
(1992) 01 OHC CK 0025

In the Orissa High Court

Case No : O.J.C. No"s. 1939 and 1941 of 1989

Kishore Chandra Samal and Others and Sarat @ Sharat
Chandra Padhi

APPELLANT

Vs

State of Orissa and Others and Chairman-cum-Collector,
Cuttack Municipality and Others

RESPONDENT

Date of Decision : 28-01-1992

Acts Referred:

Orissa Local Fund Service Rules, 1975 — Rule 3(2)
Orissa Municipal Act, 1950 — Section 81, 81(2)

Citation : (1992) 74 CLT 649 : (1992) 1 OLR 544

Hon'ble Judges : K.C. Jagadebroy, J;G.B. Pattnaik, J;A.K. Padhi, J

Bench : Full Bench

Advocate : B. Pal, in OJC 1939/89 and K.N. Das and N.M. Das in OJC 1941/89, for the Appellant; S. Mohanty, Additional Government Advocate and S.K. Nayak, for the Respondent

Judgement

G.B. Pattnaik, J.—A common question of law is involved in both these writ applications and, therefore, these cases have been heard together and are being disposed of by this common Judgment. The order of transfer of the petitioners under Annexure-1 is the subject matter of challenge. The question " of law raised in these two applications is whether the personnel belonging to the Octroi Section of a Municipality from a cadre by themselves and are, therefore, not to be transferred to any other posts, notwithstanding the provisions of the Orissa Local Fund Service Rules, 1975 ?

2. The Government of Orissa had issued a Notification on 31-8-1976 grouping different posts in the Municipalities within a cadre and it is because of the said notification, the petitioners have been transferred from one post to the other within the cadre so formed by the Government in the notification referred to earlier. The aforesaid Notification had been challenged by an employee of the Berhampur Municipality and a Bench of this Court in the said case of K. Babu Rao Vs. Executive Officer, Berhampur Municipality and Others, after analysing the

different provisions of the Orissa Municipal Act came to hold that there being no similarity in the nature of duties and degree of responsibilities of the posts which have been grouped in one cadre under the Notification, the said grouping contravened the provisions of the Orissa Municipal Act as well as was violative of Article 16 of the Constitution. On the aforesaid conclusion, the transfer of the petitioner of the said writ application from Octroi Inspector to Lower Division Clerk was quashed. This decision was again followed by another Bench of this Court in 1937 OJC 3226 (*Hemanta Kumar Ratha v. State of Orissa and Ors.*) disposed of on 13th November, 1988, whereunder the transfer of an Octroi Inspector to the post of a Junior Assistant was quashed. The aforesaid decision in *K. Babu Rao's* case was also followed in yet another decision of this Court in 1981 OJC 2893 (*Dwarikanath Panigrahi v. State of Orissa and Ors.*), disposed of on 11th July, 1989, whereunder the direction of the Government to adjust an Octroi Superintendent as a Senior Assistant was set aside. When the present case came up before the Division Bench, the learned counsel for the Municipality brought it to the notice of the Division Bench that an earlier Bench decision of this Court in the case of *Rabinarayan Vyas v. State of Orissa*, (1979 OJC 930 disposed of on 16-5-1980) had not been brought to the notice of any of the three Division B benches, referred to supra, and that in *Rabinarayan's* case, the Court had taken a different view of the matter and because of the inconsistency between the Bench decisions, the matter was referred to a larger Bench.

3. The petitioners were continuing in different posts in the Octroi Section of the Municipality. By the impugned order of transfer they have been posted against different posts. The scale of pay of the posts to which they have been transferred is equal to the scale of pay which they were getting while serving under the Octroi Section. But they allege in the writ applications that the Octroi Section itself constitutes a cadre and, therefore, personnel from that cadre cannot be transferred to any other Section of the Municipality forming a different cadre.

