

(1971) 07 OHC CK 0029

In the Orissa High Court

Case No : O.J.C. No's. 876 and 1555 of 1968 and No's. 913, 914 and 915 of 1969

Dr. Rajendralal Ghose and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 22-07-1971

Acts Referred:

Constitution of India, 1950 — Article 15, 228, 309
Government of India Act, 1935 — Section 241
Orissa Medical Service Rules, 1941 — Rule 1, 11, 12, 13, 14

Citation : (1971) 37 CLT 980

Hon'ble Judges : R.N. Misra, J;B.C. Das, J

Bench : Division Bench

Advocate : P. Palit and J. Patnaik, for the Appellant; S.S. Basu and M. Patra and Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

R.N. Misra, J.—These are five applications under Article 228 of the Constitution, each case by a doctor who belongs to the Orissa medical Service. Though each of them was recruited into the service on different dates and there is disparity in qualification among themselves each of them has made a common cause so far as the present proceeding is concerned and we are called upon to decide a question common to each of the petitions. The learned Counsel for both sides have argued in the same way and we have heard only one set of arguments. Therefore, we propose to dispose of all the five applications by one judgment.

2. It is not necessary to deal with the facts enumerated in each of the writ applications. Suffice to say that at the relevant date each of the Petitioners was an Assistant Surgeon belonging to the Orissa Medical Service. The Orissa Medical Service has been constituted under a set of rules framed on 27.8.1941 u/s 241 of the Government of India Act, 1935. We shall first extract the relevant rules:

(1) The Orissa Medical Service shall consist of Civil Surgeons appointed ,by

promotion from the ranks of Assistant Surgeons, and Assistant Surgeons, and will include such other posts as the Governor may, from time to time, declare to be included therein.

(2) Recruitment to the Orissa Medical Service shall be:

(a) by direct recruitment in accordance with the rules in Part II, or

(b) by promotion in accordance with the rules in Part III.

Part II deals with direct appointments. As there is no dispute about recruitment of Assistant Surgeons into the service we do not propose to refer to the rules in Part 11. Part III deals with promotion of officers already in Government service. Rules 11 to 18 provide:

11.(a) The director of Health and Inspector General of Prison, after consulting the Civil Surgeons and the Superintendent, Cuttack, General Hospital and the Principal, Orissa Medical School, will nominate for promotion to the Orissa Medical Service such number of Officers from the Subordinate Medical Service as may be fixed in each year by the Governor. The names of the Officers so nominated shall ordinarily be arranged in order of seniority and if an officer is placed higher in the list than his seniority warrants, the reasons for so doing shall be recorded and the records of any officers thereby superseded shall be sent to the Commission, together with a report of the grounds for supersession.

(b)

12. The Commission shall arrange the names of the officers in order of merit and advise the Governor in respect of each officer nominated whether his qualifications are sufficient and whether his record proves him to have the requisite character and professional ability for the service to which it is proposed to appoint him.

13. The final selection of officers to be promoted shall be made by the Governor after considering the recommendations made by the commission under Rule 12.

3. Though sufficient opportunity was given to the learned Government Advocate who appeared on behalf of the State before us, no rules relating to the Subordinate Medical service have been placed before us. There can be no dispute that the Subordinate Medical Service is different from the Orissa Medical Service. We are told at the Bar that the Orissa Medical School which is now non-exist used to provide teaching for the Diploma in Licentiate in Medical Practice (usually known as L.M.P.) and the Subordinate Medical Service consisted of doctors with that qualification.

The Orissa Medical Service Rules of 1941 had become somewhat outdated and due care had not been taken in time to bring them up-to-date either by necessary amendment or adaptation. The Orissa Medical School had gone out of existence for about two decades. The post of the Director of Health had become separate and distinct from the post of the Inspector General of Prisons. It was

only during the pendency of this writ application that Part III of these rules were replaced and we shall refer to these amendments later.

