

HIGH COURT OF ORISSA: CUTTACK

W.P.(C) Nos.1759, 1732 and 765 of 2010

In the matter of an application under Articles 226 and 227 of the Constitution of India.

W.P.(C) No.1759 of 2010

Brajabandhu Nayak and others Petitioners

Versus

State of Orissa and others Opposite parties

For Petitioners -- M/s.Manoj Kumar Mishra,
D.K.Patnaik, A.N.Mohanty and
G.N.Panda
For Opp. Parties -- Mr.B.P.Tripathy,
Standing Counsel
(For O.Ps.1 and 2)
Mr.B.K.Dash
(For O.P.3)
M/s.J.K.Lenka & P.K.Behera
(For O.Ps.4 to 30)

W.P.(C) Nos.1732 of 2010

Abanish Rath and others Petitioners

Versus

State of Orissa and others Opposite parties

For Petitioners -- M/s.Jagannath Pattnaik
Biplab Mohanty, T.K.Pattnaik,
S.Pattnaik. A.Pattnaik,
R.P.Ray and B.S.Rajguru
For Opp. Parties -- Mr.B.P.Tripathy,
Standing Counsel
(For O.Ps.1 and 2)
Mr.B.K.Das
(For O.P.3)
M/s.G.A.R.Dora & Smt.G.Rani Dora
(For O.Ps.4 to 30)
M/s.Mr.J.K.Lenka & P.K.Behera
M/s.Kali Prasanna Mishra,
S.Mohapatra, T.P.Tripathy,
L.P.Dwivedy
M/s.Dr.Gangadhara Tripathy,
B.Jalli and J.P.Tripathy
(For Intervenors)

M/s.B.S.Tripathy & N.P.Patra
(For O.Ps. 5,11,13,15,25,26,26,29
& Intervenors)

W.P.(C) No.765 of 2010

Bidyadhar Jena and others

Petitioners

Versus

State of Orissa and others

Opposite parties

For Petitioners - M/s.Budhadev Routray,
D.Mohapatra, S.Jena,
P.K.Sahoo, S.K.Samal &
G.N.Panda.

For Opp. Parties - Mr.B.P.Tripathy,
Standing Counsel
(For O.Ps.1 and 2)
Mr.B.K.Dash
(For O.P.3)
Shri J.K.Lenka and
P.K.Behera
(For O.Ps.4 to 30)

PRESENT:

**THE HONOURABLE SHRI JUSTICE L. MOHAPATRA
AND**

THE HONOURABLE SHRI JUSTICE C.R.DASH

Date of hearing 13.08.2012 : Date of judgment: 31.08.2012

L. Mohapatra, J. All the three writ applications arise out of the judgment and order dated 18.11.2009 passed by the Orissa Administrative Tribunal, Bhubaneswar Bench, Bhubaneswar in O.A.No.624 of 2003.

The petitioners in W.P.(C) No.1759 of 2010 were respondents 4, 5, 6, 8, 13, 15, 18, 20, 21, 22 and 25 before the Tribunal and the petitioners in W.P.(C) No.1732 of 2010 were respondents 7, 9, 23 and 37 before the Tribunal. The Original Application had been filed before the Tribunal by the private opposite parties 4 to 30 in W.P.(C) No.1759 of 2010.

2. The facts leading to the present litigation are as follows:-

The National Policy on Education 1986 led emphasis on teacher education programme including pre-service and in-service training of teachers of both the formal and non-formal streams. In the context of Universalization of Elementary Education, the N.P.E. envisaged revitalising elementary teacher education programme and, accordingly, the Government of India issued guidelines for upgrading some of the existing Secondary Training Schools as District Institutes of Education and Training (D.I.E.T.) to be opened one in each district to cater the needs of training of teachers working at the elementary level of both streams. In pursuance thereof, during 1987-88 five D.I.E.Ts for the districts of Koraput, Sundargarh, Mayurbhanj, Kalahandi and Dhenkanal and during 1988-89, six more D.I.E.Ts for the districts of Puri, Cuttack, Phulbani, Sambalpur, Bolangir and Keonjhar were sanctioned. According to the funding pattern, the State Government was to meet the existing level of expenditure in respect of each of the institutions as at the time of their up-gradation and the balance of the requirement was to be funded by the Government of India. As per the guidelines, the teaching staffs required for each D.I.E.Ts have to be of the following categories, such as, Teacher Educators, Senior Teacher Educators/Vice-Principal and Principal. The guidelines also prescribed the mode of recruitment and the present case relates to Teacher Educators.

