

STATE OF ORISSA

v.

MD. FAKIRUDDIN AND DR. (MRS.) GIRISHABALA MOHANTY

OCTOBER 14, 1993

[S.C. AGRAWAL AND N. VENKATACHALA, JJ.]

Service Law :

Education Service

Orissa Education Service (Senior Administrative Grade) Recruitment Rules, 1990 rr.9, 10, 11, 12, 13—Director, Higher Education—Appointment—Eligibility—By promotion of Principals (Grade I) of three years' service as such with a provision for relaxation of requirement of minimum service experience and in absence of a suitable candidate, by transfer of a Director of Education Department—Held, Rules do not provide for appointment being made from Principals (Grade I) not possessing required minimum experience by relaxing service experience by State Government itself, without reference to Educational Promotion Board and State Public Service Commission.

Rule 9 of Orissa Education Service (Senior Administrative Grade) Recruitment Rules, 1990 their prior to as stoul amendments in 1992, provided that appointment to the post of Director, Higher Education should be made by way of promotion from among the officers having rendered service of three years as Principal (Grade-I). The promotion was to be based on merit and suitability with due regard to seniority. The Government was also enabled to relax the condition of minimum service experience if adequate number of persons with the required experience were not available.

The appellant-State issued order dated 24.6.1992 appointing respondent no.2 (in both the appeals) as Director, Higher Education by transfer from the post of Director, Elementary Education, as none of the Principals (Grade-I) could satisfy the requirement of minimum service experience and the Government after examining the question of relaxation of service experience, decided not to so relax. Respondents No.1 in both the appeals challenged the said order before the Orissa Administrative Tribunal.

A Meanwhile, Rule 9 was amended by the Orissa Education Service (Senior Administrative Grade) Recruitment (Amendment) Rules, 1992. In the amended Rule 9, though almost all the provisions of rule 9 of 1990 Rules, were retained and rearranged in its sub-rules (1) and (3) but a provision was inserted as sub-rule (2) to the effect that notwithstanding anything contained in sub-rule (1) where a suitable candidate with the required experience was not available to fill up the post of Director, Higher Education and the Government was of the opinion that relaxation of such requirement would not be in public interest, it may fill up the post by transfer of an officer who had held the post of a Director under the Education Department.

C The appellant state after the amendment of r.9, again decided not to relax the requirement of minimum period of three years' experience as envisaged by sub-rule(1), and on 17.10.1992 is sued a fresh order appointing by transfer respondent no.2 as Director, Higher Education.

D The Tribunal allowed the applications of respondents no.1 and quashed the order of appointment of respondent no.2 as Director, Higher Education holding that the same was vitiated by law as there was no material indicating that the State Government before the said appointment had considered the cases of all the Principals (Grade-I). It directed the State Government to consider the cases of all the Principals Grade I and decide whether the required minimum experience could be relaxed for appointment of any of the Principals Grade I as Director Higher Education and make such appointment. Aggrieved, the State Government filed the appeals. Allowing the appeals, and setting aside the Tribunal's order, this Court

G HELD 1.1 In view of the overriding effect of sub-rule (2) on sub-rule(1) of Rule 9 of the Orissa Education Service (Senior Administrative Grade) Recruitment Rules, 1990 as amended in 1992, it cannot be said that the cases of each of the Principals (Grade-I) have to be considered for relaxation even though they did not possess the minimum experience of three years as Principal (Grade-I), as a condition precedent for filling up the post of Director, Higher Education by transfer of an officer who had held the post of Director in the Education Department. The plain language employed in the sub-rule makes it incumbent on the State Government to take a decision on the question whether it would be in the public interest

to relax the minimum requirement of experience of three years as Principals(Grade-I) for considering their cases for appointment as Director, Higher Education, before taking up the question of appointment of others by transfer. [278-H, 279-A-C]

1.2. The scheme of the provisions of the Orissa Education Service (Senior Administrative Grade) Recruitment Rules 1990 does not provide for appointment of Director, Higher Education being made from the Principal(Grade-I), who are not possessing the required minimum experience by relaxing the required minimum experience, by the State Government itself, as the provisions of the Rules exclude the possibility of the Government examining the cases of Principals(Grade-I) for appointment as Director, Higher Education by promotion, without reference to the Departmental Promotion Board and the State Public Service Commission.

[280-B-C]

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 5434-35 of 1993.

