
(2010) 03 OHC CK 0071

In the Orissa High Court

Case No : Writ Petition (C) . No. 3388 and 3752 of 2010

Hrusikes Sethi and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 19-03-2010

Acts Referred:

Administrative Tribunals Act, 1985 — Section 14, 14(1), 14(3), 15, 15(1)
Constitution of India, 1950 — Article 136, 226, 309, 310, 310(2)

Citation : (2010) 1 ILR (Ori) 844 : (2010) 1 OLR 1101 Supp

Hon'ble Judges : B.N. Mahapatra, J;A.S. Naidu, J

Bench : Division Bench

Judgement

A.S. Naidu, J.—The controversy in both these writ petitions centers round recruitment on contractual basis in different departments of the State Government.

2. At the out-set, learned Counsel for the opposite parties-State raised a preliminary objection with regard to maintainability of the writ petitions in view of Section 15 of the Administrative Tribunals Act, 1985. The said section deals with jurisdiction, powers and authority of State Administrative Tribunals and stipulates that Administrative Tribunals alone shall exercise, on and from the appointed day, all the jurisdiction, powers and authority exercisable immediately before that day by all Courts except Supreme Court in relation to recruitment and matters concerning to any civil service of the State or to any civil post under the State. According to learned Counsel as the appointments are against "civil services", the writ petition is not maintainable.

3. For the sake of brevity and better understanding, Section 15 of the Administrative Tribunals Act, 1985, hereinafter to be called as "the Act", in short, is quoted here-in-below:

15. Jurisdiction, powers and authority of State Administrative Tribunals: (1) Save as otherwise expressly provided in this Act, the Administrative Tribunal for a State shall exercise, on and from the appointed day, all the jurisdiction, powers

and authority exercisable immediately before that day by all Courts except the Supreme Court in relation to -

(a) recruitment, and matters concerning recruitment, to any civil service of the State or to any civil post under the State;

(b) all service matters concerning a person not being a person referred to in Clause (c) of this Sub-section or a member, person or civilian referred to in Clause (b) of Sub-section (1) of Section 14 appointed to any civil service of the State or any civil post under the State and pertaining to the service of such person in connection with the affairs of the State or of any local or other authority under the control of the State Government or of any Corporation or society owned or controlled by the State Government;

(c) all service matters pertaining to service in connection with the affairs of the State concerning a person appointed to any service or post referred to in Clause (b), being a person whose services have been placed by any such local or other authority or Corporation or society or other body as is controlled or owned by the State Government at the disposal of the State Government for such appointment.

(2) The State Government may, by notification, apply with effect from such date as may be specified in the notification the provisions of Sub-section (3) to local or other authorities and Corporations or societies controlled or owned by the State Government.

(3) Provided that if the State Government considers it expedient so to do for the purpose of facilitating transition to the scheme as envisaged by this Act, different dates may be so specified under this Sub-section in respect of different classes of, or different categories under any class of, local or other authorities or Corporations or societies from which the provisions of this Sub-section apply to any local or other authority or corporation or society all the jurisdiction, powers and authority exercisable immediately before that date by all Courts except the Supreme Court in relation to-

(a) recruitment, and matters concerning recruitment, to any service or post in connection with the affairs of such local or other authority or corporation or society; and

(b) all service matters concerning a person other than a person referred to in Clause (b) of Sub-section (1) of this Section or a member, person or civilian referred to in Clause (b) of Sub-section (1) of Section 14 appointed to any service or post in connection with the affairs of such local or other authority or corporation or society and pertaining to the service of such person in connection with such affairs.

(4) For the removal of doubts, it is hereby declared that the jurisdiction, powers and authority of the Administrative Tribunal for a State shall not extend to, or be exercisable in relation to, any matter in relation to which the jurisdiction, powers and authority of the Central Administrative Tribunal extends or is exercisable.

4. The moot question which arises for determination in these two writ petitions is, whether, after enactment of Administrative Tribunals Act, 1985 and adoption of the same by the State of Orissa, this Court has authority, jurisdiction and power to decide any dispute or controversy arising out of recruitment, matters concerning recruitment to any "civil service" of the State or to any "civil post" under the State.