It was provided in the guidelines that the Teacher Educators shall be appointed both by direct recruitment and by selection from amongst the in-service teachers of the school wing, who are otherwise

eligible for such posts and possess the requisite qualifications. The proportion of direct recruitment and selection would be 50 : 50.

So far as direct recruitment is concerned, it was provided that the same be made through open advertisement by the State Selection Board on receipt of requisition regarding vacancy position from the Director, Directorate of Teacher Education and S.C.E.R.T., Orissa.

So far as recruitment by way of selection is concerned, it was provided that suitable teachers of the school wing having requisite qualification may be selected by the State Selection Board and the open advertisement shall also be made on receipt of requisition regarding vacancy position from the Director, Teacher Education and S.C.E.R.T. by inviting applications from the in-service teachers of the school wing through their respective Inspector of Schools, who shall forward their applications along with their service records and CCRs. Clause-6 of the guidelines empowers the Government to relax the qualification and experience in the suitable cases. This decision was published by way of a Resolution dated 30.11.1990 by the Government of Orissa, Education and Youth Services Department, and it was called "Personnel Policy" for the D.I.E.Ts.

3. There was delay in recruitment of Teacher Educators as per the above Personnel Policy. The Government of India also intimated that the teachers will reimburse the pay and allowances of the staff of D.I.E.Ts up to 31.3.1991 to the extent of actual requirement. So long as the vacancies were not filled up, State could not have claimed reimbursement.

Accordingly, by Resolution dated 28.1.1991 a decision was taken to make ad hoc appointment against the said post of Teacher Educators pending regular recruitment through State Selection Board. At this juncture, it was found that 17 private B. Ed. Colleges were functioning in the State till 14.8.1989 i.e. till coming into the force the Orissa Education (Amendment) Act, 1989. The said Amendment Act prohibited establishment, continuance and recognition of private B.Ed Colleges. These 17 private B.Ed Colleges, which were functioning till 14.8.1989, had both the teaching and non-teaching staff and after closure of the said Colleges, they were unemployed. Those teaching and non-teaching staffs were agitating from time to time for their absorption in suitable vacancies under the Government. Therefore, having decided to fill up the post of Teacher Educators on ad hoc basis, a decision was also taken to absorb some of the teaching staff of the erstwhile B.Ed. Colleges in D.I.E.Ts as the Teacher Educators. After obtaining the list of said teachers, it was found that some of them did not have the required qualification and experience for appointment as Teacher Educators and some of them had also crossed the age limit prescribed for entry in to the Government Service. In order to make them eligible for appointment, it was felt necessary to relax the age, qualification and experience in suitable cases. Schedule-II to the aforesaid Resolution dated 28.1.1991 prescribed the mode of selection and it was further provided therein that in respect of appointment made for the purpose of rehabilitation of the teaching members of the defunct private B.Ed. Colleges, the procedure of conducting interview, written test etc. should be dispensed with and the Director, T.E. and S.C.E.R.T. should make

appointment to such teaching members as Teacher Educators on ad hoc basis, if such persons possess the required qualification and experience and are within the age limit prescribed. Relaxation of age, experience and qualification in suitable cases should also be made by the Director, S.C.E.R.T. In terms of the above decision, the private opposite parties, who were applicants before the Tribunal in the Original Application, were appointed. The petitioners in both the writ applications, who were some of the respondents before the Tribunal, were in-service teachers from the school wings having requisite qualification and experience. In pursuance of an advertisement issued by the State Selection Board on 1.12.1991, they had applied for the post of Teacher Educators. Their C.C.Rs and Service Books were forwarded from the competent authority to the State Selection Board along with the application and through a selection process as prescribed in the guideline, they were selected and appointed as Teacher Educators. According to the petitioners, they were appointed as Teacher Educators on 17.9.1992 when the private opposite parties were continuing on ad hoc basis having been appointed as such on 20th February 1991 and regularization of their services was subject to acceptance of their candidature by the State Selection Board. Though the private opposite parties were given ad hoc appointment for a period of one year, it was extended for another six months and again it was extended for another six months. Again on 6.5.1993 the ad hoc appointment of the private opposite parties was extended for a period of six months and further extension was granted for a period of six months from 14.1.1994. While they were continuing on ad hoc basis, their services being extended from time to

