ITEM NO.101 COURT NO.5 SECTION XIA

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s). 1676/2015

STATE OF ORISSA Appellant(s)

VERSUS

SASMITA PATTNAIK Respondent(s)

(with appln.(s) for directions, impleadment and office report)
WITH
C.A. No. 1678/2015
C.A. No. 1679/2015
C.A. No. 1680/2015
C.A. No. 1681/2015
C.A. No. 1682/2015
(With appln.(s) for directions, permission to file additional documents and Office Report)
C.A. No. 1683/2015
C.A. No. 1684/2015
(With appln.(s) for exemption from filing O.T., directions and appln.(s) for intervention and Office Report)
C.A. No. 1685/2015
C.A. No. 1686/2015
(With appln.(s) for directions)

Date : 28/07/2016 These appeals were called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE J. CHELAMESWAR
HON'BLE MR. JUSTICE ABHAY MANOHAR SAPRE

For Appellant(s) Mr. Vikas Singh,Sr.Adv.
Mr. Sibo Sankar Mishra,Adv.
Mr. Niranjan Sahu,Adv.
Ms. Deepika Kalia,Adv.

For Respondent(s) Mr. Nilakanta Nayak,Adv.
Mr. Aniruddha P. Mayee,Adv.

Mr. Debal Kumar Banerji,Sr.Adv.
Mr. Manish Singhvi,Adv.
Mr. Merusagar Samantaray,Adv.
Mr. Lhingneivah,Adv.
Ms. Vidushi,Adv.
Mrs. Kirti Renu Mishra,Adv.

Mr. Rana Mukherjee,Sr.Adv.
Ms. Neha Sharma,Adv.
Mr. D. Verma,Adv.
Mr. Deeptakirti Verma,Adv.

Mr. Bharat Sangal,Adv.
Mr. Shuvodeep Roy,Adv.

Mr. Soumyajit Pani,Adv.
Mr. Vinodh Kanna B.,Adv.

For Intervenor Mr. Arvind Gupta,Adv.
Mr. Harish Pandey,Adv.

UPON hearing the counsel the Court made the following

O R D E R

The appeals are allowed in part, in terms of the signed order.

The applications for impleadment/intervention in Civil Appeals are allowed.

All other pending applications stand disposed of.

[O.P. SHARMA] [RAJINDER KAUR]
AR-cum-PS COURT MASTER

(Signed order is placed on the file)

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICITON**

**CIVIL APPEAL NO(S).1676 OF 2015**

**STATE OF ORISSA** **Appellant(s)**

**VERSUS**

**SASMITA PATTNAIK** **Respondent(s)**

**WITH**

**CIVIL APPEAL No. 1678 OF 2015**
**CIVIL APPEAL No. 1679 OF 2015**
**CIVIL APPEAL No. 1680 OF 2015**
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**CIVIL APPEAL No. 1684 OF 2015**
**CIVIL APPEAL No. 1685 OF 2015**
**CIVIL APPEAL No. 1686 OF 2015**

**O R D E R**

**On 15.3.1996, the appellant-State of Orissa (Department of Home) sent a requisition to the Orissa State Public Service Commission (Respondent No. 2 herein) to initiate the process for the recruitment of 100 Junior Assistants in the Ministerial Service in the Secretariat pertaining to the various departments under the Government of Orissa. Unfortunately no legal instrument either the Rules or some other document by which such posts are created are placed before us, whether such posts constitute a cadre as understood in the service law and if there is a cadre created, what is the strength of it is not very clear from the record. Nor any information in that regard placed before us.**

Be that as it may, the fact remains that the appellant thought it fit to recruit 100 Junior Assistants and therefore initiated the process of making a requisition to the Respondent No.2.

A few months later (on 1.6.1996), another requisition went from the Home Department of the appellant to the Respondent No. 2 calling upon the Respondent No. 2 to initiate the process of recruitment of 200 more Junior Assistants.

On the receipt of above two requisitions, the Respondent No. 2 issued an advertisement dated 29.8.1996 inviting applications from the eligible candidates for filling up of a total of 300 posts of Junior Assistants. It appears from the record that (though the record is not very clear in this regard) some of these posts are meant to be filled only by candidates belonging to constitutionally protected categories, the details of which are not relevant for the present.