5. In pursuance of Article 323A of the Constitution of India, the Administrative Tribunals Act, 1985 was enacted and the same was adopted by the State of Orissa and of the Administrative Tribunal was constituted. From the date of constitution of such Tribunal, the jurisdiction of all Courts except Supreme Court under Article 136 with respect to the disputes and complaints referred to under Clause-(1) of Section 15 have been vested with the State Administrative Tribunal. The expression "all Courts" mentioned in Section 15(1) is comprehensive enough to include the High Court. Thus, if the matter of dispute or controversy is held to be covered u/s 15 of the Act, the logical conclusion would be the said controversy, or dispute has to be adjudicated by the Tribunal. In other words, the High Court having left with no jurisdiction to deal with such controversy lacks power to do so.

6. The submission of learned Counsel for the Petitioners, on the other hand, is that since the Petitioners are not assailing recruitment to any "civil posts" under the State of Orissa and the recruitment is only with regard to contractual appointments under the State Government, the provisions of Administrative Tribunals Act are not attracted. According to them, the posts, which are sought to be filled up on "contractual basis" and or "ad hoc basis" or for specific period, do not satisfy the nomenclature of "civil service" of the State or "civil post" under the State. Thus, the bar imposed u/s 15 of the Act cannot be ipso facto made applicable to the requirement to said posts and it is a fit case where the High Court alone has the jurisdiction to decide the controversy in exercise of the powers conferred upon it under Article 226 of the Constitution more so because there is no other equally efficacious or alternative remedy, available to mitigate the grievance of the Petitioners.

7. To appreciate the arguments advanced, it would be necessary to have a bird's eye view to the statements, objects and reasons for enacting Administrative Tribunals Act, 1985, which are as follows:

An Act to provide for the adjudication or trial by Administrative Tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any Corporation or Society owned or controlled by the Government in pursuance of Article 323A of the Constitution and for matters connected therewith or incidental thereto. As would be evident, the Tribunals were constituted to deal with disputes relating to two types of services being "CIVIL SERVICE" and "civil posts".

The word "Service matters" has been defined u/s 3(q) of the Act and reads as follows:

3(q) "Service matters", in relation to a person, means all matters relating to the conditions of his service in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India, or as the case may be, of any Corporation or society owned or controlled by the Government, as respects-

- (i) remuneration (including allowances), pension, promotion, retirement benefits;
- (ii) tenure including confirmation, seniority, promotion, reversion, premature retirement and superannuation;
- (iii) leave of any kind;
- (iv) disciplinary matters; or
- (v) any other matter whatsoever;

8. Of course, there is no formal definition of "post" and "civil posts". The sense in which the said words are used in Chapter of Part-XIV of the Constitution indicates by their context and setting. A "civil post" is distinguished in Article 310 from a post connected with defence; it is a post on the civil as distinguished from the defence side of the administration. Under Article 311, a member of a civil service of the Union or an all-India service or a civil service of a State is mentioned separately, and a civil post means a post not connected with defence.

9. A person holding a post under a State is a person serving or employed under the State. The relationship of master and servant exists between the State and the person holding a post under it. The existence of this relationship is indicated by the State's right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control, the manner and method of his doing the work and the payment of wages or remuneration, as the case may be. A relationship of master and servant may be established by the presence of all or some of these indicia, in conjunction with other circumstances and it is a question of fact in each case whether such a relation between the State and the alleged holder of a post exists or not.

10. A conjoint reading of Articles 309, 310 and 311 gives an impression that post under the State denotes an office. A person who holds a civil post under a State holds an office during the pleasure of the Government except as expressly provided by Article 310 of the Constitution. In other words, a post under the State is an office or a position to which duties in connection with the affairs of the State are attached. Article 310(2) contemplates that a post may be abolished and a person holding a post may be required to vacate the post.

11. The method of determination of the question as to whether a person holding a post under the government is a member of the civil service came before the Supreme Court in the case of Mathuradas Mohanlal Kedia and Ors. v. S.D.

