
(1969) 02 OHC CK 0008
In the Orissa High Court
Case No : O.J.C. No. 1360 of 1968

Radha Charan Patnaik

APPELLANT

Vs

State of Orissa and Another

RESPONDENT

Date of Decision : 28-02-1969

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 233(2), 309

Orissa Superior Judicial Service Rules, 1963 — Rule 6(1), 6(2), 6(3), 6(4), 8(2)

Citation : AIR 1969 Ori 237 : (1969) 35 CLT 448

Hon'ble Judges : S. Barman, C.J;B.K. Patra, J

Bench : Division Bench

Advocate : R.N. Misra, R. Mohanty, Y.S.N. Murty, S. Patnaik, C.V. Murty, B. Pal, R.C. Ram, G.B. Patnaik, R. Das, A.K. Das, P.K. Sengupta, P.V.B. Rao, P.K. Dhal, H. Mohapatra, S. Basu, S.C. Ghosh, S.N. Sinha, A. Mohanty, S.K. Dey, R.K. Kar, S. Sahu, B. Harichandan, L. Rath, B. Naik and B. Roy, for the Appellant; Govt. Advocate and R.C. Misra, for the Respondent

Final Decision : Partly Allowed

Judgement

Barman, C. J.

1. The petitioner -- an Advocate of this High Court -- challenges the advertisement dated September 11, 1963, issued by the Registrar of the Orissa High Court inviting applications for one post of District Judge under Rules 8 (2) (ii) and 6 of the Orissa Superior Judicial Service Rules, 1963 made by the Governor in exercise of the powers conferred by the proviso to Article 309 of the Constitution for the regulation of recruitment to posts in, and the conditions of service of persons appointed to, the Orissa Superior Judicial Service, as unconstitutional and invalid with a prayer for directing the Registrar of the Orissa High Court to republish the said advertisement.

2. Rule 8 (2) is this;

"8 (2) Candidates for direct recruitment to the Senior Branch of the Service shall-

- (i) be at least 7 years standing at the Bar, and
- (ii) not be under 35 and over 45 years of age."

It is in conformity with this Rule that, in paragraph 2 of the advertisement, it was stated thus:

"A candidate for the post shall-

- X XX XX (ii) be at least 7 years standing at the Bar by the 22nd October, 1968;
- (iii) not be under 35 and over 45 years of age on the 22nd October, 1968."

The petitioner aged about 34 years challenges both the Rule and the advertisement as made, as unconstitutional in that it violates Article 233(2) of the Constitution which provides as follows:

"233(2). A person not already in the service of the Union or of the State shall only be eligible to be appointed a District Judge, if he has been for not less than 7 years an Advocate or Pleader and is recommended by the High Court for appointment."

3. The petitioner's point is that all that is required by the Constitution is that the candidate should be an Advocate of 7 years standing irrespective of his age. It is submitted on behalf of the petitioner that u/s 24 of the Advocates Act, 1961, one can be an Advocate if he has completed 21 years of age; therefore he becomes eligible for appointment to the post of a District Judge at the age of 28 years after completing seven years' practice as an Advocate. According to the petitioner, the restriction that the candidate shall not be under 35 and over 45 years of age as laid down in the Rule and in the advertisement, is an unreasonable restriction not envisaged by the Constitution; in fact, it is stated to be violative of Article 233(2) by which all that is required is that he shall be an Advocate or Pleader for not less than 7 years and be recommended by the High Court for appointment. In support of this proposition, the petitioner relied on a decision of the Supreme Court *Rameshwar Dayal Vs. The State of Punjab and Others*, holding that the appointment as District Judge of a person whose name was on the roll of Advocates of the East Punjab High Court on the date of his appointment and who had a period of 7 years' practice at the Bar including his period of service in or under the Lahore High Court before partition, was not open to objection under Article 233 of the Constitution. The passage in the judgment on which the petitioner relied is this:

"As to a person not already in service, a qualification is laid down in Clause (2) (of Article 233) and all that is required is that he should be an Advocate or Pleader of seven years standing".