On 24.4.1997, the second respondent sent a list (calling it a 'Select List') of 671 candidates to the appellant.

The procedure for recruitment in question (we are informed at the Bar) is regulated by the rules made by State of Orissa under Article 309 of the Constitution titled "The Orissa Ministerial Service (Method of Recruitment and Condition of Service of Junior

Assistants in the Offices of Departments of Secretariat) Rules, 1951". (hereinafter referred to as "1951 Rules") Rule 7 of the 1951 Rules contemplates holding of examination for the purpose of recruitment. Rule 8 contemplates the preparation of list of successful candidates arranged in the order of merit though the rule is silent about the measure of success at such an examination. Rule 9 of 1951 Rules reads as follows:

> "9. The list so prepared by the Commission shall be equal to the number of vacancies notified. The recommendation of the Commission shall remain valid for a period of one year from the date of its approval by Government. The Secretary to the Commission shall also send the application of the successful candidates to the Government in the Home Department."

Two things are very clear from Rule 9. Firstly, the list of recruited candidates prepared under Rule 8 shall be equal to the number of vacancies notified. Secondly, such list shall remain only for one year.

Notwithstanding the stipulation contained in Rule 9 that the Commission shall prepare a list of successful candidates equal to the number of vacancies notified, the second respondent chose to send a list of 671 candidates on 24.4.1997. We do not find any basis for the preparation of such list either under the Rules nor any other material justifying the preparation of such a list is placed before us.

(1) However, initially the appellant chose to appoint 218

candidates out of the above mentioned 671 candidates. Admittedly, another 143 candidates out of the above mentioned 671 came to be appointed by the appellant by a subsequent proceeding dated 9.4.1999.

(2) We are informed that appointment in excess of the notified vacancies was recommended because the appellant noticed certain irregularities in the appointment of the first group of 218 candidates.

(3) In a purported bid to rectify the irregularities, 61 appointments in excess of the notified vacancies were made.

(4) Thus, in all 361 candidates out of the above mentioned 671 candidates came to be appointed.

Admittedly, the appellant kept issuing proceedings from time to time purporting to extend the validity of the select list (referred to supra) from time to time and such proceedings purported to extend the validity of select list till 31.7.2003. Such an exercise is to say the least appears to be inconsistent with the mandate contained in Rule 9 which stipulated that the "recommendation of the Commission may remain valid for a period of one year……".

We must make it clear that no statutory provision or a rule made under Article 309 of the Constitution of India is brought to our notice which justifies such an exercise of keeping the select list alive from time to time for such a long period.

In the meanwhile, a number of Original Applications came to be filed by some of the candidates who were not appointed before the Orissa Administrative Tribunal. Though the exact prayer in the Original Applications is not known as copies of the said OAs are not available on record, the substance of dispute in these OAs is the above mentioned recruitment process. By an order dated 25.9.2008, the above mentioned OAs were allowed by the Tribunal expressing;

> "12. As a corollary we allow the respondents to draw from the list of 671 and the respondents are free to draw from the list of 671 upto the number of vacancies and successful candidates available in that list, but with the following conditions:
>
> (i) The vacancies that have occurred in the meantime be added to 300 and total restricted to 671.
>
> (ii) The list of 671 be treated as valid for the purpose of filling up the vacancies so determined until the list is exhausted."

alongwith various incidental directions, the details of which is not necessary for our purpose.

Aggrieved by the above mentioned judgment, the appellant herein preferred writ petitions No.14783/2009 and batch which came to be disposed of by a common order dated 11.12.2009. The order does not contain any discussion whatsoever regarding the issues involved in the matter nor is there any adjudication. The order records that the Advocate General of Orissa made a submission that the State would file an application before the Administrative

Tribunal for "modification/recalling or review of the order dated 25.9.2008" and went on to dispose of the writ petition with the following directions:

> "If such an application is filed by the State before the Orissa Administrative Tribunal within seven days from today, we request the Tribunal to dispose of the same within one month thereafter. Till disposal of the said application, the contempt proceeding shall remain stayed. It is made clear that we have not expressed any opinion regarding merit of the case."