4. The stand of the Municipality, on the other hand, is that all these employees had been initially appointed as Lower Division Clerk-cum-Assistant Octroi Superintendents and during their service career, they have been transferred to general Section on several occasions earlier. Therefore, there cannot be a close tight compartment for employees serving under the Octroi Section. It is the further case of the Municipality that the employer can bring a group of persons to form a cadre and there cannot be any fetter on the power of the employer to constitute a cadre. Since by the impugned notification of the year 1976, the posts in which the petitioners were serving and the posts to which they have been transferred have been brought within one cadre, the order of transfer cannot be held to be vitiated. The stand of the Municipality further is that in view of the decision of this Court in *Rabinarayan's* case which was in respect of an employee of the Cuttack Municipality, the order of transfer cannot be interfered with by this Court.

5. In view of the rival stand of the parties, the following questions arise for our

consideration :

- (i) What is a cadre and who has the authority to constitute a cadre ?
- (ii) While constituting a cadre can there be any limitation on the power of the authority ?
- (iii) In constituting the cadre of the present case, has there been any infraction of any statutory provision which vitiates the formation of cadre made by the State Government in their notification of the year 1976 ?
- (iv) Is the case of Rabinarayan Vyas v. State of Orissa correctly decided ?

Before examining the aforesaid questions, we would like to point out that a transfer is an incidence of service and, therefore, an employee cannot generally complain of transfer unless such transfer is mala fide or is contrary to any statutory provision. Further, a transfer can be made only within a cadre and an employee cannot be transferred beyond the cadre.

6. Coming to the first question, the expression "cadre" has not been defined under the Orissa Municipal Act. In the absence of a definition in the Municipal Act, we would borrow the meaning of the said expression contained in the Orissa Service Code. "Cadre" has been defined in the Orissa Service Code to mean, "the strength of a Service or part of a Service sanctioned as a separate unit". The employer, therefore, has the full authority to constitute a cadre ; to abolish the same and to create a new cadre in accordance with the exigencies of public service.

7. Coming to the second question, though the employer is fully empowered to decide the strength of a Service as a separate unit forming a cadre, but while so constituting the power cannot be exercised arbitrarily or irrationally or in a manner which would contravene any provisions of the Constitution or any statutory provision in that respect. In this view of the matter, if under the Act or the Rules framed for formation of a Cadre, any guideline has been indicated, the employer has to follow the same while constituting a cadre. Subject to the aforesaid limitations, the employer, however, can choose to create as it chooses according to administrative convenience.

8. Coming to the third question, which is indeed important in the present case and is the real issue, it would be necessary to examine the provisions of the Act and the Rules framed thereunder, Section 31 of the Orissa Municipal Act empowers the State Government to create a Local Fund Service. The State Government, therefore, by a Nomination may constitute any class of officers or servants of Municipalities into a Local Fund Service for the State of Orissa. Sub-section (2) thereof stipulates that the State Government has 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 or authorities as may

be prescribed therein. The proviso to the aforesaid Sub-section further stipulates that the terms and conditions of service prescribed under such Rules in respect of officers and servants who, on the constitution of 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. In exercise of the aforesaid power contained in Sub-section (2) of Section 81 of the Orissa Municipal Act, the State Government has framed a set of Rules called the Orissa Local Fund Service Rules, 1975 (hereinafter referred to as the "Rules"). Chapter-1 of the Rules deals with constitution of Local Fund Service. Rule 3(1) provides that the Local Fund Service shall be constituted by the State Government as per the provisions 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. Sub-rule (2) of the aforesaid Rule 3, however, indicates that on constitution of the Service under Sub-rule (1), the posts of the equal time-scales having duties and degree of responsibilities of the same nature in Municipalities shall form, one cadre. On a combined reading of the aforesaid provisions makes it absolutely clear that the State Government while constituting the Local Fund Service under the Rules and while constituting a cadre of the Municipal employees must be guided by the limitations contained, in Sub-rule (2) of Rule 3. Necessarily, therefore, if a cadre is constituted in contravention of Sub-rule (2) of Rule 3, then notwithstanding the general power of the employer to constitute a cadre, the same will be held to be vitiated. The two necessary pre-conditions contained in Sub-rule (2) of Rule 3 of the Rules are that the posts brought together must be in equal time-scales and the duties and degree of responsibilities of those posts must be of the same nature. Taking into consideration the aforesaid guidelines and analysing the different provisions of the Act and the Rules in *K. Babu Rao Vs. Executive Officer, Berhampur Municipality and Others*, this Court held that the Government while issuing the notification in the year 1976 grouping the posts to constitute a cadre have failed to follow the principles contained in Sub-rule (2) of Rule 3 of the Rules and, therefore, it was concluded that the post of Octroi Inspector and post of Lower Division Clerk cannot be brought within one cadre and such a grouping or constituting into a cadre would be contrary to the proviso to Section 81(2) of the Orissa Municipal Act as well as Sub-rule (2) of Rule 3 of the Rules and further it would be violative of Article 16 of the Constitution. The aforesaid decision of this Court in *K. Babu Rao's* case, in our considered opinion, has been correctly decided and lays down the correct principles with regard to formation of a cadre in respect of employees of municipalities.