In our opinion, this sentence read in the context of the discussion, does not support the petitioner's point because the meaning is quite clear from the sentence following where the Supreme Court made it clear that Clause (2) does not say how the period of standing must be reckoned and if an Advocate of the

Punjab High Court is entitled to count the period of his practice in the Lahore High Court for determining his standing at the Bar, there is nothing in Art. 233 which must lead to the exclusion of the period for determining his eligibility for appointment as District Judge.

4. It was also argued that Rule 8 (2) (ii) is ultra vires the Constitution as violative of Articles 14 and 16 on the grounds that there is no rational nexus for prescribing the age limit of the minimum 35 years and the maximum 45 years for achieving the object that is an impartial judiciary well versed in law and that the Rule is ex facie discriminatory.

5. On the question as to whether the Governor has power to make Rules under Article 309 of the Constitution, it was argued on behalf of the petitioner that Article 233(2) being a self-contained provision laying down the conditions of eligibility for appointment as a District Judge, no Rules under Article 309 of the Constitution are contemplated. In this context, for analogy, he relied on Article 234 regarding recruitment of persons other than District Judges to the Judicial Service, which provides that appointment of such person shall be made by the Governor of the State in accordance with rules made by him In that behalf after consultation with the State Public Service Commission and the High Court exercising jurisdiction in relation to such State. The petitioner's point is that it is significant that whereas in Article 234 rules were specifically mentioned, but in the case of District Judges there is no mention of rules to be made by the Governor of the State. This argument however loses its force in the face of the provisions of Article 309. In our opinion, on plain reading of the Article, the Governor is competent to make rules to regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of a State and that the rules so made by the Governor shall have effect subject to any of the provisions of the Constitution. In other words, so long as the rules made under Article 309 are not in conflict with any provision of the Constitution they cannot be challenged as invalid.

6. This brings us to the main question as to whether the impugned Rule 8 (2) (iii) purporting to be a restriction as to the age, is hit by any of the provisions of the Constitution. It was argued on behalf of the petitioner that Rule 8 (2) (ii) violates Articles 14 and 16 in that by the impugned rule the State denies equal opportunity before the law and that by restricting the eligible candidates to persons falling within a particular age group, that is between 35 and 45 years, it denies equality of opportunity for all the eligible candidates in matters relating to employment for appointment to any office under the State. In our opinion, this argument is not tenable because the fixation of age group -- fixing both the minimum and the maximum -- as indicative of sufficient maturity as a basis for classification for appointment as a District Judge direct from the Bar is a reasonable classification and is not discriminatory; such fixation of age is intended for efficiency of service and it is a reasonable restriction; discrimination between two classes of persons does not violate Article 14 of the Constitution,

Equal protection clause does not prevent classification and does not prevent drawing of lines. The clause only requires that the classification must be reasonable and not arbitrary.

7. Thus, for example, fixation of an age of majority for a minor of whose property superintendence has been assumed by the Court of Wards has been done at 21 years, whereas for other classes of minors it is fixed at the age of 18 years as provided in Section 3 of the Indian Majority Act (Central Act 7 of 1875); such classification was found to be not unreasonable.

Selection of age limit for legal majority is artificial in any case. If the Legislature has fixed a different age limit in the case of wards whose estates the Court of Wards has taken charge of, it cannot be said that the classification effected is *prima facie* unreasonable. On this reasoning the Patna High Court held that the discrimination in Section 3 of the Majority Act does not violate Article 14 of the Constitution. In truth all legislation involves classification of some sort and what Article 14 means is that any classification must be reasonably relevant to the purpose of good government. This view is based on the sound principle that the Court ought to make every reasonable presumption in favour of the constitutionality of an enactment or rule the principle is specially important when the issue of constitutionality before the court is one dependent on some question of degree. (*Gopeshwar Prasad v. State of Bihar* AIR 1951 Pat 570).

8. Thus viewed from the aspects as discussed above, the fixation of an age limit between 35 and 45 years as laid down in Rule 8 (2) (ii) cannot be said to be unconstitutional, arbitrary and unreasonable as violative of the provisions of the Constitution.