From the Judgment and order dated 6.4.93 of the Orissa Administrative Tribunal in O.A. Nos. 1088 and 1587 of 1992.

V.R.Reddy, A.S.G. and Raj Kumar Mehta for the Appellant.

S.K. Dholakia and J.K. Das for the Respondents.

The Judgment of the Court was delivered by

VENKATACHALA, J. Leave is granted.

These appeals of the State of Orissa are directed against the common Judgment dated April 6, 1993 in O.A. Nos. 1088 and 1587 of 1992 of the Orissa Administrative Tribunal. By that Judgment, the Tribunal has not only quashed the Orissa Government Order dated October 17, 1992, by which respondent-2, Dr. (Mrs.) Girishbala Mohanty, the Director, Elementary Education of its Education Department had come to be transferred and posted on *ad hoc* basis as the Director, Higher Education of its Education Department, but also has directed the Orissa State Government to fill-up the vacancy in the post of Director, Higher Education caused by such quashing. Further, that direction is required to be implemented by Orissa Government after considering the cases of all officers belonging to Orissa Education Service of Senior Administrative Grade constituted

- A under the Orissa Education Service (Senior Administrative Grade) Recruitment Rules, 1990, to be called 'the Education Service Rules, 1990', as regards relaxation of the requisite number of years of experience according to the Education Service Rules, 1990, as stood amended by the Orissa Education Service (Senior Administrative Grade) Recruitment (Amendment) Rules, 1992, to be called 'the Education Service Amendment Rule, 1992', if otherwise merited and suitable having due regard to seniority.

- B The 'Education Service Cadre' under the Education Service Rules was comprised of all the posts categorised as Principals of Grade-I and Director of Higher Education and the other posts to be brought by the State Government from time to time into that cadre.

C Rule 9 of the Education Service Rules, 1990, which provided for appointment to the post of 'Director' read thus :

- D "9. *Appointment of Director* - (1) Appointment to the post of Director, Higher Education shall be made by promotion from among the Principals (Grade-I).

- E 2. In order to be considered eligible for promotion to the post of Director, Higher Education, a Principal (Grade-I) should have rendered service as such for a period of three years.

Provided that if adequate number of persons with such experience are not available in the rank of Principals (Grade-I) this requirement may be relaxed by Govt.

- F 3. Promotion to the post of Director, Higher Education, shall be based on merit and suitability with due regard to seniority."

- G 'Definitions' clause in Rule 2 defined 'College' as meaning a Government College imparting + 3 Education and of above standard. Clause (g) and (i) of the said Rule defined the 'Lead College' as the college of Government of Orissa and 'Principal (Grade-I)' as the Principal of the Lead College. Rule 10 thereof, which deals with the Departmental Promotion Board and its constitution and functions reads thus :

- H "10. *Departmental Promotion Board* - (1) There shall be a Departmental Promotion Board (hereinafter referred to as the

Board), for considering promotion to the post of Director, Higher Education, which shall consist of the following :- A

(a) The Chief Secretary/Additional - : Chairman
Chief Secretary.

(b) Secretary, Education and Youth : Member B
Services Department

(c) An eminent educationist not : Member
below the rank of Professor or
an Officer of the rank of
Secretary to Government of C
Orissa to be nominated by
the Government.

(d) Additiona/Joint/Deputy - : Convener.
Secretary, Education and Youth D
Services Department.

2(a). The Board shall meet ordinarily in the month of June every year to consider cases for promotion against the vacancies including those anticipated in the course of subsequent 12 month. E

The Board shall consider cases of all eligible officers coming with the Zone of Consideration as defined in the Orissa Civil Service (Zone of Consideration for Promotion) Rules, 1988 and prepare a list of such officers as are found by them to be suitable for appointment as Director of Higher Education. F

(b) The number of names included in the list shall be twice the number of vacancies."

Rule 11 thereof provides for consultation with the Commission in relation to the list of officers found suitable for appointment as Director, Higher Education, prepared by the Board under Rule 10(2) thus : G

"11(1). *Consultation with the Commission* - The list prepared by the Board under rule 10(2) shall be forwarded to the Commission for recommendation alongwith the following documents, namely :- H

- A (a) Records of all eligible officer included in the list;
 (b) Records of all officers included in the zone of consideration who are proposed to be superseded along with the reasons recorded by the Board for such supersession;

B (c) The other procedure as laid down in clauses (c) to (f) of sub-rule (1) of Rule 6 shall be followed. *mutatis mutandis*.

