

(1986) 05 OHC CK 0013

In the Orissa High Court

Case No : Original Jurisdiction Case No. 924 of 1983

K. Babu Rao

APPELLANT

Vs

Executive Officer, Berhampur Municipality and Others

RESPONDENT

Date of Decision : 16-05-1986

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226
Orissa Local Fund Service Rules, 1975 — Rule 3, 3(1), 3(2), 3(3)
Orissa Municipal Act, 1950 — Section 302, 81, 81(1), 81(2), 81A(2)

Citation : (1986) 62 CLT 593

Hon'ble Judges : R.C. Patnaik, J; B.K. Behera, J

Bench : Division Bench

Advocate : A.K. Padhi, S.K. Padhi and M.R. Patnaik, for the Appellant; Y.S. Murty, for O.P. No. 1, A.S.C. for O.Ps. 2 and 3, S.K. Nayak and S.K. Biswal for O.P. No. 4, for the Respondent

Final Decision : Allowed

Judgement

R.C. Patnaik, J.—The Petitioner in this writ application under Article 226 of the Constitution of India has assailed the notification dated 31-8-1976 (Annexure-8/1) issued by the State Government in exercise of powers conferred under Sub-section (1) of Section 81 of the Orissa Municipal Act, 1950 (Act 23 of 1950) (for short, "Act") read with Rule 3 of the Orissa Local Fund Service Rules, 1975 (for short, "Rules") constituting the local Fund Service in the State Government of Orissa with effect from 31-8-1976, as ultra vires Articles 14 and 16 of the Constitution of India and violative of Section 81(2) of the Act and Rule 3(3) and the order dated 25-4-1983 (Annexure-8) transferring him from the post of Octroi Inspector to the post of Lower Division Clerk.

2. The Petitioner was appointed as an Octroi Collector by the Berhampur Municipality with effect from 15-7-1963. With effect from 24-12-1963, he was promoted as an Octroi Inspector. He has averred that in the establishment of the Berhampur Municipality there are various wings and he belongs to the Executive

wing of the Octroi Section. During the course of the two decades, he has received excellent commendations from his superiors and has not received at any time an adverse comment. The Octroi bye-laws framed in 1975 and enforced from 20-2-1976 have recognised and maintained the distinct and separate character of the octroi wing. The octroi wing is distinct from the other wings of the establishment of the municipality. The nature and character of the job of an Octroi Inspector are different from those of the members of the ministerial staff like lower Division Clerk. The Lower Division Clerk discharges clerical work whereas an, Octroi Inspector has to render mobile work and should possess diverse skills necessary for the discharge of his duties. The distinction was maintained and observed by the municipality. It refused to allow the Petitioner to take the accounts examination in the year 1973 an examination, pass in which is essential for promotion from the post of Lower Division Clerk to that of an upper Division Clerk on the ground that he was not a ministerial employee (vide Annexure-2) dated 28-11-1973. In 1976, the Local Fund Service was constituted and the Petitioner was called upon to exercise option for absorption in the Service. With a view to removing certain anomalies in the revised scales of pay described under the 1974 Rules in respect of the services under Local Fund Service, the Government took a decision in shape of 11 resolution dated 27-3-1979. The scale of pay of the Octroi Inspector was revised as Rs. 255-360/-. In the remarks column it was indicated that the channel of promotion for an Octroi Inspector was to the post of Octroi Superintendent. While he was continuing as Octroi Inspector, the employees, who were too junior to him, were promoted as Upper Division Clerks, vide the particulars in Annexure-4. By order dated 25-2-1981, he was transferred by the Executive Officer of the Municipality to the post of Lower Division Clerk. He made representation to the Collector, who was in charge of the Berhampur Municipality under suspension, pleading that he belonged to a different cadre and was not a member of the ministerial staff and hence he should not be transferred to the post of Lower Division Clerk, and that by his transfer he would lose the chance of the promotion to the post of Octroi Superintendent a copy whereof has been annexed as Annexure-6. It is alleged that on his representation, the Collector kept the order of transfer in abeyance until instructions in that behalf were received from Government. The Collector was of the view that transfer of the Octroi Inspectors, who were in the executive line, to ministerial cadre might lead to legal complications (vide Annexure-7). Then came the impugned order dated 25-4-1983 transferring him as Lower Division Clerk in charge of Octroi Establishment. The Petitioner has averred that of the four Octroi Inspectors, he was appointed in 1963, Shri Hari Krishna Padhi (Petitioner in O.J.C. No. 925 of 1983 heard analogously with this case in 1967, Shri Subash Chandra Naik in 1980 and Shri Sudarsan Naik in 1982. The last two have not been disturbed. The Petitioner has averred that whereas Section 81(1) of the Act authorises the State Government to constitute a Local Fund Service for the State of Orissa, Sub-section (2), as amended by the Orissa Municipal (Amendment) Act, 1972 (Orissa Act 23 of 1972), adequately safeguards the rights of the servants. The Petitioner has relied upon Rule 3, especially, Sub-rule

