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STATE OF ORISSA

v.

DURGA CHARAN DAS

December 6, 1965

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[P. B. GAJENDRAGADKAR, C.J., K. N. WANCHOO,
M. HIDAYATULLAH, V. RAMASWAMI AND
P. SATYANARAYANA RAJU, JJ.]

C

Government of India (Construction of Orissa) Order, 1936, s. 23(2)—Protection Rules framed thereunder to protect members of a Provincial or subordinate service required to serve in Orissa—Rule 6—Whether protection of pension rights covers any rights of promotion to selection posts.

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The respondent joined service as an Assistant in the old Bihar & Orissa Secretariat and upon the formation of the Province of Orissa, was transferred to the Orissa Secretariat. In due course he secured certain promotions and on the 24th April 1954, he was temporarily promoted to officiate as Registrar for a short period. He was again promoted temporarily in February 1956 and was confirmed as Registrar on the 4th October 1958. When he eventually retired from service on 17th October 1959, his pension was calculated by reference to his date of confirmation as Registrar and was fixed by the State Government at 190/- p.m.

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The respondent claimed that for the purpose of determining his pension he should be deemed to have been confirmed on 24th April 1954 and his pension fixed at Rs. 290/- p.m. Alternatively he claimed that by virtue of the protection available to him under Rule 6 of the Protection Rules framed under s. 23(2) of the Government of India (Construction of Orissa) Order, 1936, whereby the conditions of service including pay, allowances, pension, etc. of employees transferred to Orissa could not be less favourable than they were in the old Bihar & Orissa Secretariat Service, he should be deemed to have been confirmed as Registrar at the latest on the 23rd August 1956 and his pension fixed at Rs. 290/- p.m.; this latter date was the date on which an officer who was junior to him in the cadre of the old Bihar & Orissa Secretariat had been confirmed as Registrar in the Bihar Government.

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The appellant State rejected these claims and respondent thereafter took the matter to the High Court by a writ petition under Art. 226. The High Court rejected the respondent's first claim but found in his favour on the alternative claim and directed the appellant to re-fix his pension by treating the respondent as having been confirmed on 23rd August 1956.

In the appeal to this Court, it was also contended, *inter alia*, that in view of another specific instance where the entitlement to salary of a Registrar was determined by reference to the date when an officer junior to him in the Bihar service was promoted as Registrar, the treatment meted out to the respondent was discriminatory.

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HELD : The High Court's order must be set aside and the respondent's writ petition dismissed.

In coming to its conclusion, the High Court had incorrectly assumed that the protection afforded by R. 6 to the public servants transferred to Orissa took within its sweep claims for promotion to higher posts and

that in determining whether R. 6 had been contravened it would be relevant and material to inquire when the officer in question would have been promoted to a corresponding post if he had continued in service in Bihar. [910 H-911 B] A

What R. 6 guarantees is that the public servants who were transferred to Orissa will not suffer in regard to their pay, allowance, leave and pension; these respective conditions did not include a claim for promotion to a higher selection post because for such promotion a number of factors such as the existence of a vacancy, seniority, the record of the officer concerned, the eligibility of other persons, etc., had to be taken into consideration. [911 E-G] B

As promotion to a selection post was outside the terms of R. 6, a claim for promotion could not be indirectly permitted on the ground that it had a bearing on the amount of pension to which a transferred public servant would be entitled. [912 G-913 B-D] C

The instance cited to show discrimination against the appellant was also outside R. 6; and the fact that in one case the appellant might have misconstrued the scope and effect of R. 6 would not justify a claim by the respondent that the Rule should be similarly construed in all other cases thereafter. [916 C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 751 of 1964. D

Appeal from the judgment and order dated May 7, 1963 of the Orissa High Court in O.J.C. No. 270 of 1962.

