
(1955) 02 OHC CK 0010
In the Orissa High Court
Case No : O.J.C. No. 29 of 1954

P. Raghunadha Rao

APPELLANT

Vs

The State of Orissa and Another

RESPONDENT

Date of Decision : 25-02-1955

Acts Referred:

Constitution of India, 1950 — Article 15, 16, 29, 309, 316
Government of India Act, 1935 — Section 265
Orissa Administrative Service and the Orissa Subordinate Administrative Service
(Recruitment) Rules, 1950 — Rule 5

Citation : AIR 1955 Ori 113

Hon'ble Judges : Panigrahi, C.J.; S. Mohapatra, J

Bench : Division Bench

Advocate : A.L.J. Rao, for the Appellant; A.G., for the Respondent

Final Decision : Dismissed

Judgement

Panigrahi, C.J.—The petitioner was an applicant for a post in the Orissa Administrative Service and was examined by the Orissa Public Service Commission in various subjects, but was disqualified on the ground that he failed to pass the language test in Oriya upto the Middle Standard. The question raised in this application is whether the action of the Public Service Commission in eliminating the petitioner from the list of eligible candidates is unconstitutional. The petitioner also challenges the validity of the composition of the Service Commission itself and prays for the issue of a writ directing the Commission to include his name in the list of candidates sent up to Government for selection to the Orissa Administrative Service, or, in the alternative, to declare the composition of the Commission as unconstitutional.

2. It is said on behalf of the State that the applicant was not qualified under the rules prescribed for recruitment to the Orissa Administrative Service as he did not know Oriya up to the Middle Standard. Accordingly, no viva voce examination was held and the petitioner was intimated that he was not qualified.

3. Part III of the Orissa Administrative Service and the Orissa Subordinate Administrative Service (Recruitment) Rules 1950, deals with direct recruitment and says that:

"Direct recruitment shall be made on the result of a competitive examination to be conducted by the Commission, in accordance with rules, framed in this behalf (reproduced in Annexure)."

The rules reproduced in the Annexure purport to have been made by the Governor of Orissa in pursuance of the provisions of Article 309 of the Constitution. Rule 2 of the Annexure says that:

"a combined competitive examination shall be conducted by the Orissa Public Service Commission for direct recruitment to the Serviceson a date or dates to be announced by the said Service Commission in the manner prescribed in Appendix I to these Rules."

Rule 3 lays down that the candidates shall be under 25 years and over 21 years of age, on 1st August of the year in which applications are invited. Rule 4 deals with the education qualifications and says that a candidate must hold a Degree of a recognised University. Rule 5 is the impugned rule which reads as follows:

"5. Residence: -- Candidates shall ordinarily be permanent residents of the State of Orissa as defined in Resolution No. 38 -Reforms dated 18-1-1949 and No. 870 -Reforms dated 9-12-1949 (Appendix III) and shall be required to file along with their applications a declaration in the prescribed form (Vide Appendix IV)."

Rules 6 and 7 relate to character and physical fitness. It is unnecessary to refer to the other rules as they are not relevant to the points in issue here.

4. Resolution No. 38 -Reforms dated 18-1-1949, referred to in Rule 5 was passed by the Governor of Orissa when the Government of India Act 1935, as adapted by the India (Provisional Constitution) Order, 1947, was in force. This resolution deals with the Domicile Rules which were till then in force in the State. Paragraph 5 defines a "permanent resident of the Province of Orissa" as any person who, or one of whose parents, has lived in the Province of Orissa for a minimum period of 12 years and is (a) either able to speak Oriya and (b) if he is a literate person (i) is able to read of 12 years and is (a) either able to speak Oriya equivalent to the Middle Standard. The production of a Domicile Certificate from a prescribed authority was done away with, and persons seeking service under the State Government were required by this rule to make a declaration whether they are permanent residents of the Province or not within the meaning of the above Resolution dated 18-1-1949. A form of declaration was prescribed and the candidate was required to make a declaration himself. It was left to the appointing authority to verify the declared residential qualification of the candidates in such manner as they thought fit. A penalty for making a false declaration was also attached. The Resolution says that anybody who secures a job under the Provincial Government on the basis of a false declaration about his

residential qualification, is liable to be dismissed from Government service and also liable to prosecution under the Indian Penal Code.

5. On 9-12-1949, another Resolution No. 870 Reforms was passed by the Government of Orissa in the Home Department which laid down that no new entrant to Government service will be confirmed unless he passed a Middle Standard Examination in Oriya, within twelve months of his appointment. That Resolution also empowered the Public Service Commission to prescribe a test in Oriya up to the Middle Standard along with other tests which the candidates may be required to pass.

6. These rules were in force when the Constitution was passed in 1950 and have since been incorporated in the Rules framed by the Governor of Orissa under Article 309 of the Constitution.