(2) thereof. On 31-8-1976 was issued a notification by the State Government in exercise of powers conferred by Sub-section (1) of Section 81 and Rule 3 constituting the Local Fund Service. It constituted the cadres of the officers and servants of the municipalities and Notified Area Councils with various designations to which they should belong and under which they should be grouped. The post of Octroi Inspector was grouped with the post of Lower Division Clerk, Cashier, Typists and other posts which carried the scale of pay of Rs. 255-360/-. Those posts which carried the scale of pay of Rs. 300-410/- were grouped under the cadres of Senior Assistant, those carrying Rs. 320-500/- were grouped under the cadre of Head Assistant and the cadre of Superintendent carried the scale of pay of Rs. 400-675/-. The cadre of Assistant Engineer including the posts of Overseer, Supervisor (P.W.D.) and Pipe-line Inspector carried the scale of pay of Rs. 375-750/-. The Petitioner has averred that the legislative intention behind Section 81 and the Rules was to encadre posts having the duties and degrees of responsibilities of same nature in one cadre. The promotional prospects are important conditions of service and the Law prohibited any alteration in the conditions of service. The grouping of posts under the notification lacks rationality and is arbitrary. Equating an Octroi Inspector with Lower Division Clerk or a Typist or a librarian shows the arbitrary way in which the power has been exercised. The Petitioner has further averred that in the Gradation list of the Municipal staff which was prepared by the Municipality, the name of the Petitioner was not shown obviously because he belonged to a ministerial staff. He has, therefore, assailed the order of his transfer to the post of Lower Division Clerk as arbitrary unjust and violative of the provisions of the Act, Rules and the equality clause of the Constitution.

3. In the return submitted by the Municipality, opposite party No. 1, while traversing the allegations made by the Petitioner, it has been disputed that the Octroi Section is a separate executive wing of the municipality. It is averred that the Petitioner belonged to the cadre of Lower Division Clerk. The omission of the name of the Petitioner in the gradation list was a mistake. The services of Octroi Inspector and of Lower Division Clerk were inter-changeable. It has sought to explain its refusal to permit the Petitioner to take the accounts examination by the plea that by 1973. Local Fund Service Rules had not come into existence. It has further been averred that after constitution of the Service, the Petitioner has not applied for taking the accounts test. After the Service was constituted, he was asked to exercise option and upon his failure, he should be deemed to have opted for being absorbed in service u/s 81-A(2). It has relied upon the notification issued u/s 81(1) (vide Annexure-8/1) and averred that the post of Octroi Inspector belonged to the cadre of Junior Assistant, so also did the post of Lower Division Clerk. Being of one cadre, the services in the posts are inter changeable. It has relied upon the clarification issued by the Government of Orissa in the Housing and Urban Development Department bearing No. 37380/LFS (S)-13/82 dated 27-8-1982 (Annexure-B/1) to the effect that the services of the incumbents holding the posts of Lower Division Clerk and Octroi Inspectors