(2) The Commission shall consider the list prepared by the Board along with the documents received from Government and convey its recommendation to the Government. The Commission shall assign reason for making any alteration in the panel prepared by the Board."

C

D Rule 12 thereof which provides for a Select List to be prepared, and Rule 13 thereof which provides for appointment of persons to the post of Director, read thus :

"12. *Select List* - (1) The recommendation of Commission shall be placed before the Government for approval and shall form the select list after approval by the Government with or without modification if any.

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(2) The select list shall ordinarily be in force a period of one year, or till the next select list is prepared, whichever is later."

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"13. *Appointment* - Appointment to the post of Director, of any other post included in that category of the Service, shall be made in the same order in which the names appears in the select list and the *inter se* seniority of the officers so appointed to such rank shall be in that order."

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With the coming into force of the Education Service Rules, 1990 on 21.3.1990, respondents-1 and 2 and a few others, who became the Principals (Grade-I) of Lead Colleges got into the category of posts of Principals (Grade-I) of the cadre of 'Education Service Cadre' constituted under those Rules, but none of the Principals (Grade-I) in the service so constituted, became entitled for appointment to the post of the Director, Higher Education in the same service, in that, none of them could satisfy

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the requirement in Rule 9 requiring three years' period of service as

Principals (Grade-I). This situation led to the appointment of Prof. L.K. Das, Director, Secondary Education of the Education Department as the very first Director of Higher Education in Education Service Cadre' newly constituted under the Education Service Rules, 1990 by transfer and appointment under Government Order dated October 31, 1990. Even when Prof. L.K. Das was due to retire on June 30, 1992, none of the Principals (Grade-I) in the 'Education Service Cadre' constituted by the Education Service Rules, 1990, had come to acquire the required minimum experience of having served for three years as Principal (Grade-I), as would entitle them to be considered for appointment as Director, Higher Education in the 'Education Service Cadre' under the Rules. The Orissa Government, which examined the question of relaxation in the requirement of minimum experience of three years as Principal (Grade-I) for appointment as Director, Higher Education, decided not to so relax. In this situation the Government of Orissa considered several alternatives open to it in the matter of appointment to be made to the post of Director, Higher Education. Ultimately, it decided appoint Dr. (Mrs.) Girishbala Mohanty, the Director, Elementary Education, as Director, Higher Education by her transfer from the post of Director, Elementary Education, which she had held then. The State Government Order dated June 24, 1992 was accordingly issued appointing Dr.(Mrs.) Girishbala Mohanty, Director, Elementary Education, as Director, Higher Education. It is that appointment Order, which was questioned by respondent-1, who was then a Member of Service Selection Board, by filing O.A. No. 1088 of 1992, before the Orissa Administrative Tribunal under section 19 of the Administrative Tribunals Act, 1985 on June 29, 1992, despite the admitted fact that he did not possess the minimum experience of three years as Principals (Grade-I) in lead College as required under Rule 9 of the Education Service Rules, 1990. Similar application. O.A. No. 1587 of 1992 came to be filled before the same Tribunal on July 13, 1992 by Dr. Gangadhar Sahu respondent-1, who did not also possess the minimum experience of three years as Principal (Grade-I) as required for appointment as Director, Higher Education under Rule 9 of the Education Service Rules, 1990. When the said application were pending consideration before the Orissa Administrative Tribunal, certain interim order were made in them. This situation led to the need to amend Rule 9 of the Education Service Rules, 1990 by the Education Service Amendment Rules, 1990 with effect from October 7, 1992. The amended Rule 9 read :

"9. *Appointment of Director* - (1) Appointment to the post of

A Director, Higher Education shall be made by way of promotion from among the Principals (Grade-I) who have rendered service as such for a period of not less than three years.

B Provided that where no suitable candidate having the requisite experience is available, the Government may relax such requirement as it may consider necessary or expedient.

C (2) Notwithstanding anything contained in sub-rule (1), where a suitable candidate with the experience provided in sub-rule (1) is not available to fill up the post of Director, Higher Education and the Government is of the opinion that the relaxation of such requirement under the proviso to the said sub-rule will not be in public interest, it may fill up the post by transfer of an Officer who has held the post of a Director under the Education Department.