7. Mr. Rao, learned counsel for the petitioner, attacked the validity of these provisions and took his stand on the provisions of the Constitution relating to equality. He contended that the test of residence cannot be linked with knowledge of Oriya language, and that Rule 5 is discriminatory in effect inasmuch as a person who is ignorant of Oriya is made ineligible for appointment to Government service. Reliance was placed on Article 16 of the Constitution which guarantees equality of opportunity to all citizens in matters relating to employment or appointment to any office under the State. It was argued that no discrimination could be made in respect of any employment under the State Government on the ground of residence as that would contravene Article 16(2). It was next contended that if any law could be made prescribing any requirement as to "residence" it was Parliament alone that could enact such a law, and it was beyond the rule-making power of the Governor to make any such law.

8. It is therefore, necessary to canvass the validity of Resolution No. 38 Reforms dated 18-1-1949 which was passed when the Government of India Act 1935, was in force. u/s 241(2), Government of India Act the conditions of service of persons serving His Majesty in a civil capacity were to be prescribed, in the case of persons serving in connection with the affairs of a Province by the Governor of that Province or by a person authorized by the Governor of that Province to make rules for the purpose. These conditions of service could also be regulated by an Act of the appropriate Legislature u/s 241(4). Item 6 of List II of the Provincial Legislative List, shows that Provincial Public Service was a Provincial Subject in respect of which the Provincial Legislature could enact laws. Section 298, Government of India Act lays down that:

no subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour, or any of them, be ineligible for office under the Crown in India".

These provisions have been elaborated and incorporated in the Constitution. Part III of the Constitution deals with "Fundamental Rights" and Articles 15 and 16 deal with discrimination and equality of opportunity respectively. Article 15 says

that

"the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth, or any of them".

Article 16 is as follows:

"(16) Equality of opportunity in matters of public employment-

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence, or any of them, be ineligible for, or discriminated against, in respect of any employment or office under the State.

(8) Nothing in this Article shall prevent Parliament from, making any law prescribing, in regard to a class Or classes of employment or appointment to an office under any State, specified in the First Schedule, or any local or other authority, within its territory, any requirement as to residence within that State prior to such employment or appointment.

(4) & (5) "

It is, therefore clear that both under the Government of India Act and under the present Constitution, no discrimination could be made on the ground of residence and no citizen could be declared ineligible for entry into Government Service on the ground of place of birth or residence. Mr. Rao's contention, therefore, is that any discrimination based on residence alone would have been repugnant to the provisions of the Government of India Act as it undoubtedly is under our Constitution.

9. But the question is whether the rules purport to debar persons who are not residents of the State from applying for appointment in the State. It should be noticed that neither Article 15 nor 16 prohibits restrictions being imposed on grounds of language qualification. On the other hand, Article 29 saves the cultural and educational rights of any section of citizens residing in any part of India. The effect of the Government Resolutions referred to above is only to prescribe a language test as a necessary condition for entry into Government service. It is, therefore, open to any citizen to get himself qualified by satisfying the language test. The rule does not purport to discriminate one citizen against another, and the test is applicable to all applicants. The need for the rule is apparent specially when we remember that the English language is being replaced in educational institutions and administration is being carried on through the regional language. The State is entitled to select only eligible candidates for employment under it, and in the process of selection those who fail to satisfy the required qualifications are bound to be eliminated from selection. But the opportunity is given to all and it cannot be said that the rule is discriminatory in its operation against a particular citizen or particular classes of

citizens.

10. The next contention of Mr. Rao, based on Article 16(3) is that Parliament alone can enact a law prescribing requirements as to- residence within a State prior to such employment or appointment. Article 16(3) undoubtedly empowers Parliament to make a law prescribing requirements as to residence within the State. Article 35(a) makes the position clear by enacting that Parliament shall have, and the "Legislature of a State shall not have, power to make laws, with respect to any of the matters which under Clause (3) Article 16... may be provided for by law made by Parliament. This does not, however, take away the power of the State Legislature to prescribe conditions of recruitment and service which is provided for in Article 309. Article 309 says:

"Subject to the provisions of this Constitution, Acts of appropriate Legislature may regulate the 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".

There is a proviso to this Article which says that, until provision in that behalf is made by an Act of the appropriate Legislature the Governor may make" rules regulating recruitment and conditions of service of persons appointed to such services. Entry 41 in List 2 of the Seventh Schedule mentions

"State Public Services" as one of the State subjects, in respect of which the State Legislature is competent to make laws. Article 372 declares the continuance in force of existing laws and says:

"All the laws in force in the territory of India immediately before the commencement of the Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority".

From this it follows that until Parliament has made a law under Article 16(3) the existing laws continue to be in force and are not hit by that Article. I am therefore inclined to the view that the requirement as to knowledge of Oriya of a certain standard, is one of the conditions of recruitment which was validly made before the Constitution & continued in force after the Constitution came into force in 1950, by virtue of Article 372, and there is nothing in it which violates the Fundamental Rights guaranteed by the Constitution in Article .16.