are inter-changeable under the municipality from one establishment to other. It has explained that the four persons mentioned in Annexure-4, who joined after the Petitioner have been promoted to the post of Upper Division Clerk, as they had passed the accounts examination which is the minimum required qualification for promotion. It has been disputed that the nature of duties and the degree of responsibilities of an Octroi Inspector in any way different from that of a Lower Division Clerk. When there is no change in the emoluments and the posts belong to a common cadre, transfer from one to the other was neither unjust nor violative of the equality clause or any provision of law. It has disputed the assertion of the Petitioner that the normal channel of promotion from the post of Octroi Inspector is to the post of Octroi Superintendent. It has submitted that it is open to the State Government to post an Officer from the administrative services as Octroi Superintendent if the income of the Municipality from octroi is more than five lacs. It is averred that as the Petitioner has not passed the accounts examination, which is the minimum required qualification for promotion to the post of Upper Division Clerk, he cannot contend that the persons, those who were junior to him in service originally, are now occupying higher posts. According to the Municipality, the order of transfer is in conformity with the Government notification as per Annexure A/1 and the clarification as per Annexure-B/1. There having been no reduction in emoluments or rank, the order of transfer (Annexure-8) is unassailable.

4. The question that falls for consideration therefore, is if the notification of the Government dated 31.8-1976 (Annexure-A/1) grouping the post of Octroi Inspector under the cadre of Junior Assistant with the posts of Lower Division Clerk, Cashier, Typists, Librarian, etc., is in accordance with the Act, the Rules and the Constitutional provisions.

5. The Octroi Department was created and Bye-Laws were framed when it was decided to levy Octroi tax within the jurisdiction of the Berhampur Municipality. The posts of Octroi Superintendent and Octroi Officers were created under the provisions of Bye-laws. Though, no doubt, it was a part of the Municipal establishment, it was engaged in a distinct and specific work that of collection of octroi. From Annexure-2. the order of the Municipality disallowing the Petitioner and Shri Hari Krishna Padhi the Petitioner in O.J.C. No. 925 of 1983, to take the accounts examination, in excluding their names from the gradation list of the ministerial staff and the Government resolution removing the anomaly in the scale of pay of the Octroi Superintendent, it is discernible that the Octroi Inspector was not being treated as a ministerial employee. When the Petitioner and Shri Padhi sought permission to appear at the accounts examination passing which was essential for promotion to the post of Upper Division Clerk, they were intimated on 28-11-1973:

In returning herewith the application of Sri Harikrishna Padhi, Octroi Inspector and Shri K. Babu Rao Octroi Inspector of your office, I am to say they are not eligible to sit in the Accounts examination of clerks as they are not ministerial

employees.

The omission of the names of the Petitioner and Shri Padhi from the gradation list of the ministerial employees leads but to one conclusion, namely, the Octroi Inspectors were not considered as ministerial employees. The nature of the duty and the responsibility that an Octroi Inspector is called upon to discharge is different from the nature of duties and the responsibility of a Lower Division Clerk. The nature of duties and the responsibility of a Lower Division Clerk is essentially clerical. Clerical work is routine desk work. An Octroi Inspector is required to render service of a different character, supervision of the staff under him, detection of Octroi evasion with tact and dexterity, assessment of valuation with a view to detecting evasion of Octroi. The resolution of the Government removing anomalies in the 1974 Rules, while revising the scale of pay of Octroi Inspector to Rs. 255-360/-, laid down that the channel of promotion of Octroi Inspector was to the post of Octroi Superintendent. That went to distinguish the post of Octroi Inspector from the post of Lower Division Clerk.