N. S. Bindra, B. R. G. K. Achar and R. N. Sachthey, for the appellant. E

S. N. Andley, Rameshwar Nath and P. L. Vohra, for the respondent.

The Judgment of the Court was delivered by

Gajendragadkar, C.J. This appeal which has been brought to this Court on a certificate granted by the Orissa High Court, raises a short question about the construction of Rule 6 of the Rules issued by the Governor-General in Council on the 15th September, 1936, for the protection of members of a Provincial or Subordinate service required to serve in, or in connection with, the affairs of Orissa (hereinafter called "the Protection Rules"). These Rules were framed by the Governor-General in Council in exercise of the powers conferred on him by section 23(2) of the Government of India (Construction of Orissa) Order, 1936, in view of the fact that a separate Province of Orissa had already been formed on the 1st April, 1936. The said question arises in this way : F

The respondent, Durga Charan Das, joined as an Assistant in the old Bihar & Orissa Secretariat prior to the formation of the G

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- A Province of Orissa. When the said Province was formed, he was transferred to the Orissa Secretariat, Home Department. In due course, he was promoted to higher posts, such as Junior Head Assistant and Senior Head Assistant. On 24th April, 1954, while holding the post of Senior Head Assistant, he was temporarily promoted as Registrar in the Supply Department of the
- B Orissa Secretariat. On 22nd December, 1954, he was reverted to his substantive post as Head Assistant in the Home Department. Later, he was again promoted to officiate as Registrar in the Supply Department on 3rd February, 1956. In June, 1957, he was promoted to officiate as Assistant Secretary in the same Department, and ultimately he was confirmed as Registrar in the
- C Orissa Secretariat on the 14th October, 1958. Eventually, he retired from service on the 17th October, 1959.

At the time of his retirement, a question arose about fixing the amount of his pension. For the purpose of determining this amount, the relevant date was the date on which he was confirmed as Registrar, because he held the post of the Assistant Secretary to which he was promoted for some time, only on an officiating basis. The appellant, the State of Orissa, fixed the pension of the respondent at Rs. 190 per month by reference to 14th October, 1958, which was the date on which he was confirmed as Registrar. The respondent then represented to the

D appellant that he should be deemed to have been confirmed as Registrar on the 24th April, 1954, and his pension calculated on that basis at Rs. 290 p.m. In the alternative, he urged that he should be deemed to have been confirmed as Registrar, at the latest on the 23rd August, 1956; he pleaded this date, because his case was that on that date, Mr. J. N. Dutta, who was Junior to him in the cadre of the old Bihar & Orissa Secretariat, had been confirmed as Registrar in the Bihar Government. On this latter

E basis, the respondent would be entitled to get Rs. 240 p.m. as pension. The appellant rejected both the prayers made by the respondent, and that took the respondent to the High Court under Article 226 of the Constitution. By this writ petition, the respondent claimed an appropriate writ calling upon the appellant

F to fix his pension either on the footing that he had been confirmed as Registrar on the 24th April, 1954, or, at any rate, on the 23rd August, 1956.

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H This plea was resisted by the appellant and it was pleaded by it that the claim made by the respondent was not justified by the provisions of R. 6 of the Protection Rules. The High Court has held that the respondent's claim to have his pension calculated on

the basis that he should be deemed to have been confirmed as Registrar on the 24th April, 1954, was not well-founded. It has, however, found in favour of the respondent in regard to the alternative claim made by him, and accordingly it has directed the appellant to re-fix the pension payable to the respondent on the footing that the respondent should be treated as having been confirmed as Registrar in the Orissa Secretariat with effect from 23rd August, 1956. It is this order which is challenged by the appellant before us, and that raises the question about the construction of R. 6 of the Protection Rules.

Rule 6 of the Protection Rules reads thus :—

“The conditions of service as respects pay, allowances leave and pension of any member of Provincial or Subordinate service serving immediately before the 1st day of April, 1936 in or in connection with the affairs of the province of Bihar & Orissa, who is required to serve in or in connection with the affairs of Orissa shall not in the case of any such person while he is serving in or in connection with the affairs of Orissa be less favourable than they were immediately before the 1st day of April, 1936.

Provided that the Government of Orissa may make such alterations in the conditions of service of any such person as would have applied to him if he had passed from the service of the Government of Bihar & Orissa to the service of the Government of Bihar.

Provided further that nothing in this rule shall apply to conditions of service which prescribe rates of travelling allowance”.