It would be necessary at this stage to notice the earlier Bench decision of this Court in *Rabinarayan Vyas v. State of Orissa* (1979 OJC 930 disposed of on 16-6-1980), which is the sheet-anchor of the arguments advanced by the learned counsel for the Municipality. In the aforesaid *Rabinarayan's* case, the Octroi Revenue Collector having been transferred and posted to the Tax Section, the said Octroi Revenue Collector had approached this Court. It was contended

that the Octroi Revenue Collectors constituted a separate cadre under Octroi Section and, therefore, could not be transferred and posted to the Tax Section. In paragraph-3 of the Judgment, their Lordships held that the entire municipal establishment was one under the administrative control of the Executive Officer and there were separate wings only and, therefore, in the absence of independent cadre, transfer of municipal employees from one post to another which does not affect the service benefits could not be objected to. Though the observations in the aforesaid Rabinarayan's case support the contention of the learned counsel for the Municipality, but it is to be noticed that neither there has been any discussion of law nor the learned Judges while deciding Rabinarayana's case have focussed their attention to the different provisions of the Act and the Rules framed thereunder, which have been fully discussed in K. Babu Rao's case (supra). Rabinarayana's case, on the other hand, has proceeded on the assumption that all the posts within the Municipality would come within one cadre which assumption would be contrary to the statutory provisions, as discussed by us earlier, and as has been held in K. Babu Rao's case and followed by two other Division Bench cases, referred to supra. In the aforesaid premises, we have no hesitation to come to the conclusion that Rabinarayan's case has not been correctly decided and the same is accordingly overruled. We would further hold that the principles of law with regard to the cadrisation have been rightly decided in K. Babu Rao's case though it is only in relation to encadrement of the Octroi Inspector and a Lower Division Clerk together.

9. We would now examine the notification of the State Government dated 31st of August, 1976. By the said notification, five different cadres have been constituted. But on examining the same, we do not find any infirmity in the cadre constituted under items 1, 2 and 5. But while constituting cadre as per items 3 and 4, the appropriate authority has merely taken into account the scales of pay of the posts and not the nature of duties and degree of responsibilities of the posts, whereas under Sub-rule (2) of Rule 3 of the Rules both these conditions must be satisfied to bring the posts within one cadre. The cadre of Senior Assistants in the time-scale of pay of Rs. 300-410/- has been constituted under the Local Fund Service bringing within the same the posts of Accountant, U.O. Clerk, Octroi Superintendent and Tax Daroga. From the nature of duties and the degree of responsibilities discharged by the incumbents of these posts, there cannot be any manner of doubt that the job of Octroi Superintendent and Tax Daroga may be akin or similar, but they cannot be said to have been discharging the same nature of duties as of a U.D. Clerk, which is essentially ministerial. Therefore, grouping of Octroi Superintendent and Tax Daroga within the cadre Senior Assistants contravenes Sub-rule (2) of 3 of the Rules, though there cannot be possibly any objection if Octroi Superintendent and Tax Daroga are grouped together. Therefore, transfer of an Octroi Superintendent to the post of Tax Daroga or vice-versa, cannot be said to be contrary to law, but transfer of an Octroi Superintendent or Tax Daroga to the post of a U. D. Clerk cannot be sustained. Similarly, in the cadre of Junior Assistants, the posts of L.D. Clerk,

Cashier, Typist, Carriage Inspector, Errant Officer, Light Inspector, Librarian, Birth and Death Registration Clerk, Assistant Octroi Superintendent, Licence Inspector, Storekeeper and Octroi Inspector have been included. Undisputedly the duties of Assistant Octroi Superintendent and Octroi Inspector may be some what similar with the duties of Licence Inspector, but it cannot be similar with the duties of a Typist or a Carriage Inspector or an Errant Inspector or a Librarian and so on and so forth and therefore, it must be held that grouping of all these posts within one cadre has contravened Sub-rule (2) of Rule 3 of the Rules, though we may observe that it would be open for the employer to group the posts of Licence Inspector, Octroi Inspector and Assistant Octroi Superintendent and any other posts which carry similar duties together.