time, the Government of Orissa issued a Resolution on 2.6.1994 wherein it was decided to regularize the services of the said ad hoc appointees with effect from the date of their joining as Teacher Educators in the D.I.E.Ts on ad hoc basis without prejudice to the claims of others. In terms of the above decision, 45 ad hoc employees were regularised without mentioning anything about the condonation of break-in-service in between different phases of ad hoc appointments.

While the matter stood thus, a letter was issued to all the Principals of D.I.E.Ts to circulate the provisional gradation list amongst the Teacher Educators inviting objection. In the said provisional gradation list, the Teacher Educators appointed on ad hoc basis from out of the defunct B.Ed. College Lecturers were placed in Group-‘A’ and the candidates selected through the Selection Board, such as the petitioners, were placed in Group-‘B’. Therefore, the petitioners raised objection about their placement and the modified gradation list was finally published on 8.4.2003 by arranging the Teacher Educators branch-wise and subject-wise. As per the said gradation list dated 8.4.2003, the petitioners were placed above the private opposite parties in their respective branches. Challenging the said gradation list, the private opposite parties filed Original Application No.624 of 2003 before the Orissa Administrative Tribunal, Bhubaneswar Bench, Bhubaneswar and their Original Application having been allowed by the Tribunal in the impugned order, this writ application has been filed by the teachers, who were selected and appointed through the State Selection Board and had been placed above the private opposite parties in their respective branches.

The Tribunal in the impugned judgment came to observe that the divide between direct recruits and the absorbees or for that matter between in-service teachers and the absorbees is fictional in as much as the private opposite parties, who were inducted regularly on ad hoc basis, cannot be deprived of their right to continue on the strength of that appointment undisturbed by entrants into the cadre later. Relying on a decision of the Hon'ble Apex Court in the case of **The Direct Recruit Class-II Engineering Officers' Association and others Vrs. State of Maharashtra** reported in AIR 1990 SC 1607, the Tribunal further held that the private opposite parties were appointed when there were no rules in force and only a Personnel Policy was in existence. The initial appointment of the private opposite parties was evidently not made following any procedure or rules. It was a decision taken to meet an exigency. They having continued uninterruptedly in that post since the date of joining, their regularization on ad hoc basis are to be treated as their final regularization and, accordingly, the Tribunal held that the present private opposite parties to be the senior to the petitioners in both the writ applications.

4. Shri B.Routray, Shri Manoj Kumar Mishra and Shri Jatannath Pattnaik, learned Senior Counsel appearing for the petitioners assailed the impugned judgment of the Tribunal on the following grounds:-

- i) In absence of any rule with regard to recruitment of Teacher Educators, the State Government or the Central Government, as the case may be, was competent to issue executive instructions or guidelines to cover the

field. The Personnel Policy dated 30.11.1990 issued by the Education and Youth Services Department, Government of Orissa laid down the procedure for appointment of Teacher Educators, and the private opposite parties admittedly having not been appointed in terms of the procedure laid down in the Personnel Policy, their appointment to such post of Teacher Educators was illegal and no right accrued in their favour so long as they had not been regularized in the posts by order of the Governor on 2nd June, 1994.

- ii) Initial appointment of the private opposite parties was only on ad hoc basis subject to appointment of candidates through State Selection Board and such appointment had been extended from time to time with breaks. Therefore, finding of the Tribunal that there was uninterrupted continuance of service during the ad hoc period is an error of record.
- iii) Even if the private opposite parties are taken to have been regularized by order of the Governor with effect from 2.6.1994, their regularization being without prejudice to the rights of others, their seniority in the cadre can only be computed from 2.6.1994 and not from the date they were appointed initially on ad hoc basis as Teacher Educators.