The High Court has, no doubt, recognised the fact that the confirmation of an officer in a particular case would depend on several factors, such as the existence of a permanent vacancy, the claim of officers senior to a given officer, the record of the officer concerned, and the opinion which the Public Service Commission may form about his merits in relation to confirmation. Even so, the High Court has taken the view that since Mr. Dutta who was junior to the respondent had in fact been promoted as Registrar on the 23rd August, 1956, that can reasonably be taken to be the date on which the respondent was entitled to be confirmed by virtue of the provisions of R. 6. In coming to this conclusion, the High Court has made two assumptions. The first assumption is that the protection afforded to the public servants transferred

A to Orissa took within its sweep claims for promotion to higher posts; and the other assumption is that in determining the question as to whether the provision as to the said protection has been contravened, it would be relevant and material to enquire when the officer in question would have been promoted to a corresponding post if he had continued in service in Bihar. Proceeding to deal
B with this problem on the basis of these two assumptions, the High Court has thought it reasonable to draw the inference that the respondent would certainly have been promoted as Registrar and confirmed as such, at the latest, on the 23rd August, 1956, when Mr. Dutta who was junior to him was in fact promoted and confirmed as Registrar. Mr. Bindra for the appellant contends that
C the assumptions made by the High Court in reaching this conclusion are not well-founded. In our opinion, Mr. Bindra is right.

The Rule in question protects the conditions of service as respects pay, allowances, leave and pension of the members falling under its purview, and it guarantees that in no case shall the terms
D in relation to the said conditions of service be less favourable than they were immediately before the 1st of April, 1936. The question is : do any of the conditions specified in R. 6 include a claim for promotion to a higher selection post and confirmation in it. It is well known that promotion to a selection post is not a matter of right which can be claimed merely by seniority. Normally, in
E considering the question of a public servant's claim for promotion to a selection post, his seniority and his merits have to be considered; and so, it seems to us very difficult to accept the view taken by the High Court that in R. 6 of the Protection Rules, a guarantee can be inferred in regard to promotion to a selection
F post. What the Rule guarantees is that the public servants who were transferred to Orissa will not suffer in regard to their pay, allowances, leave and pension; and these respective conditions do not seem to include a claim for promotion to a higher selection post; and indeed, it seems very unlikely that any protection could ever have been reasonably intended to be given in regard to
G promotion to a selection post.

It is true that in 1939, a question arose whether the prospects of promotion of transferred officers were protected by the Protection Rules, and the Joint Public Service Commission for Bihar, Orissa, and the Central Provinces, which was functioning in 1939,
H took the view that the said Rules must be interpreted to require that an officer transferred from Bihar and Orissa to Orissa shall have prospects of promotion as good as he would have had in Bihar and Orissa, and when promoted shall draw pay not less than

that which he would have drawn if so promoted in Bihar and Orissa. A

Similarly, the Governor of Orissa, after consulting the Governor-General in Council, issued some instructions on the 28th January, 1942, clarifying R. 6 of the Protection Rules. One of these instructions provided that the object underlying the Governor-General in Council's Protection Rules, 1936, was to ensure the transferred officers a fair deal under the new Government. The instruction, therefore, added that the Provincial Rules should in all cases be so applied as to secure this result. In other words, the essential requirement is that the spirit of the Protection Rules should be fully observed and hard cases, should they occur, should be given special treatment. B
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This instruction is general in terms, and does not support the view taken by the High Court that a claim for promotion to a selection post is included within the term of R. 6. In our opinion, there can be no doubt that the interpretation placed by the Joint Public Service Commission on the Protection Rules, or the opinion expressed by the Governor of Orissa, though perhaps relevant, cannot have a material bearing on the construction of the Rule in question when the matter reaches the Court. It is for the Court to consider the Rule fairly, taking into account the spirit underlying the Rule and the object intended to be achieved by it. Even the High Court has observed that "though, ordinarily, the right of promotion and confirmation in particular posts may not be said to have been expressly protected by the Protection Rules, nevertheless, where these have a direct bearing either on the pay or the pension of a transferred officer, the protection must be deemed to cover these aspects also, having regard to the letter and spirit of the Protection Rules". In other words, the High Court seems to have taken the view that though promotion and confirmation in particular posts cannot be claimed directly under R. 6, a claim in that behalf can be indirectly permitted if it has a bearing on the amount of pension to which a transferred public servant would be entitled on retirement. It is, therefore, necessary to consider this aspect of the matter. D
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It is common ground that the amount of pension payable to the respondent has to be calculated by reference to the date on which he was confirmed as a Registrar; and the argument which found favour with the High Court was that in determining this amount, it would be relevant to enquire when the respondent would have been promoted to the post of a Registrar if he had continued to serve in Bihar. If it is shown that he would have been H