10a. It must also be noticed that before applying for the post the petitioner signed the Declaration Form printed as Appendix IV to the Recruitment Rules. It reads as follows:

"Whereas, I, P. Raghunadha Rao, inhabitant of Berhampur, in the district of Ganjam, desire to apply for a post in the Orissa Administrative, Finance and Police Services, under the Government of Orissa:

And whereas I am required to make a declaration under the Resolution of the Government of , Orissa in Home Department Resolution No. 38 Reforms dated

18-1-1949, to the effect that I am a permanent resident of the Province of Orissa;

Now, therefore, in pursuance of the said Resolution I do hereby declare that I.P. Raghunadha Rao, son of P. Subba Rao, in the district of Ganjam, am a permanent resident of the Province of Orissa as defined therein.

Sd/- P. Raghunadha Rao In the presence of..... District Inspector of Schools, Ganjam."

The declaration that the petitioner is a permanent resident of the State of Orissa does not relate to physical residence for a certain number of years. but, in terms of the Resolution, it has reference to his ability to read and write Oriya and to pass a test in that language upto the Middle Standard. A person who satisfies this test in Oriya language and has resided in the State for a certain number of years is declared a permanent resident of Orissa. The applicant knew at the time of his applying that he was not qualified to apply, in terms of that Resolution, and yet signed that declaration; and when he failed in the language examination, held by the Service Commission for recruitment to the post he Applied for, he was rightly disqualified and declared ineligible for being selected.

11. The next contention raised by Mr. Rao, relates to the constitution of the Orissa Public Service Commission. It is necessary to refer to the corresponding provisions in the Government of India Act. Section 265, Government of India Act deals with the composition of the Service Commission and reads thus:

"265 (1). The Chairman and other members of the Public Service Commission shall be appointed in the case of the Federal Commission by the Governor-General and in the case of the Provincial Commission by the Governor of the Province:

Provided that "at least half" of the members of every Public Service Commission shall be persons who, at the dates of their respective appointments, have held office for at least ten years under the Crown."

Article 316 of the Constitution is very similar in language and reads as follows;

"316 (1). The Chairman and other members of a Public Service Commission shall be appointed, in the case of the Union Commission or a Joint Commission, by the President, and in the case of a State Commission, by the Governor or Rajpramukh of the State:

Provided that "as nearly as may be one-half of the members of every Public Service Commission shall be persons who at the dates of their respective appointments have held office for at least ten years either under the Government of India or under the Government of a State, and in computing the said period of ten years any period before the commencement of this Constitution during which a person has held office under the Crown in India or under the Government of an Indian State shall be included."

It will be noticed that the only change that has been introduced is in the proviso which, under the Government of India Act, required that at least half of the members shall be persons who have held office for at least 10 years under the Crown. The expression "at least half" has been replaced by "as nearly as may be one-half". Mr. Rao contended that the members constituting the Orissa Public Service Commission are all persons who have held office either under the Crown in India or under the Government of an Indian State for ten years prior to their appointment to their posts. His argument is that when the Constitution says "as nearly as may be one-half" the other half must necessarily be composed of persons who have not held appointments under the Crown or under the Government of an Indian State. He wants me to read "as nearly as may be one half" as equivalent to "not more than half". It is contended that the Government of India Act laid down the minimum when it used the expression "at least half" while the Constitution lays down the maximum by using the expression "as nearly as may be one-half". I have gone through the Debates of the Constituent Assembly and I find that an amendment to substitute the word "one-third" for the word "one-half" was defeated. Similarly, another suggestion to substitute "not more than half" for the words "at least half" also met, with the same fate, and the expression "as nearly as may be one-half" was ultimately agreed upon.

In -- "*Potter & Co. v. Burrell & Son*", (1897) 66 LJ QB 63 (A) the expression "as nearly as possible a steamer a month" was interpreted as more or less approximating to a month, and the actual date was not to be taken as a fixed date. The proper construction of the expression "as nearly as may be one-half" should, therefore, be, in my opinion, that it indicates only an approximation. This limitation about the number is prescribed by way of a proviso to the main Article which is absolute in language and vests the power on the Governor to appoint the members of the Commission. The, proviso is to be read as an exception to the generality of the power conferred by the Article, and subject to the exception the option is left to the Governor to appoint the other members of the Commission as he pleases. It is open to him to appoint the: other members of the Commission either from among officials or from among non-officials as he chooses. I am therefore satisfied that the Constitution of the present Commission is not in conflict with the provisions of the Constitution in Article 316.

12. All the contentions of the petitioner having failed he is entitled to no relief. The application is accordingly rejected.

Mohapatra, J.

13. I agree.