4. On 18-10-1963, Government in the Health Department in a letter to the Directory of Health Services fixed the requirement of post-graduate qualification for promotion to the post of Civil Surgeon. That letter was to the following effect:

...Government have been pleased to decide that in order to be eligible for appointment as Civil Surgeons, one should have either D.P.H/M.P.H. qualification or have post-graduate degrees plus reorientation training in Public Health under the auspices of ,Government of India ,or the State Government. The above decision will be enforced with effect from 14-1966 and not apply to those who have already been promoted as Civil Surgeons or who may in the normal course, qualify themselves for and are appointed to the post of Civil Surgeon till 1-4-1966. Meanwhile The existing Civil Surgeons and those who may become Civil Surgeons till 1-4-1966 must an be given re-orientation training in public Health, unless they have D.P.H/M.P.H. qualification or have already undergone this training. For such Civil Surgeons a programme of training may be prepared forthwith. Diploma like D.P.M., M.R.C.P., F.R.C.S., M.R.C.O.G., should be considered equivalent to post-graduate degrees for the above purpose other Diplomas should not be considered equivalent to post-graduate degree.

On 28.7.1966, Government wrote another letter in the matter (Annexure-H). As far as relevant it read, Government had decided that in order to be eligible for appointment as Civil Surgeons, Assistant surgeons should have possessed either D.P. H.I.M. P.H. qualification or the Post-graduate degree plus reorientation training in Public Health, under the auspices of Government of India or the State Government. The above decision was to be enforced with effect from 1.4.1966.

As sufficient time has not been allowed for acquiring post-graduate qualification it would be unfair to debar senior officers from promotion to the post of Civil Surgeons for not obtaining the required postgraduate qualification within the period. Government have therefore after careful consideration and after careful consideration and after consulting the Public Service Commission been pleased to decide that the requirement of post graduate qualification for promotion to The rank of Civil Surgeon prescribed in G.R. No. 20637/H. dated 18-10-1963 will come into force with effect from 1-4-1968 instead of 1-4-1966.

It is now stated that from 1-4-1968, this has been enforced. Each of the Petitioners admittedly does not possess such qualification. "Challenge is offered to provision of such qualification as requisite for promotion. Mr. Palit does not contend that the Petitioner in each of these cases is entitled to promotion and we should hold to that effect, but what he asks us to hold is that they are entitled to consideration for promotion. By making a provision for the qualification now imposed each of the Petitioners has been kept out of consideration on the ground that he does not possess the requisite qualification for the promoted post. It was contended in each of the writ applications that it was not open to Government by

executive Action to add to the statutory Rules and since the Rule covered the complete field for promotion, Executive direction adding to the qualification was unauthorised, unenforceable and could not debar the Petitioner of each application from being considered for promotion.

5. Mr. Palit, the learned Counsel in support of each of the applications initiated his argument by contending that by virtue of Rule 1, the post of Civil Surgeon could be filled only by promotion and that out of Assistant Surgeons. Rule 11 dealt with the method of promotion and since Rules 1 and 11 covered the entire field in relation to promotion to the post of Civil Surgeon Government have Acted an authorisedly when by Executive instruction they have added to the requirement of qualification. As the arguments proceeded, Mr. Palit, however, accepted the position that Rule 11 had nothing to do with the promotion of Civil Surgeons, but dealt with promotion into the Orissa Medical Service of persons belonging to the Subordinate Medical Service. Rule 11, therefore, provided for recruitment into the Orissa Medical Service by promotion. In fact if Rule 2 is analyzed it makes that position clear. The post of Assistant Surgeon can be filled under clause Car of Rule 2 by direct recruitment in accordance with the rules in Part II and also by promotion in accordance with the Rules in Part III. Thus Rule 1 seems to be the only rule which dealt with the post of Civil Surgeon and it provided that such posts shall be filled up by promotion only from the rank of Assistant Surgeons. Apart from making this provision The Rules provide for no other details.