A promoted to the post of a Registrar, for instance, on the 23rd August, 1956, his pension should be calculated by reference to that date. That is how the date of promotion and confirmation are alleged to have a bearing on the determination of the amount of pension payable to the respondent. In our opinion, if promotion to a selection post is outside the terms of R. 6, it would be

B difficult to entertain the claim made by the respondent on the basis that his junior Mr. Dutta had been promoted to the post of Registrar and confirmed as such on the 23rd August, 1956. As we have already indicated, promotion to a selection post depends upon several relevant factors; the number of vacancies in the posts of Registrars is one factor; the number of persons eligible for the

C said promotions is another factor; and the seniority of the said competitors along with their past record and their merits as judged by the Public Service Commission, is yet another factor. Now, it seems to us unreasonable and impracticable to determine this question by reference to another enquiry as to when officers

D junior to the respondent were promoted in Bihar. An attempt to correlate the question about the promotions of officers transferred to Orissa with promotions secured by officers in Bihar, seems to us to be outside the contemplation of R. 6. The difficulties in making such an assessment or estimate are too plain to need any detailed enumeration.

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Mr. Andley for the respondent attempted to argue that the respondent had received unfair treatment inasmuch as the Rules of promotion which would have governed his case if he had continued in Bihar, are radically different from the Rules of promotion which were introduced in Orissa after his services were

F transferred to Orissa, and that, he contends, is a contravention of R. 6 of the Protection Rules. The relevant rule in Bihar for promotion is R. 2(1); it reads thus :—

“Rule 2(1)—Registrar,—

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The post of Registrar (Pay B & O Old Scale—Rs. 500-20-600)—(B & O Revised Scale—Rs. 450-20-550) in the Secretariat is a Gazetted and belongs to the General Provincial service. The appointment is made by Government in consultation with the State Public Service Commission. Selection is ordinarily made from among the Section Heads of the Department concerned,

H failing which from among the Section Heads of other Departments of the Secretariat”.

This Rule is contrasted by Mr. Andley with the relevant Service Rules which were in force in Orissa; they are Rules 6 to 9. R. 6 of these Rules reads thus :—

“Ordinarily by the 1st April each Calendar year, the departments of the Secretariat and the Secretary to Chief Minister shall notify to the Home Department the number of vacancies in the rank of Registrar and Assistant Secretary which have occurred or are likely to occur during the twelve months commencing from the following July. They shall also report to the Home Department in order of seniority in the form appended to the rules (Appendix I) the names and other particulars of service of Head Assistants both Senior and Junior who have not officiated as Registrar or Assistant Secretary on the recommendation of the Commission by the time the reference is made, and other Ministerial Officers, whose pay and status are at least equivalent to those of a Junior Head Assistant and also of such Accountants and Record Keepers, who draw pay in the scales of pay of Junior Head Assistant or in higher scale.

The Service Book and Character Rolls of all such officers with latest appreciation of their work by the Secretary of the Department concerned with particular reference to their suitability for promotion to the rank of Assistant Secretary or Registrar shall also be forwarded to the Home Department”.

R. 7 provides that the Government in Home Department on receipt of the requisite information from all departments shall report to the Commission within the time specified by it and intimate to it the relevant details indicated in it. R. 8 then requires the Commission to proceed to assess the suitability of candidate for promotion; and R. 9 provides that the Commission shall prepare two separate lists, viz., (a) a list of those candidates who are fit for promotion to the ranks of both Registrar and Assistant Secretary, and (b) a list of those fit for promotion to the rank of Registrar only, but not to that of Assistant Secretary, and shall arrange the names in order of merit. The lists so prepared by the Commission have to be forwarded to the Government in the Home Department within the time specified.

Mr. Andley's argument is that whereas under R. 2(1) of the Bihar Rules, selection is ordinarily made from among the Section Heads of the Department concerned, the selection under the relevant Orissa Rule is made from a larger class of public servants

A indicated therein. We are not satisfied that this contention is well-founded. In the present proceedings, besides quoting the relevant Rules in the petition, the respondent has led no further evidence to show what exactly is meant by the Section Heads of the Department concerned mentioned in R. 2(1) of the Bihar Rules; and in the absence of any material, it would be difficult for
B us to accept Mr. Andley's argument that the conditions for promotion prescribed by R. 2(1) of the Bihar Rules are substantially or radically different from the conditions prescribed by the relevant Orissa Rules, and thereby caused prejudice to the respondent within the meaning of R. 6 of the Protection Rules.