5. Shri G.A.R. Dora, learned Senior Counsel and Shri Tripathy, learned counsel appearing for the opposite parties contended that the Personnel Policy dated 30th November 1990 is not by order of the Governor whereas the decision taken to appoint the private opposite parties as Teacher Educators in Resolution dated 28.1.1991 is by order of the Governor and the order of regularization dated 2.6.1994 is also by order of

the Governor. According to Shri Dora, learned Senior Counsel, the Personnel Policy dated 30th November, 1990 having not been passed by order of the Governor, it was open for the Department to deviate from the decision taken in the said Personnel Policy. It was further contended that there was no break in-service during the ad hoc period as alleged by the petitioners and the order of regularization dated 2.6.1994 was never challenged by the petitioners. Therefore, it is no more open for the petitioners to question initial appointment of the private opposite parties and regularization of their services. Referring to some of the decisions of the Hon'ble Apex Court, Shri G.A.R. Dora, learned Senior Counsel further contended that the private opposite parties having been regularised in service while continuing on ad hoc basis, their entire ad hoc period has to be taken into account for the purpose of seniority.

6. The Orissa Education Act was amended in 1989 prohibiting establishment and functioning of private B.Ed. Colleges. At that point of time it appears that 42 B.Ed Colleges were existing in different parts of the State and out of that only 17 B.Ed. Colleges were having Government recognition and University affiliation. After a decision was taken for closure of these private B.Ed. Colleges, there was a hunger strike launched by the staff and students of 17 Private Training Colleges making the following demands.

- (a) Rehabilitation of teaching and non-teaching staff of the non-recognized 15 B.Ed Colleges numbering about 200.

(b) To give permission for holding of examination for the students, who had been admitted to such Colleges during 1988-89 and 1889-90.

(C) Taking over the properties and assets of private B.Ed. Training Colleges.

The State Government took a decision that both the teaching and non-teaching staff of fifteen private non-recognized B.Ed Colleges will be suitably absorbed in the D.I.E.Ts subject to their qualification and experience. Their experience will be given preference and age relaxation may also be extended, if necessary. This decision was intimated to the General Secretary, Orissa Non-Government Training College Staff Association from the office of the Deputy Secretary to Government of Orissa in the Education and Youth Services Department dated 10.1.1990. The Resolution relating to Personnel Policy for the D.I.E.Ts. came on 30.11.1990. It provided for appointment of three categories of employees in the teaching side, such as, Teacher Educator, Senior Teacher Educator/Vice-Principal and Principal. The Personnel Policy also laid down that 50% of the posts of Teacher Educator shall be filled up by direct recruitment and the rest 50% shall be filled up by way of selection from amongst the suitable teachers of the school wing through the State Selection Board. The manner of recruitment was also provided in the said Personnel Policy. From Annexure-4 series, it appears that a decision had been taken to appoint 14 Teacher Educators for each D.I.E.Ts. in the scale of pay of Rs.1700-3200/- and, accordingly the total number of post of Teacher Educators to be filled up came to 154. From the Resolution dated

28.1.1991 issued by the Government of Orissa, Education Department in Annexure-3, it appears that the Government of India intimated that they will reimburse the pay and allowance of the staff of D.I.E.Ts up to 31.3.1991 to the extent of actual requirement. Therefore, the question as to whether the posts were required to be filled up to claim reimbursement came up for consideration. In the said Resolution, it was decided that in order to appoint the teaching and non-teaching staff of defunct 17 private B.Ed Colleges, it was necessary to relax the age, qualification and experience in suitable cases. It was further decided in Schedule-II of the said Resolution that in respect of the appointment made for the purpose of rehabilitation of the teaching members of defunct private B.Ed Colleges, the procedure of conducting interview, written test etc. shall be dispensed with and the Director, T.E. & S.C.E.R.T. shall make appointment to such teaching members as Teacher Educator on ad hoc basis, if such person possesses the required qualification and experience and is within the age limit prescribed. Relaxation of age, experience and qualification in suitable cases shall also be made. So far as qualification is concerned, the basic minimum qualification cannot be relaxed. Only when a candidate does not have required specialization in the concerned subject, the same may be relaxed. This decision was taken in terms of Clause-6 of the Personnel Policy for the D.I.E.Ts. laid down in Resolution dated 30.11.1990. The said provision of the Personnel Policy empowers the Government to relax the qualification and experience in suitable cases.