6. During the pendency of these writ applications Part III of the aforesaid Rules were substituted by rules framed under Article 309 of the Constitution by the Governor of Orissa. These Rules are dated 19-8-1969 but are directed to take effect from 1st of April 1968. The requisite qualification which had been prescribed by Executive directions has now been incorporated into the amended Rule 11. We are not reproducing the amended rule as so far as the qualifications are concerned it is same as indicated in the Executive instructions. The focus of dispute has shifted from what was originally challenged in the writ petition to a challenge against the Rules an particularly so far as its retrospective character is concerned. The points raised by Mr. Palit against the amended Rules are:

(a) We should not take notice of them as Government in their counter affidavit had not referred them nor placed the Rules before us,

(b) Those rules do not affect pending proceedings;

(c) The Rules cannot be retrospective and cannot take away vested rights; and

(d) There is no jurisdiction for providing these qualifications for promotion to the post of Civil Surgeon because the post of Civil Surgeon is essentially administrative and these qualifications are neither relevant nor have any nexus with the normal duties a Civil Surgeon is called upon to discharge. Each of these points may now be examined.

7. It is well settled that Rules under the proviso of Article 309 of the Constitution and legislation under Article 309 are at par though the Rules are subject to the Act. If the Act covers a part of the entire field, Rules can cover the rest. We are bound to take judicial notice of these Rules even if the State in its counter had not referred to them. Some of the opposite parties who are doctors already promoted to the rank of Civil Surgeon have, however, referred to these amendments in their counter affidavits. At the hearing of the writ applications these Rules have been produced before us. We would overrule Mr. Palit's objection and hold that we are bound to look into these Rules and dispose of the writ petitions on the basis of the law as introduced by these Rules.

8. Mr. Palit's next contention was that the amended Rules do not apply to pending proceedings. He also contended that the rules under Article 309 of the Constitution cannot be retrospective, nor can they take away vested rights. Both these contentions can be treated together. In *B.S. Vadera Vs. Union of India (UOI) and Others*, , their Lordships have laid down:

It is also significant to note that the proviso to Article 309, clearly lays down that any rules so made shall have effect, subject to the provisions of any such act. The clear and unambiguous expressions used in the Constitution, must be given their full and unrestricted meaning unless hedged-in, by any limitations. The rules, which have to be subject to the provisions of the Constitution, shall have effect subject to the provisions of any such Act. That is, if the appropriate Legislature has passed an Act, under Article 309, the rule, framed under the Proviso, will have effect, subject to that Act; but, in the absence of any Act, of the appropriate Legislature, on the matter, in our opinion, the rules, made by the President, or by such person as he may direct, are to have full effect, both prospectively and retrospectively. Apart from the limitations, pointed out above, there is none other, imposed by the proviso to Article 309, regarding the ambit of the operation of such rules. In other words, the rules unless they can be impeached on grounds such as breach of Part III, or any other Constitutional provision, must be enforced, if made by the appropriate authority.

There is no dispute that these Rules are made by the appropriate authority. The rules purport to be retrospective. Are they then open to attack for breach of Part III of the Constitution" or any other Constitutional provision? We shall examine this contention presently.

It is the contention of Mr. Palit that to be eligible for consideration for promotion is a guarantee under Article 15 of the Constitution. That right had also vested in the Petitioner in each of the writ applications at the time when these new rules came into force. By making these rules retrospective that right is being taken away and thus the direction to make the Rules retrospective is bad in law.

We are not impressed with this contention of Mr. Palit. The attack which is available to be raised against the rules under Article 309 as indicated in the decision of their Lordships of the Supreme Court referred to above is not on such

score. The right which Mr. Palit alleges had vested in the Petitioners of being entitled to consideration for promotion without the additional qualification now prescribed is indeed not one which can he said to have been covered under Part III, and in strict sense cannot be treated as a vested right. We are also not impressed with the contention of Mr. Palit that these Rues though retrospective would not affect pending proceedings. Similar contentions as raised by Mr. Palit were raised before a Division Bench of the Allahabad High Court in Abdul Waqar Vs. State, . It was held:

The Applicant's contention, lastly is that this amending Act does not apply to the present case which was pending on the date on which it came into force, and, secondly that the legislature has no power to affect the right of parties in a pending case for two reasons:

- (a) it cannot take away vested rights, and
- (b) it cannot decide a pending case which is the function of the judiciary and not the function of the Legislature.