Munshaw and Ors. and State of Gujarat and Others Vs. Raman Lal Keshav Lal and Others, , the Supreme Court answering the said question observed as follows:

The true test for determination of the question whether a person is holding a civil post or is a member of the civil service is the existence of a relationship of master and servant between the State and the person holding a post under it and that the existence of such relationship was dependent upon the right of the State to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wages and remuneration. The relationship of master and servant may be established by the presence of all or some of the factors referred to above in conjunction with other circumstances.

In the said case, the Supreme Court was dealing with the question as to whether "Panchayat service was a civil service of the State" and other ancillary questions. In para 14, the Supreme Court observed as follows:

The first question is whether the Panchayat Service constituted under the Panchayats Act is a civil service of the State. The expressions "civil service" or "civil post" are not formally defined. Entry 70 of List I of the Seventh Schedule to the Constitution refers to Union Public Services and All India Services, and Entry 41 of List II of that Schedule refers to the State Public Services. Part XIV of the Constitution deals with services under the Union and the States. In Article 309 of the Constitution, we find reference to persons appointed to public services and posts in connection with the affairs of the Union or of any State. Article 310 of the Constitution distinguishes the defence service from the civil service when it refers to members of a "defence service or of a civil service". But all persons who are members of a defence service or of a civil service of the Union or of an all-India service or persons who hold any post connected with defence or any civil post under the Union are treated as persons serving the Union and every person who is a member of the civil service of a State or holds any civil post under a State is treated as a person serving a State. The factors which govern the determination of the question whether a person holds a civil post or is a member of civil service were considered by a Constitution Bench of this Court in State of Assam and Others Vs. Shri Kanak Chandra Dutta,) and Bachawat, J. speaking for the Bench observed thus:

There is no formal definition of "post" and "civil post". The sense in which they are used in the Services Chapter of Part XIV of the Constitution is indicated by their context and setting. A civil post is distinguished in Art., 310 from a post connected with defence; it is a post on the civil as distinguished from the defence side of the administration, an employment in a civil capacity under the Union or a State. See marginal note to Article 311. In Article 311, a member of a civil service of the Union or an all-India service or a civil service of a State is mentioned separately, and a civil post means a post not connected with defence outside the regular civil services. A post is a service or employment. A person

holding a post under a State is a person serving or employed under the State. See the marginal notes to Arts. 309, 310, and 311. The heading and the sub-heading of Part-XIV and Chapter I emphasise the element of service. There is a relationship of master and servant between the State and a person holding a post under it. The existence of this relationship is indicated by the State's right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wages or remuneration. A relationship of master and servant may be established by the presence of all or some of these indica in conjunction with other circumstances and it is a question of fact in each case whether there is such a relation between the State and the alleged holder of a post.

The administration of a service under a State involves broadly the following functions:

- (i) The organization of the civil service and determination of the remuneration, conditions of service expenses and allowance of persons serving under it;
- (ii) The manner of admitting persons to civil service;
- (iii) Exercise of disciplinary control over the members of the service and power to transfer, suspend, remove or dismiss them in the public interest as and when occasion to do so arises.

12. Similar questions were also raised before this Court in the case of Basudevpur (R and B) N.M.R. Employees Association and Others Vs. State of Orissa and Others, . The Full Bench of this Court interpreting Section 15 of the Act observed that State Civil Posts of any class not included in the General State Service of the corresponding class and a Government servant appointed to any such post shall be deemed to be a member of that service unless he is already a member of any other State Civil Service of the same class. After giving anxious thought to the problem and considering the decision of the Supreme Court in various cases, the Full Bench came to the conclusion that engagement of N.M.R. employees being temporary does not carry any scale and they are paid daily wage as approved from time to time by the Labour and Employment Department, the tenure of such N.M.R. employees is for different spells, having regard to the need and requirement of the particular project or works. The absorption on permanent basis in the establishment of a particular project is by its very nature is inconceivable since the project will be completed one day or other and there will be no need thereafter for employment of the workers. The Full Bench arrived at the conclusion that the dispute with regard to recruitment of service of N.M.R. and casual labourers employed by the State Government the Government Corporations in different schemes or projects are to be adjudicated by this Court as the State Administrative Tribunal and no jurisdiction.