7. Learned Senior Counsel appearing for the petitioners with reference to Articles 162 and 166 of Constitution of India submitted that in absence of any Rule prescribing the mode of appointment of Teacher Educators, the Personnel Policy laid down for appointment of Teacher Educators in different D.I.E.Ts has to be governed by Resolution dated 30.11.1990 and there cannot be a departure from what has been laid down in the said Resolution.

Learned counsel appearing for the private opposite parties contended that every policy decision of the State Government in terms of Article 166 of the Constitution of India has to be by order of the Governor, but the Personnel Policy dated 30.11.1990 is only an executive instruction and not by the order of the Governor. On the other hand, the Resolution dated 28.1.1991 in which a decision was taken to recruit the teaching and non-teaching staff of seventeen defunct B.Ed. Colleges by relaxing age, experience and qualification in suitable cases was by order of the Governor and, accordingly, the norms laid down for appointment of Teacher Educators in the Resolution 30.11.1990 cannot be treated to be mandatory and same is subject to subsequent Resolution of the very same Department dated 28.1.1991.

8. In the case of **Ambuja Kumar Chinnara Vrs. State of Orissa and others** reported in 2005 (Supp.) OLR-842, it was held that when there were no statutory rules framed under Article 309 of the Constitution of India, the Government Resolution, which was issued under Article 162 of Constitution, was as good as statutory rule. In absence of such rules

framed under Article 309, the executive power of a State shall extend to the matter with respect to which legislature of the State has power to make laws. In this connection, reference may also be made to a decision of the Hon'ble Supreme Court in the case of **R.Chitralekha Vrs. State of Mysore** reported in AIR 1964 SC 1823 where it was laid down that every executive order/instruction need not be by order of the Governor and the provision contained under Article 166 of the Constitution of India is directory and not mandatory. If the ratio laid down in the above decision is taken into consideration, both the Resolution dated 30.11.1990 and 28.1.1991 have to be treated as having the same force. The Resolution dated 30.11.1990 prescribes the mode of selection of Teacher Educators and the decision taken in the Resolution dated 28.1.1999 lays down that age, experience and qualification relaxation can be extended to the teaching and non-teaching staff of the seventeen defunct B.Ed Colleges and this relaxation has been granted in terms of Clause-VI of the Resolution dated 30.11.1990.

It is, therefore clear that the State Government was competent to extend the relaxation in the matter of age, qualification and experience for appointment to the post of Teacher Educators for those teaching and non-teaching staff, who were working in the defunct seventeen B.Ed Colleges. Similarly the decision taken in the Resolution dated 28.1.1991 to exempt this category of candidates from interview and written test etc. is also within the competency of the State Government in absence of any Rule made under Article 309 of the Constitution of India. We are, therefore of the view that the Resolution dated 30.11.1990 and the Resolution dated

28.1.1991 stand on the same footing having the same force. Therefore, appointment of private opposite parties as Teacher Educators by extending age, experience and qualification relaxation and also exempting them from appearing in the written test and viva-voce test is not illegal. Moreover, such appointment of the private opposite parties had never been questioned by the petitioners even though they were given appointment in February 1991.

9. The second ground taken by the learned counsel for the petitioners is with regard to uninterrupted ad hoc service rendered by the private opposite parties. Though it was contended by the learned counsel for the petitioners that the private opposite parties were given extension of their ad hoc services with breaks, the specific finding of the Tribunal in the impugned judgment is that there was uninterrupted continued service of the private opposite parties as ad hoc Teacher Educators. Thus, the finding of fact arrived at by the Tribunal need not be reconsidered in a writ jurisdiction. Moreover, this question had also never been raised by the petitioners at any point of time and was raised for the first time before the Tribunal.

Learned counsel appearing for the private opposite parties not only emphatically submitted that there was no break in service but also produced the service book of the private opposite parties to substantiate such a submission and we find substantial force in their contention.