The contentions raised by the counsel for the Applicant have no force. The general principle no doubt is that an enactment is presumed to be prospective only and should not be interpreted as affecting vested rights, vide Colonial Sugar Refining Co., Ltd. Irving (1905) A.C. 369 (4) and the presumption is still stronger in the case of a pending Action. But this is only a rule of presumption. That rule itself implies that if the Legislature so desires, it may affect vested rights, whether in past truncations or in pending cases, provided its language is clear beyond (sic). The contention of the learned Counsel, therefore, that the Legislature has no power to affect vested rights is without substance.

Similar view was expressed by another Division Bench of the Allahabad High Court in Prem Narain Tandon Vs. State of Uttar Pradesh and Another, . A full Bench of the Allahabad High Court in Ram Autar Pandey Vs. State of Uttar Pradesh and Another, considered both the aspects, namely, whether a rule under Article 309 could be retrospective and as to whether a right, Is, and call be, taken away." Therein it has beep said:

The rule making power conferred by Article, 309 on the Governor of his nominee is, therefore, not confined to perspective rule making and appears to be wide enough to include the making of rules with retrospective effect. In fact, if rules regulating conditions of service can be made only with prospective effect and cannot be made applicable to persons already in Government employment administration may some times become impossible.

A comparison of the language used in the main part of Article 309 with that used in the proviso will show that the power given to the Legislature for regulating the recruitment and conditions of service of persons is identical with the power given to the Governor or such person as he may direct in regulating the recruitment or conditions of service employed in services and posts in connection with the

affairs of the State. The only difference is that the Legislature can make the regulation for an times and the Governor can do so only till the Act of the Legislature under the main part of the Article is passed. The Legislature, it is well settled, can legislate prospectively as well as retrospectively vide *J.K. Jute Mills Co. Ltd. Vs. The State of Uttar Pradesh and Another*, . The powers of the Governor under the Proviso to Article 309 being identical with that of the legislation under the main Article there is no valid reason why the Governor should not be able to make rule with similar effect.

The Full Bench quoted with approval from the decision of the Calcutta High Court in *Anil Nath De Vs. Collector of Central Excise, Calcutta and Another*, where it had been stated by P.B. Mukherji, J., as his Lordship then was:

I am unable to agree with the contention. The service in this case means that the Government servant accepts as part of his condition of service these Rules as they from time to time are made and modified. In fact, Rule 2 of the Revised Leave Rules says expressly that these Rules shall apply with retrospective a effect. A part of the obligation of a Government Servant as I understand under these Rules, is that he takes the risk of the amendments made in these Rules from time to time. So long as these Rules or their amendments do not violate any provisions of The Constitution or of any relevant Statute, mutability of these Rules forms part of the contract and The conditions of service are to be deemed as engrafted therein as and when they or their amendments are made, unless expressly or by necessary implication, they say otherwise.

This view is also supported by two Full Bench decisions of the Kerala High Court. See *V. Hariharan Pillai Vs. State of Kerala and Others*, and *Hariharan Pillai v. State* AIR 1958 Ker. 17. The position of law on this aspect of the dispute seems to be well settled. Mr. Palit referred to a number of cases to support his contention that each of the Petitioners had a vested right and it could not be taken away by retrospective application of the rule. We have examined them with particular care to find out if any support could be had for the propositions of Mr. Palit. Some of Mr. Palit's authorities are:

1. *Unikat Sankunni Menon Vs. The State of Rajasthan*, .
2. *V.V. Sarma and Others Vs. State of Andhra Pradesh and Others*, .
3. *Akharbhai Nazarali Vs. Md. Hussain Bhai*, .
4. *United Provinces v. Atiqa Begum* AIR 1941 F.C. 6.
5. *Chief Settlement Commissioner, Rehabilitation Department, Punjab and Others, etc. Vs. Om Prakash and Others etc.*, .
6. *Ramchandra Aggarwal and Another Vs. State of Uttar Pradesh and Another*, .