6. Before the constitution of the service and the grouping of the post of Octroi Inspector under the cadre of Junior Assistant, the next promotional post was the post of Octroi Superintendent. There was no obligation to pass the Accounts Examination. After the grouping of the post, as under Annexure-A/1, on the transfer of the incumbent to the post of Lower Division Clerk, he is required to pass the Accounts Examination to be eligible for promotion to the post of Upper Division Clerk, the next higher post, so long as he does not pass the Accounts Examination, the doors of promotion are closed. Therefore, on transfer to the post of Lower Division Clerk the incumbent is at a disadvantage. The Stand of the opposite parties in paragraph 25 of the counter affidavit is as follows:

That in reply to paragraph 19(c), it is submitted that the rejection of the application of the Petitioner to appear at the accounts examination was in the year 1973, much prior to the constitution of the local Fund Service in the year 1976. As stated earlier, the Petitioner never made any application nor sought permission to sit for the accounts examination after 1976. On his failure to pass the accounts examination, it would not be open to him to claim promotion to the higher post. It has been made clear in the earlier paras that the posts of Octroi Inspector and the L.D. clerk belong to the same cadre of Junior Assistant and therefore the posts are inter-changeable. The contentions of the Petitioner to the contrary are incorrect and are legally unsustainable.

In paragraph 26 it is averred:

That in reply to paragraph 19(d), it is submitted that the Petitioner was not considered for promotion as he did not acquire the requisite qualification namely passing of the preliminary accounts examination, It is absolutely incorrect to say that he was not considered for promotion on the ground that he was taken as a member of a separate cadre.

The aforesaid averments clearly indicate that an additional obligation is placed on

an Octroi Inspector transferred as Lower Division Clerk and for promotion to the post of Upper Division Clerk he is required to pass the accounts examination, a requirement which was not applicable to him when he was an Octroi Inspector. Hence grouping the post of Octroi Inspector with that of Lower Division Clerk and posting the Petitioner as a Lower Division Clerk is contrary to Section 81(2) proviso. The terms and conditions are less favourable. Such an action is derogatory of Section 81(2), as amended by Orissa Act 23 of 1972, which reads as hereunder:

The State Government shall, subject to the provisions of Section 302, have power to make rules to regulate the classification, methods of recruitment, conditions of service pay and allowances, discipline and conduct of the officers and servants belonging to the Local Fund Service and such rules may vest jurisdiction in relation to such service in the State Government or in such other authority of authorities as may be prescribed therein:

Provided that the terms and conditions of service prescribed under such rules in respect of officers and servants who, on the constitution of the local Fund Service have been absorbed therein, shall not in any way be less favourable than the terms and conditions which were applicable to them immediately prior to such constitution.

The proviso is important for our consideration. The proviso contains the safeguard for the employee so that he does not suffer detriment upon the constitution of the Service by specifically providing that the terms and conditions of service prescribed under the Rule shall not in any way be less favourable than the terms and conditions which are APPLICABLE TO HIM IMMEDIATELY PRIOR to the constitution of the Service. Rule 3 of the Rules reads as hereunder:

3.(1) The Local Fund Service shall be constituted by the State Government as per the provision in Sub-section (1) of Section 81 of the Act and shall include such of the posts of the Municipalities as specified by the Government from time to time by order in this behalf.

(2) On the constitution of the service under Sub-rule (1) the post of the equal time scales having duties and degree or responsibilities of the same nature in Municipalities shall form one cadre.

(3) A gradation list of persons in respect of each cadre shall be prepared by the Director of Municipal administration as per such directions as the Government may issue from time to time.

Sub-rule (2) thereof provides the guideline, furnishes the principle in accordance with which the cadre is to be formed. It provides that post having equal time scales and having duties and degree of responsibilities of the same nature in Municipalities shall form one cadre. Hence, two things are essential. Not only the posts must, (a) carry equal time scale of pay but also (b) have duties and degree of responsibilities of the same nature.