9. As a part of the argument based on the challenge to the constitutional validity of Rule 8 (2) (ii), it was further contended that the fixation of the date ---October 22, 1968 -- for the purpose of counting of the age and period of standing as mentioned in Sub-clause (iii) of clause 2 of the impugned advertisement dated September 11, 1968 is without the authority of law or rule and as such the fixation of such date as done in the advertisement cannot be sustained as valid. The date October 22, 1968 for age and standing was fixed with reference to the last date of receiving applications *prima facie* there is nothing unreasonable in fixing such date. But the rules should provide for such fixation of date with reference to which the age and standing are to be counted. Once authority is conferred by the rules to fix the date appropriately, and notification or advertisement issued in pursuance thereof, fixing such date, cannot be questioned as illegal or without the authority of law. We are of the opinion that the rule should be appropriately amended.

10. The petitioner also challenged the constitutionality of Rule 8 (2) (iii) which reads as follows:

"8 (2) (iii). The High Court shall for each vacancy open to direct recruits to the Senior Branch of the Service, furnish to Government a list of two candidates in

order of merit and Government shall appoint one of them after satisfying themselves as to the character and antecedents of the selected candidates."

The ground on which this Rule is challenged is that although the rule might not in terms, enact a discriminatory rule of law, but it might enable an unequal and discriminatory treatment to be accorded to persons or things similarly situated. In the present case, the petitioner's apprehension is that the Governor is vested with an unguided and arbitrary power enabling him to discriminate between the candidates out of the list as furnished by the High Court. The petitioner's point is that in this position the very rule that enables the Governor to discriminate offends the guarantee of equal protection afforded by Article 14. In support of this contention the petitioner relied on the decision of the Supreme Court in *Jyoti Pershad Vs. The Administrator for The Union Territory of Delhi*, .

11. In determining the question of validity or otherwise of such a rule the Court will not strike down the law out of hand only because discretion is given to the Governor to make the selection, but will go on to examine and ascertain if the rule has laid down any principle or policy for the guidance for the exercise of discretion by Governor in the matter of selection. In the present case, the rule provides that the Governor has to make appointments from out of a list of names recommended by the High Court. This does not amount to clothing the Governor with the authority, unguided and arbitrary power enabling him to discriminate as contended by the petitioner, In the present case there is no question of delegation of power of appointment in favour of the Governor; in fact by Article 233(2) of the Constitution the Governor himself is given the power to make appointment of only a candidate recommended by the High Court. Therefore, the contention of the petitioner challenging the constitutionality of Rule 8 (2) (iii) is untenable.

12. In the course, of a hearing, an application was filed by a lady Advocate of this Court, praying that she be allowed to intervene in the proceedings stating that she is vitally interested in the reliefs claimed by the petitioner on the basis of the challenge to the constitutional validity of Rule 6 (1), (2) and (3) by which she as a married woman is barred from applying for the post of a District Judge. Her application to intervene in the proceedings was allowed.

13. Now we come to Rule 6 which the petitioner and the intervener challenge on the ground that the disqualifications for appointment as District Judge laid down therein, on the ground of marriage in the case of woman and on the ground of language, are discriminatory. Sub-rule (2) of Rule 6 purporting to disqualify a woman on the ground of marriage is in these terms:

"6 (2). No married woman shall be entitled as of right to be appointed to the Service and where a woman appointed to the service subsequently marries, the State Government may, if the maintenance of the efficiency of the service so requires, call upon her to resign."

In this connection, we have to keep in view the distinction between a provision

excluding females or males as such and married females and married men as such. The question is: Can the State make a rule as quoted above? Corresponding to this there is a similar rule in the Indian Administrative Service (Recruitment) Rules, 1954 which excludes married women from posts included in that service on the ground that marriage brings about certain disabilities and obligations which may affect the efficiency or suitability for employment. In other words, can any such ground be the basis for discontinuing the employment of women on the ground of marriage? One view, with which we do not agree, is that the validity of such a provision relating to disqualification of women for employment on the ground of marriage cannot be questioned. The reasons in support of this view are these; It is said that the exclusion of married women from appointment is not based only on the ground of sex of the citizen, but on the additional factor of marriage. Women are eligible to be appointed or to be continued in the employment in certain services so long as they are unmarried; thus, the discrimination is on the basis not of sex only but on the additional ground of marriage. The reference to "maintenance of efficiency of the service" in the rule is significant and is suggestive of the real ground. In other words, the discrimination is based on a classification having a reasonable nexus in relation to the object to be achieved, namely the maintenance of the efficiency of the service. Marriage in the case of women, as is well known, involves certain disabilities by reason of which in the interests of the service they may not be entitled, as of right, to be appointed to it.