10 The Octroi Section is known for its notoriety as it involves the duty of collection of octroi at the check-gates. Persons appointed to these posts are reluctant to leave the same, as a result of which vested interests grow at the check gates. While, therefore, it is desirable that those people should be transferred to some other posts, but the posts must be such where the employees would be required to discharge similar nature of duties. In other words, an Octroi Inspector can be posted in any job of the Municipality where collection of Municipal dues is involved. Which posts would be carrying the similar nature of duties will have to be decided by the employer for constituting a cadre. But in view of the principles of law as discussed, the encadrisation of all the posts in the cadre of Junior Assistants as well as encadrisation of the posts in the cadre of Senior Assistants in the Government Notification dated 31st of August, 1976, cannot be sustained having contravened the provisions contained in Sub-rule (2) of Rule 3 of the Rules as well as Article 16 of the Constitution. There has been no prayer in the writ application to quash the Notification of the State Government dated 31st of August, 1976 (Annexure-7) though its basis is being challenged while the orders of transfer have been assailed. But in view of our conclusion made earlier, the Government should reconsider the matter of constitution of cadre and should regroup the posts and constitute cadres in accordance with law bearing in mind the provisions contained in Sub-rule (2) of Rule 3 of the Rules as well as the observations made by us. In view of the power of the employer to constitute a cadre as discussed by us, we have also the least hesitation to negative the contention of the learned counsel for the petitioners that the persons appointed in the Octroi Section constitute an independent cadre by themselves and can not be included along with the other employees of the Municipality.

11. In view of the fact that only the order of transfer of the petitioners as per Annexure-1 has been assailed, we had called upon Mr. Pal appearing for the petitioners to indicate as to what posts the petitioners were holding and to which posts they have been transferred to determine the legality of the order of transfer on the ground that they could not have been included within one cadre and pursuant to the same. Me. Pat has given a chart in respect of the 40 petitioners and Mr. Das appearing for the petitioner in 1989 OJC 1941 has also

indicated by a chart. Having examined the chart submitted by Mr. Pal appearing for the petitioners in OX No. 1939 of 1989 and applying the law laid down by us, we do not find any infirmity in the transfer of petitioner Nos. 1, 3, 4, 17, 21, 22, 23, 26, 28 to 40, inasmuch as the Octroi Tax Collector, the Octroi Revenue Collector, and the Assistant Octroi Superintendent can be grouped together with Tax Daroga, Licence Supervisor, Carriage Inspector and Tax Collector. Their order of transfer under Annexure-1, therefore must be sustained and cannot be interfered with. The transfer order of other petitioners must be held to be invalid as the post to which they are being transferred could not have been brought within one cadre and is accordingly quashed. So far as the petitioner in 1989 OJC 1941 is concerned, an Octroi Inspector has been placed in the Accounts Section not for any collection, but for maintenance of accounts and, there-fore, the same must be held to have contravened Sub-rule (2) of Rule 3 of the Rules and must accordingly be quashed.

12. In the premises, as aforesaid, both the writ applications are disposed of in the manner indicated above. The decision of this Court In 1979 OJC 930 (Rabinarayan Vyas v. State of Orissa) disposed of on 16-5-1980 overruled. The law laid down by this Court in K. Babu Rao Vs. Executive Officer, Berhampur Municipality and Others, and followed in Hemanta Kumar Ratha's case (1987 OJC 3226) Dwarikanath Panigrahi's case (1981 OJC 9893) is affirmed and these cases are held to have been correctly decided. We make no order as to costs.

A.K. Padhi, J.

13. I agree.

K.C. Jagadebroy, J.

14. I agree.