7. In our view, the principle contained in Sub-rule (2) has not been scrupulously followed while grouping the post of Octroi Inspector with other posts under the cadre of Junior Assistant. If the clarification of the Government as in Annexure-8/1 is correct, an Octroi Inspector can be posted as a Typist or a librarian. It seems, therefore, to us that only one aspect of Sub-rule (2) has been kept in mind while grouping the posts, namely, their scale of pay. Posts having the same scale of pay have been grouped under one cadre. The second principle which is also an essential requirement, namely, the duties and the degree of responsibilities stated to the post, has not been kept in mind. The posts of Overseer, Supervisor (P.W.D.) and Pipeline Inspector have been grouped under the cadre of Assistant Engineer. The posts carry the same scale of pay. Does the Pipeline Inspector possess the skill and expertise of the Overseer? The Overseer should have knowledge of Civil Engineering. The Pipeline Inspector is not expected to possess the skill and expertise of the Overseer. Are the duties and the degree of responsibilities of a Tax Daroga the same as that of an Accountant which post has been grouped under the cadre of Senior Assistant?

The opposite parties have relied upon the clarification of the Government as per Annexure-8/1 dated 27-8-1982, relevant portion whereof is extracted as under:

The posts of L.D.C. and Octroi Inspector have been included in the cadre of Junior Asst. in Local Fund Service w.e.f. 31.8-76. The services of the incumbents holding both the posts are under one cadre i.e., Junior Asst. and as such their services are interchangeable under the Municipality from one establishment to other.

If a grouping is bad, the clarification cannot land sanctity to the grouping. Besides, whether the posts are inter-changeable or not would depend upon the provisions contained in the Act and the Rules and the notification as per Annexure-A/1 constituting the Service. The grouping of different posts under one cadre in the Notification does not indicate that the services of the incumbents are inter-changeable. By clarification, a notification cannot be modified. If it is contended that the clarification issued u/s 81(b) was of general or special order providing for any matter necessary, ancillary or incidental to the constitution and working of the Local Fund Service, the order has to be issued before the expiry of two years from the date of constitution of the Local Fund Service. The clarification cannot be also supported u/s 81-D.

Opposite party No. 1 in the counter-affidavit has averred that where the income of the Octroi tax exceeds rupees 5 lakhs, an officer belonging to the Administrative Service would be posted as the Octroi Superintendent. This argument does not come to grip with the contention advanced by the counsel for Petitioner that the ordinary avenue for promotion of the Octroi Inspector is Octroi Superintendent. The income of all Municipalities from Octroi Tax does not exceed rupees (sic) lacs.

8. As we have already shown, while grouping the post of Octroi Inspector only

one aspect, namely the equality in the time scale of pay has been taken as the basis the other requirement of Sub-rule (2) of Rule 3, which is in accord with Article 16 of the Constitution of India, namely, equals be treated as equals and unequals should not be treated as equals, by prescribing "having duties and degree of responsibility of the same nature", has not been followed. Departure therefrom has violated the constitutional guarantee of Article 16.

9. In a different context, a Division Bench of Calcutta High Court in the case of State of West Bengal and Ors. v. Hirendra Nath Banerjee AIR 1969 Cal. 285 observed:

It does not seem to be in accord with commonsense that a person who is not in any cadre post, but who has been specifically appointed "permanently" to a statutory post of a particular description, can be transferred at will to some other post which might involve a work of an entirely different nature.... The holder of a post may require a certain kind of technical knowledge, and to say that he can be transferred to another post for which he is not qualified, would be absurd. For example, supposing a person fills the post of a police officer; can he be transferred as a bus conductor under the State Government in its Transport Department? The answer is obviously negative.

10. We are, therefore, of the view that the grouping of the post of Octroi Inspector in one cadre with Local Division Clerk is contrary to Section 81(2) proviso and Rule 3(2) and is violative of Article 16 of the Constitution of India and the order of transfer from the post of Octroi Inspector to the post of L.D.C. as per Annexure-8 is quashed. The writ, petition is accordingly allowed. There would be no order as to costs.

B.K. Behera, J.

11. I agree.