14. The above reasoning, however, overlooks the aspect that in substance the disqualification of married women from being eligible for appointment amounts, in substance, to a disqualification on the ground of sex only and as such is violative of Article 14 of the Constitution. Marriage does not operate as a disqualification for appointment as a District Judge in the case of men, whereas in the case of married women, by Rule 6 (2) they are being excluded from appointment. Such a disqualification being thus based on sex is unconstitutional. That apart, the restriction disqualifying a married woman from appointment as a District Judge is also unreasonable and discriminatory. It is significant that under Article 217 there is no bar to a married woman from being eligible to be appointed as a High Court Judge if she is otherwise qualified; appointment to the post of a High Court Judge involves the discharge of more onerous duties than those of a District Judge. In this view of the matter, the impugned Rule 6 (2) in so far as it operates as a disqualification in the case of married women only, as against married man, must be held to be discriminatory and must be struck down.

15. The other two disqualifications arising from marriage are mentioned in Sub-rules (1) and (3) of Rule 6, namely:

"6 (1). No person who has more than one wife living shall be eligible for appointment to the service;

Provided that the State Government may, if satisfied that there are special

reasons for doing so, exempt any person from the operation of this sub-rule.

(3) Subject to the provisions contained in Sub-rules (2) no woman who is married to any person who has a wife living shall be eligible for appointment to service.

Provided that the State Government may, if it is satisfied that there are special grounds for doing so, exempt any such woman from the operation of this sub-rule."

In our opinion these are reasonable restrictions. They involve only a classification, having a reasonable nexus in relation to the object, namely maintenance of the efficiency of the Service and cannot be challenged as discriminatory. That apart, the provisos to the said Rules, giving the State discretion to exempt any person from the operation of the sub-rules for special reasons or grounds for doing so, show that the restrictions imposed in Sub-rules (1) and (3) are not absolute.

16. Lastly as regards language, the disqualification for appointment on the ground of language is in Sub-rules (4) of Rule G which lays down:

"6 (4). No person shall be eligible for direct recruitment to the Senior Branch of Service unless he is able to speak, read and write Oriya and has passed a test equivalent to the M. E. standard."

This sub-rule cannot be challenged because it is by way of regulating the conditions of service for maintaining its efficiency, namely, that a person eligible for direct recruitment as to the Senior Branch of the Judicial Service in Orissa should be sufficiently conversant with the regional language, namely Oriya and with that object in view the rule purports to lay down certain standards of knowledge of Oriya which a candidate is expected to possess as a qualification for appointment as District Judge.

17. It is in the light of the aforesaid discussions that the impugned advertisement dated September 11, 1968, issued by the Registrar is to be, examined. Clause 2 of the advertisement is as follows:--

"2. A candidate for the post shall

(i) be a graduate in law of a University recognised by the Government or a Barrister-at-Law or a Member of the Faculty of the Advocate in Scotland;

(ii) be at least 7 years standing at the Bar by the 22nd October, 1968;

(iii) not be under 35 and over 45 years of age on the 22nd October, 1968;

(iv) be able to speak, read and write Oriya and passed a test in Oriya Language equivalent to M. E. standard."

Sub-clauses (ii) and (iii) may be suitably amended so as to require an eligible candidate to be an Advocate or Pleader for not less than 7 years standing and be

within the age limits on such date as may be mentioned according 11 the Rule 8(2)(ii) amended as indicated above.

18. In the result therefore -

(a) Rule 6(2) relating to married women is struck down as discriminatory and unconstitutional.

(b) Rule 8(2) be clarified or amended as indicated above.

(c) Fresh advertisement be issued according to the Rules and clarified or amended.

The writ petition is partly allowed in terms aforesaid. No order as to costs.

Patra J.

19. I agree.