So far as third ground taken by the learned counsel for the petitioners is concerned, it relates to fixation of inter se seniority between

the private opposite parties and the petitioners. Numbers of decision were cited by the learned counsel appearing for the petitioners in this regard. In the case of **Davinder Bathia and others Vrs. Union of India and others** reported in AIR 1998 Supreme Court 2098, the applicant therein was appointed against the post of Inquiry of Enquiry-cum-Reservation Clerk without selection and on ad hoc basis. For the purpose of determining his seniority, the Hon'ble Apex Court held that he did not have a right to be in the cadre so long as he was not regularised after going through a selection process and therefore the ad hoc service rendered by him cannot be counted for determination of seniority. In the case of **V.Sreenivasa Reddy and others Vrs. Government of Andhra Pradesh and others** reported in AIR 1995 Supreme Court 586, it was held that appointment/promotion must be in accordance with Rules. Direct recruit takes his seniority from the date on which he starts discharging the duty of the post borne on the cadre while a temporary appointee appointed dehors the rules or on ad hoc basis or to a fortuitous vacancy gets seniority from the date of regular appointment. Appointment in accordance with Rules is a condition precedent to count seniority. Temporary or ad hoc or fortuitous appointments etc. is not an appointment in accordance with the Rules and the temporary service cannot be counted towards the seniority. Similar views were also expressed in the case of **K.Madalaimuthu and another Vrs. State of Tamilnadu and others** reported in (2006) 6 Supreme Court Cases 558, **R.K.Mobisana Singh Vrs. Kh.Temba Singh and others** reported in (2008) 1 Supreme Court Cases 747 and several others decisions cited by the learned counsel for the petitioners.

10. Shri Dora, learned Senior Counsel appearing for the private opposite parties relied on a decision of the Hon'ble Apex Court in the case of **The Direct Recruit Class-II Engineering Officers' Association and others Vrs. State of Maharashtra and others** reported in AIR 1990 Supreme Court 1607 in which it was held that if the initial appointment is not made by following the procedure laid down by the rules, but the appointee continues in the post uninterruptedly till the regularization of his service in accordance with the rules, the period of officiating service will be counted. In the case of **D.P.Das Vrs. Union of India and others** reported in 2011 STPL (LE) 45538 SC, it was held that in absence of specific rule or even executive instruction, seniority amongst persons holding the similar posts in the same cadre has to be determined on the basis of length of service and not any other fortuitous circumstances.

11. While dealing with the grounds taken by the learned counsel for both the petitioners, we have held that both the Resolution dated 30.11.1990 and 28.1.1991 are only executive instructions standing on the same footing and having the same force. The private opposite parties were recruited as Teacher Educators in terms of the Resolution dated 28.1.1991 and continued on ad hoc basis till they were regularised by order of the Governor in Annexure-11 dated 2.6.1994. Therefore their ad hoc period of service has to be taken into account for the purpose of fixation of their seniority as both the petitioners and the private opposite parties are working as Teacher Educators i.e. in the same cadre.

12. The next question that comes up for consideration is that regularization of the private opposite parties as Teacher Educators in Annexure-11 was without prejudice to the claims of others. It is specifically stated in Annexure-11 that while regularising the services of the private opposite parties, the Government have been pleased to regularize the services of those Teacher Educators, who were appointed as Lecturers in their respective Colleges on regular basis and continuing as such on the date of issue of Resolution and they were hereby declared to have been regularly appointed as such with effect from the date of their joining as Teacher Educators in the D.I.E.Ts (on ad hoc basis) without prejudice to the claims of others. It was contended by the learned counsel for the petitioners that regularization of the private opposite parties was without prejudice to the rights of the petitioners and, therefore, the private opposite parties cannot claim that because of their regularization in service by Resolution dated 2.6.1994 and their length of service has been determined.

13. The last issue raised by the learned counsel appearing for the petitioners is that the order of regularization dated 2.6.1994 clearly shows that such regularization is without prejudice to the rights of others and, therefore, the claim of seniority of the private opposite parties over the petitioners had not been finalized at the time of their regularization. Large numbers of decisions were cited by the learned counsel appearing for both the parties in relation to the term “without prejudice”. We have not referred to those decisions since the order regularizing the service of private opposite parties clearly shows that such regularization is without prejudice

to the rights of others and rights of the parties are now under adjudication. On consideration of other issues raised by the learned counsel appearing for the petitioners, we have already held that ad hoc period of service rendered by the private opposite parties has to be taken into account for the purpose of computation of length of service and, accordingly, on this issue also we find nothing which can help the petitioners.

14. For the reasons stated above, there is no infirmity in the impugned order of the Tribunal and, accordingly, no interference is called for.

Accordingly, the three writ applications are dismissed.

C. R. Dash, J. I agree.

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L. Mohapatra, J.

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C.R.Dash, J.