D (3) Selection for promotion or appointment, as the case may be, to the post of Director, Higher Education, shall be based on merit and suitability with due regard to seniority."

Even after the amendment of Rule 9 of the Education Service Rules, 1990, the Government took a positive decision not to relax the requirement of minimum period of three years experience as Principal (Grade-I) for appointment as Director, Higher Education, Consequently on October 17, 1992 the State Government issued a fresh appointment order appointing by transfer Dr. (Mrs.) Girishbala Mohanty to the post of Director, Higher Education. It is this circumstance, which required the Tribunal to decide the applications filed before the Tribunal under section 19 of the Administrative Tribunal Act, 1985 and pending consideration, on the question of legality of the appointment order dated October 17, 1992 by which Dr. (Mrs.) Girishbala Mohanty was appointed as Director, Higher Education as well as the validity of the amended Rule 9 amended by the Education Service Amendment Rules, 1992. The Tribunal, which considered the matter, however, found that there being no material placed before it by the State Government which indicated that the State Government had considered the cases of all the Principals (Grade-I) for appointment as Director, Higher Education before appointment of Dr. (Mrs.) Girishbala Mohanty, Director, Elementary Education as Director, Higher Education that that appointment was vitiated by law. The Tribunal, at the same time, did not consider it necessary to examine the constitutionality of the Educa-

tion Service Amendment Rule, 1992. As a consequence of its first finding, it quashed the Order dated October 17, 1992 by which Dr. (Mrs) Girishbala Mohanty was appointed as Director, Higher Education and directed the State Government to consider the cases of all Principal (Grade-I) and decide whether the required minimum experience of three years as Principals (Grade-I) could be relaxed for appointment of any one of them as Director, Higher Education and make such appointment. The applications of respondent-1 and 2 were accordingly allowed by the Tribunal by its Order dated April 6, 1993. It is that judgment which is under challenge before us in these appeals, requiring the examination of its correctness or otherwise.

Mr. V.R. Reddy, the learned Additional Solicitor General, appearing for the State Government contended that the Tribunal had fallen into a grave error in taking the view that under the amended Rule 9 of the Education Service Rules, 1990 it was not open to the State Government to make appointment by transfer of a Director of Elementary Education as Director, Higher Education unless it found on consideration of the merit and the suitability of each Principal (Grade-I), having regard to his/her due seniority, was not entitled to relaxation. He sought to point out that the statutory scheme for appointment of Director, Higher Education envisaged under the Rules does not permit the consideration of the cases of all the Principals (Grade-I) who did not possess the required minimum experience as to their entitlement for relaxation by considering the merit of their cases as to the suitability for appointment as Director, Higher Education. He also placed before us the file of the State Government to show that the Government even after the amendment of Rule 9 in the Education Service Rules, 1990 had found that relaxation of the Rules relating to minimum experience of three years provided under Rule 9 for appointment of Principals (Grade-I) as Director, Higher Education would not be in public interest. This course was adopted by him to impress upon us that the Tribunal before whom the same file had been placed, had erroneously taken the view that the Government before making the Order dated October 17, 1992 appointing Dr. (Mrs.) Girishbala Mohanty as Director, Higher Education had not examined the question of relaxation of three years minimum experience in the cases of Principals (Grade-I) for appointment of any of them as Director, Higher Education. On the other hand, Mr. S.K. Dholakia learned Senior Counsel sought to support the Judgment of the Tribunal under appeal by urging that the Tribunal had rightly held

A the view that the cases of Principals (Grade-I) could have been considered on their merits for appointment as Director, Higher Education by making the relaxation in one or the other cases, as to the minimum requirement of three years experience as Principal (Grade-I). He did not, however, question the constitutional validity of the amended Rule 9 of the Education Service Rules, 1990.

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In the light of the said arguments of learned counsel on both sides, what is required to be considered by us is as to whether the rule which had provided for appointment of Director, Higher Education by transfer, required as a condition precedent that the Government should have examined the cases of all Principals (Grade-I) who did not possess the minimum experience of three years, to find as to the merit or suitability for appointment as Director, Higher Education.