Applications were filed before the Administrative Tribunal by the appellant which once again came to be dismissed by a common order dated 7.1.2010. The Tribunal reiterated its earlier order by refusing to review the same. In principle, the Tribunal undoubtedly has the authority not to review its earlier order. But such a decision not to review must be based on some sound principle of law. In the order dated 25.9.2008, the Tribunal identified the issue as;

> "(b) Was the OPSC right in recommending the names of 671 successful candidates required in a select list when it was to recommend names for filling up only 300 vacancies?"

but recorded a conclusion that "..we have no option but to overlook the aspect of excessive recommendation for the purpose of delivery of justice to all those who might be included in the list of 671, however, overblown it might have been."

Neither in the first writ petition nor in the second writ petition referred to supra, the High Court examined the tenability of the above conclusion of the Administrative tribunal.

In the circumstances, in the absence of any statutory authority or justification either for Respondent No.2 or the appellant herein to create a Select List far in excess of the number of vacancies advertised, such a Select List, in our opinion, is unsustainable as it is contrary to the stipulation in Rule 9 that "The list so prepared by the Commission shall be equal to the number of vacancies notified." Any claim based on such a legally untenable Select List by anyone of the members included therein seeking appointment to any post beyond the notified number of posts is absolutely untenable in law.

The respondents sought to justify the directions of the administrative tribunal compelling the appellant to appoint all the 671 candidates included in the select list furnished by respondent No.2 on the basis of Rule 11 of 1951 Rules.

> "Rule 11. In case a vacancy occurs after the list of successful candidate supplied by the Commission has been exhausted before announcement of the result of the next examination such vacancy may be filled up by a successful candidate of the previous examination provided that his age does not exceed the maximum age limit laid down in the rules and failing that by any candidate who has the qualification prescribed in the rule 20 of part III. In the later event the appointment shall only be made temporarily and shall

> **continue till the allotment of a successful candidate of the next recruitment examination is made."**

**The respondents argued that in view of the fact Rule 11 permits filling up of the vacancies occurring "after the list of successful candidates supplied by the Commission has been exhausted" from out of the "successful candidates of the previous examination" the impugned directions of the State are legally tenable.**

**This submission is required to be clearly rejected. The Rule stipulates three things:**

**(1) It provides for filling up of vacancies occurring after the list of successful candidates prepared under Rule 8 has been exhausted. Textually, the rule seems to be suggesting that such vacancies could be filled up before the announcement of the results of the next examination "by a successful candidate of the previous examination". There is a logical and schematic inconsistency in the rule. Once the list of successful candidates prepared under Rule 8 has been exhausted, the question of filling up of the vacancies occurring thereafter by another successful candidate from the same list does not arise.**

**Such are the ways of exercise of rule making authority!**

**(2) Such "successful candidates", who are required under the earlier part of the rule to be appointed in the vacancies occurring after the list of "successful candidates" has been exhausted, "does not exceed the maximum age limit laid down under the rules".**

**It is not very clear whether the age limit has to be w.r.t. the date of the application or the occurrence of such subsequent vacancy. We believe on a proper interpretation of the Rule, it could only be the date of the vacancy. If interpreted otherwise, the candidates would be ineligible to even apply.**

**(3) If such candidates, who are eligible from the point of view of the upper age limit, are not available then the Rule purports to authorise the State to fill up such subsequent vacancies by any candidate who has the qualifications prescribed under Rule 20 of Part III. However, the rule purports to restrict the authority of the State to appoint such candidates only on temporary basis till a successful candidate in the next examination (whenever conducted) is appointed to such a vacancy.**

**Apart from the logical inconsistency of the first stipulation- i.e. there cannot be any more successful candidates remaining in the list once the list of successful candidates has been exhausted, the prescription of the rule that vacancies occurring after the recruitment process could be filled up by the candidates who applied (and participated in the recruitment process) for the posts existing on the date of the notification is clearly unconstitutional[1] [See *State of U.P. And Others* v. *Rajkumar Sharma And Others,* (2006) 3 SCC 330, pr.13]**