C Mr. Andley also suggested that under the relevant Bihar Rule, promotion would go entirely by seniority, whereas under the Orissa Rule, it is on considerations of seniority coupled with merit. We do not think Mr. Andley is right in assuming that selection under R. 2(1) of the Bihar Rules could have been intended to be made
D only by reference to seniority. The very concept of selection involves the consideration of seniority coupled with merit, which is generally described as the seniority-*cum*-merit test. Besides, this aspect of the matter does not appear to have been argued before the High Court and in the absence of any material on the point and in the absence of any decision by the High Court on it, we cannot entertain this contention.

E We may incidentally point out that though in his petition, the respondent has made some vague allegations suggesting that the appellant did not deliberately appoint him in a permanent vacancy of the Registrar's post, he has produced no satisfactory evidence to support the said plea. On the other hand, it appears that in
F 1954, when the case of the respondent was examined by the Public Service Commission, it made a definite recommendation that he was fit to be Registrar for stop-gap arrangements only, and it specifically added that he should not be given preference over those whose positions are higher up in the list even for vacancies exceeding a period of four months. This recommendation clearly indi-
G cates that the Character Roll of the respondent was not as satisfactory as it should have been; and so, the argument that his appointment to the post of Registrar and confirmation in it were unduly delayed, loses all significance.

H Mr. Andley also attempted to argue that the decision of the High Court could be justified because, in law, the treatment meted out to the respondent can be properly characterised as discriminatory. In support of this plea, Mr. Andley referred us to the case of Mr. Beuria. It appears that Mr. Beuria who was also trans-

ferred from Bihar to Orissa as a Head Assistant, was held entitled to get the pay of Registrar from 1st December, 1948, and this order which was passed on the 12th October, 1960, was given retrospective effect from 1-12-1948. It does appear that this order was passed on the basis that Mr. Beuria was entitled to the salary of a Registrar, because Mr. Prasad who was junior to him in Bihar was promoted to the rank of Registrar on 1-12-1948. We do not see how this single case can be pressed into service by Mr. Andley in support of his argument that there has been illegal discrimination against the respondent. On the view we have taken about the scope and effect of R. 6 of the Protection Rules, what the appellant has done in regard to Mr. Beuria must, *prima facie*, be held to be outside the Rule; but the fact that in one case the appellant might have misconstrued the scope and effect of R. 6 of the Protection Rules, would not justify a claim by the respondent that the Rule should be similarly misconstrued in all cases thereafter. Whether or not the respondent is entitled to claim his pension on the footing that he should be deemed to have been promoted and confirmed as Registrar on the 23rd August, 1956, must be determined in the light of what we regard to be the true scope and effect of R. 6 of the Protection Rules. What the appellant did in Mr. Beuria's case has no relevance in that behalf.

Besides, if the respondent was serious about his plea about discrimination, he should have adduced more satisfactory evidence in support of such a plea. No evidence has been led in the present proceedings and no other case like the case of Mr. Beuria has been cited. If the respondent's plea of discrimination was accepted on the strength of the single case of Mr. Beuria, it would follow that because the appellant placed a misconstruction on the relevant Rule, it is bound to give effect to the said misconstruction for all times; that, plainly, cannot be said to be sound.

When we heard this appeal, we enquired from Mr. Bindra whether the appellant was justified in pressing the present appeal against a single public servant like the respondent, particularly in view of the fact that it had treated Mr. Beuria's case on the basis of the interpretation of R. 6 of the Protection Rules on which the respondent relies. We were told that the appellant was anxious to have a decision from this Court on this point, because the present case would serve as a test case and may be relied upon as a precedent by several public servants in Orissa who belong to the category of the respondent. In fact, in granting the certificate,

A the High Court has observed that the question raised is undoubtedly of public importance, because it will affect many other Government servants of the old Province of Bihar & Orissa who were permanently transferred to Orissa when that Province was separated from Bihar on the 1st April, 1936.

B The result is, the appeal is allowed, the order passed by the High Court is set aside, and the writ petition filed by the respondent is dismissed. In the circumstances of this case, we direct that parties should bear their own costs throughout.

Appeal allowed.