We are not satisfied that they support the contention of Mr. Palit, nor are we satisfied that these Petitioners had a vested right and by retrospective application of the law such right was being taken away.

Two more decisions have been referred to by Mr. Palit in support of this contention. A Division Bench of this Court in O.J.C. No. 29 of 1967 decided on 16-4-1970¹⁶, examined the claim of an accrued right of a railway employee under Executive instructions. In 1956 a circular had been issued providing for certain concessions. The Petitioner became entitled to hold the post by virtue of the concessions. In 1961 the Petitioner was reverted under a new circular of 1960. He contended in the writ petition that he was entitled to the advantages of the circular of 1956 and since under the terms provided under that circular he had become qualified he could not be reverted under the next circular particularly because the later circular did not purport to operate retrospectively and did not have the effect of disqualifying those who had become qualified in accordance with the 1956 circular. The facts of that case are thus absolutely different from those in the cases before us. Mr. Palit's contention cannot receive support from that decision.

The next case upon which reliance is placed is a judgment of their Lordships of the Supreme Court dated 4-7-1971 in Civil Appeals 1789, 1791 of 1969. The dispute raised in this case was one in relation to the age of superannuation of School teachers and the Kerala Educational Rules were being disputed. A cursory reading of this decision shows that their Lordships were dealing with a set of facts very different from those placed before us. The decision of the Supreme Court cannot support the present contention of Mr. Palit.

It would, therefore, follow that the Rules of 1969 made under the proviso to Article 309 of the Constitution are retrospective and on that account they are not bad. They would also apply to the cases of these Petitioners though their writ applications were pending at the time the said Rules were introduced with retrospective application.

9. There remains the next contention of Mr. Palit that these post-graduate qualifications now prescribed under Rule 11(a) are not at all relevant for the post of Civil Surgeons and as there is no nexus between the qualifications and the duties attached to the post of Civil Surgeon, we must hold that the prescription of these qualifications is bad. The learned Government Advocate and the learned Counsel for the other opposite parties seriously disputed the proposition of Mr. Palit that the post of Civil Surgeon is administrative. They contended that he is required to discharge the ordinary duties of a doctor; over and above that, he is also the chief administrative Officer of this branch in the district. This contention of the opposite parties seems to be true. It is not for the Court to decide what qualifications are germane or relevant for a particular post and that task cannot be taken by Court. We would, therefore, negate this contention of Mr. Palit as well.

10. It is not necessary to examine the original contentions of the Petitioners raised in the writ applications because the new Rules have brought a complete change in the situation and as we have already indicated the focus has shifted. As upon examination of the Dew Rules we find that each of the Petitioners has no

claim, we would direct each of the writ petitions to be dismissed.

11. Before we part with this case we would disappointingly notice that the canker of litigationness, has spread even to a sphere of life where discipline and spirit of service coupled with sacrifice should check ambition concerning personal preferment. A doctor is justified in taking legal Action when he feels that a stigma or punishment is undeserved, but he is expected to bear with fortitude and reconcile himself to his lot, suppressing disappointment when he finds a co-worker raised to a position which he himself aspired after.

12. Simultaneously the employer's part cannot be overlooked. In a modern democratic State the efficiency and incorruptibility of the public administration is of such importance that it is essential to afford civil servants adequate protection against capricious Action from their superior authority. It is of utmost importance even from the point of view of the State that they should enjoy a sense of security which alone can make them independent, truly efficient and allow them to work with devotion and sincerity.

13. We are not called upon to adjudicate in these writ applications as to whether the employer or the employee is entirely to blame. Even though we are withholding relief in these petitions we must, however, observe that the Petitioners, have not been fairly treated. It is for the State of Orissa in realisation of its obligations as the employer to find out ways and means to remedy the grievances of the Petitioners. This after all is a problem of the transitional phase and a reasonable solution for the employer may not be difficult to find.

In view of what we have said, we consider it only appropriate that the Petitioners should not bear the costs of these petitions.

B.C. Das, J.

14. I agree.