[1] "13. Filling up of vacancies over and above the number of vacancies advertised would be violative of the fundamental rights granted under Articles 14 and 16 of the Constitution. [See *Union of India* v. *Ishwar Singh Khatri*, 1992 Supp.(3) SCC 84; *Gujarat State Dy. Executive Engineer Assn.* v. *State of Gujarat*, 1994 Supp.(2) SCC 591; *State of Bihar* v. *Secretariat Asstt. Successful Examinees Union, 1986* (1994) 1 SCC 126; *Prem Singh* v. *Haryana SEB*, (1996) 4 SCC 319; *Surinder Singh* v. *State of Punjab*, (1997) 8 SCC 488 and *Kamlesh Kumar Sharma* v. *Yogesh Kumar Gupta*, (1998) 3 SCC 45.

**Whether the State could have filled up vacancies other than those which are notified by appointing candidates out of the above mentioned 671 candidates, is question which is required to be answered on different considerations such as whether those vacancies existed as on the date of the advertisement etc. we do not propose to examine the same for the reason that it does not appear to be the case of anyone of the petitioners before the tribunal that the State could not have done so. From the material available on record and from the submissions made at the bar by learned counsel for the respective respondents, the grievance of the respondents appears to be that appointments to 361 posts are not strictly in accordance with requirement of law that is, the requirement of the rules stipulated for the constitutionally protected class.**

**In the circumstances, we deem it appropriate to set aside the impugned order in this appeal. We also set aside the direction of the Administrative Tribunal vide its order dated 25.9.2008 directing the appointment of 671 candidates and remit the matters to the High Court only to examine the question whether the appointment of 361 candidates made by the appellant is strictly in accordance with the applicable rules.**

**In view of the fact that such an examination might lead to adverse consequences to some or all of those appointed candidates, we deem it appropriate to direct that the High Court shall bring**

**them on record by issuing appropriate notices. Since all the 361 are in the service of appellant herein, we also deem it appropriate to direct the appellant to effect the service on 361 candidates.**

**Having regard to the fact that the recruitment was initiated some two decades back and having regard to the chequered history of the litigation, it is desirable that the entire exercise is completed expeditiously preferably within a period of six months from the date of receipt of a copy of this order. We place on record our disapproval of the directions issued by the Administrative Tribunal, compelling the State to make appointments in excess of the notified vacancies without any basis in law – a practice which this Court has time and again deprecated[2]. [See *Government of Orissa Thro' Secretary, Commerce and Transport Department, Bhubaneswar* v. *Haraprasad Das and Others*, (1998) 1 SCC 487, para 9]**

**The application for impleadment is filed by some of the respondents in the writ petitions pending before the High Court of Orissa filed by the State of Orissa aggrieved by the order of**

[2] "9, It was contended by the learned counsel for the appellant-State that the Tribunal in giving the aforesaid directions has acted beyond the jurisdiction and that the said directions are illegal inasmuch as they are contrary to Rule 11 of the Rules. In our opinion the contention deserves to be accepted. Merely because there were some vacant posts of Copyholders and the Director of the Press had recommended to the Government to fill up those posts it was not open to the Tribunal to direct the Government to fill up those posts even though it had good reasons not to do so. It should have been appreciated by the Tribunal that mere empanelment or inclusion of one's name in the selection list does not give h im a right to be appointed. So also if the Government decides not to make further appointments for a valid reason, it cannot be said that it has acted arbitrarily by not appointing those whose names are included in the selection list. Whether to fill up a post or not is a policy decision and unless it is shown to be arbitrary it is not open to the Tribunal to interfere with such decision of the Government and direct it to make further appointments. The Tribunal in directing the Government to make further appointments on the efficiency ground of public administration went beyond its jurisdiction."

**Administrative Tribunal dated 7.1.2010 praying that they be impleaded as party respondents in Civil Appeal No.1676/2015.**

**In view of the above, all the Civil Appeals are allowed in part.**

**In the circumstances, the applications for impleadment in Civil Appeals are allowed.**

**.......................J.**
**(J. CHELAMESWAR)**

**.......................J.**
**(ABHAY MANOHAR SAPRE)**

**NEW DELHI**
**JULY 28, 2016**