~~Sub-rule~~

D Sub-rule (1) of Rule 9 of the Education Service Rules, 1990, as amended by the Education Service Amendment Rules, 1992, while provides that appointment to the post of Director, Higher Education shall be made by way of promotion from among the Principals (Grade-I) who have rendered service as such for a period of not less than three years, by its proviso declares that where no suitable candidate having the requisite experience is available, the Government may relax such requirement as it

E may consider necessary or expedient. Coming to sub-rule (2) it states that notwithstanding anything contained in sub-rule (1), where a suitable candidate with the experience provided in sub-rule (1) is not available to fill up the post of Director, Higher Education and the Government is of the opinion that the relaxation of such requirement under the proviso to the

F said sub-rule will not be in public interest, it may fill up the post by transfer of an Officer who has held the post as Director under the Education Department. Sub-rule (3) thereof provides that selection for promotion or appointment, as the case may be, to the post of Director, Higher Education, shall be based on merit and suitability with due regard to seniority.

G The *non obstante* clause in the said sub-rule (2), 'notwithstanding anything contained in sub-rule (1)' shows the overriding effect of sub-rule (2) on sub-rule (1). Sub-rule (2), thereof, when states that where a suitable candidate with the experience provided in sub-rule (1) is not available to fill up the post of Director, Higher Education and the Government is of

H the opinion that the relaxation of such requirement under the proviso to

the said sub-rule will not be in public interest, it is difficult to think that the cases of each of the Principals (Grade-I) have to be considered for relaxation even though they did not possess the minimum experience of three years as Principals (Grade-), as a condition precedent for filling-up the post of the Director, Higher Education, by transfer of an Officer who had held the post of Director in the Education Department, as is held by the Tribunal. In fact, the plain language employed in the sub-rule makes it incumbent on the State Government to take a decision on the question whether it would be in the public interest to relax the minimum requirement of experience of three years as Principals (Grade-I) for considering their cases for appointment as Director, Higher Education, before taking up the question of appointment of others by transfer. Therefore, the question of considering the cases of Principals (Grade-I) for appointment, as to their suitability for appointment as Director, Higher Education cannot arise. This would be the correct interpretation to be placed on sub-rules of Rule 9, becomes evident from the scheme of the provisions which entrusts the consideration of selection by promotion from Principals (Grade-I) to the post of Director, Higher Education to the Departmental Promotion Board constituted under Rule 10 of the Rules, which alone is empowered to consider the cases of all eligible officers coming within the zone of consideration and prepare a select list of such officers as are found by them to be suitable for appointment as Director, Higher Education and not the State Government as is assumed by the Tribunal. Further more, Rule 11 of the Rules, excepted by us already, required the 'Select List' prepared by the Board under Rule 10 to be forwarded to the State Public Service Commission, which alone is empowered under sub-rule (2) thereof to consider the 'Select List' prepared by the Board along with the documents received from the Government and convey its recommendation to the Government with the reasons, if it were to alter the 'Select List' prepared by the Board. While, Rule 12, already excerpted by us, provides for approval of the Government of the recommendation made by the Commission and the 'Select List' being kept in force for a period of one year or till the next select list is prepared, whichever is later, Rule 13 declares that the appointment to the post of Director, Higher Education, or any other post included in that category of the service, shall be made in the same order in which the names appear in the 'Select List' and the *inter se* seniority of the officers so appointed to such rank shall be in that order. This shows that ranking so given, has to be followed by the Government in

- A making the appointments to the post of Director, Higher Education or any other post in the category of service without deviating from the ranking indicated in that 'Select List'. It also shows that the Government has no power to meddle with the list so finally prepared by the Board and approved by the State Public Service Commission. Thus, the scheme of the provisions under the Education Service Rules, 1990 clearly exclude the possibility of the Government examining the cases of Principals (Grade-I) for appointment as Director, Higher Education by promotion, without reference to the Board and the State Public Service Commission. If that be so, we have to hold, as argued by the learned Additional Solicitor General, that the scheme of the provision of the Act do not provide for appointment of Director, Higher Education being made from the Principals (Grade-I), who are not possessing the required minimum experience by relaxing the required minimum experience, by the State Government itself as is directed by the Judgment under appeal and hold so.
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- D Hence the Judgment of the Tribunal under appeal warrants interference and is liable to be set aside.

- E In the result we allow these appeals, set aside the Judgment of the Tribunal under appeal and dismiss applications, O.A. Nos. 1088 and 1587 of 1992 made before the Tribunal by respondent-1 and 2. However, in the facts and circumstances of the case, we make no order as to costs.

R.P.

Appeals allowed.