13. After going through the entire judgment of the Full Bench, this Court feels that appointments made under contractual basis against different existing posts can not be equated with that of N.M.R. or casual labourers engaged under

different schemes or projects. The case of such workers as would be evident from the ratio of the decisions of the Supreme Court being distinctly separate does not come within the ambit of civil services and the disputes arising out of the said appointments are not covered u/s 15 of the Act and has to be adjudicated by the Tribunal. But then "contractual" or "ad hoc" appointments made against existing vacancies in Government establishments, being appointments to "civil service" are distinctly separate than engagements against schematic posts or against posts under different projects. The appointments are against existing post in Government establishment on a specific scale and satisfy the basic criterias of "civil service". The authoritative pronouncement referred to supra gives an impression that merely because the posts are filled up on contractual basis, it cannot be said that the persons appointed/ engaged are not holding civil posts. Discharging the duties assigned to them in Government offices, are governed by the service conditions, they are paid from the State exchequer and the relationship of employee and employer exists with the State. Thus, the basic ingredients to come to the conclusion that they are holding civil services are satisfied. Similar point once again came before the Supreme Court in the case of Union of India and others Vs. Deep Chand Pandey and another, . Interpreting Section 14 of the Act, which deals with power and jurisdiction of the Central Tribunals and is parameteria to Section 15, vis-?-vis Section 3(q), which defines "service matters", the Supreme Court held that the Act covers a very wide field, and there is nothing to suggest that the provisions dealing with the jurisdiction of the Tribunal should receive a narrow interpretation. It was further observed that the word "conditions of service" is of wide expression and an attempt of enumeration would be dangerous. In the said case, the Supreme Court held that the High Court has no jurisdiction to entertain the claim of the Respondents who are casual type in Government Department. The same view was also expressed by the Supreme Court in the case of Ashwani Kumar and others Vs. State of Bihar and others, etc. etc., . Justice K. Ramaswamy held that a person appointed though on casual basis, but discharges the duties of the existing post or vacancy and need to be appointed to the post or vacancy according to the Rules and if so, he and he alone is the holder of the post. It cannot, therefore, be said that appointment to Class-III and Class-IV casual employees was not to a post. It is common knowledge that existence of a post is a condition precedent for appointment where it is created by statutory rules or under the executive instructions. In the said decision, of course, Justice Hansaria, J. deferred with the aforesaid observations made.

14. After considering all the materials meticulously, this Court feels that the services under the Central Government and the State Government are broadly classified into two categories, being civil services and defence services. In other words, if a person is not serving in any defence establishment, he should be presumed to be a civil service more so when relationship between him and the State Government or the Central Government, as the case may be, is that of employee and employer.

15. Be that as it may, in view of the authoritative conclusions arrived at in the case of Mathuradas Mohanlal Kedia and Ors. (supra) coupled with the decision of the Supreme Court in the case of Union of India v. Deep Chand Pandey (supra), we have no hesitation to hold that the recruitment held for filling up of the post existing in different departments of the Government of Orissa, in whatever form, i.e., either contractual or casual, would amount to recruitment to a "civil service", as the relationship of master and servant between the State and the employee exists and added to it, payments of remunerations or wages as the case may be is paid out of the Government exchequer.

16. In view of the aforesaid conclusion, we hold that this Court lacks initial jurisdiction, power and authority to decide the dispute with regard to matters concerning contractual/ adhoc/temporary recruitment to civil service in consonance with Section 15 of the Act and the Administrative Tribunal alone has jurisdiction to decide such disputes. We also grant liberty to the Petitioners to pursue their remedies before the Tribunal.

17. In both the writ petitions, some of the terms of the advertisement for engagement of contract teachers in Government High Schools during 2009-10 are assailed. The advertisement relates to "civil service" and the posts are existing in Government establishments. Therefore, the writ petitions are not maintainable and the same are disposed of on the question of maintainability only. It is needless to say that this Court has not examined the merits of the case as the same may amount to prejudging the issues and it would be open for the Tribunal to go into the merits, if exigencies arise.

18. With the aforesaid observation, the writ petitions stand disposed of.