in the merit list, but in view of the pendency of several cases none of the selectees from the merit list was appointed. In the meantime, they have crossed the upper age limit of 31 years prescribed in the 1992 Office Memorandum and are in-eligible to appear at the interview. Thus, we direct opposite party No. 1, the State of Orissa, to extend the validity period of select list in exercise of its power contained in Clause 10.5 of the 1992 Office Memorandum.

Point No. 3

25. Mr. Manoj Mishra and Mr. B. Routray, learned Senior Advocates submitted that since the applicant, opposite party No. 4 has taken a calculated chance, appeared at the interview then, only because result of interview is not palatable to him, he cannot turn round and subsequently contend that process of interview was unfair or selection committee was not properly constituted. They have cited decisions of the Supreme Court in the case of Madan Lal and Others Vs. State of Jammu and Kashmir and Others, and Dhananjay Malik and Others Vs. State of Uttaranchal and Others, . The said decisions are distinguishable in the facts and circumstances of the present case. The applicant before the Tribunal has not challenged the process of interview or constitution of the selection committee. He has prayed, inter alia, for a direction to the State of Orissa to fill up the post of ASCOs according to the 1992 Office Memorandum by relaxing the number of vacancies meant for direct recruits. A further direction was sought that the State of Orissa cannot fill up 28 posts of ASCOs by way of direct recruitment as per Annexure-3. We, therefore, concur with the finding of the learned Tribunal that opposite party No. 4 has locus standi to file the case.

26. Mr. A.K. Mishra, learned Senior Advocate submitted that only nine posts could be filled up by way of direct recruitment. We do not delve into that aspect of the matter. We, therefore, direct opposite party Nos. 1 and 2 to calculate the vacancies and fill up 1/3rd of the same in accordance with the 1992 Office Memorandum. Though Mr. Mishra argued that reservation can not exceed 50% of the total number of vacancies, since the said point had neither been raised nor argued before the learned Tribunal nor it was answered, it is not possible for this Court to decide the said issue.

27. In view of the discussions made in the preceding paragraphs, we affirm that part of the order dated 10.12.2001 passed by the learned Tribunal in O.A. No. 3414 (C) of 1999 vide Annexure-14, where it is held that the 1992 Office Memorandum is an Executive Instruction and will hold the field, till a rule under the proviso to Article 309 of the Constitution is framed, but we are unable to persuade ourselves with the view of the learned Tribunal that the appointments should be given to direct recruits to the extent of their quota only within one year from the date of receipt of the order, after which, the list shall outlive its validity. We, therefore, direct the opposite party Nos. 1 and 2 to take a decision within a period of two months with regard to the validity period of the select list prepared by OPSC as provided under Clause 10.5 of the 1992 Office Memorandum and appoint persons from the said list in accordance with the said Office Memorandum. Before parting with the case, we would like to observe that the aforesaid impasse has been created by opposite party Nos. 1 and 2 due to non-framing of rules under the proviso to Article 309 of the Constitution of India and issuing Executive Instructions from time to time. Had earlier steps been taken at the behest of the Government, the employees could not have approached the learned Tribunal as well as this Court and precious time of the Court would have been saved. We hope and trust that the Government would take steps to frame a rule pertaining to service conditions of employees of the Orissa Soil Conservation Service as early as possible to avoid further complications and further litigations.

With the aforesaid modification of the impugned order, the writ application is allowed. There shall be no order as to costs.