A

B.K. MOHAPATRA

v.

STATE OF ORISSA

OCTOBER 28, 1987

B [E.S. VENKATARAMIAH AND K.N. SINGH, JJ.

Teacher's service matter—Rationalisation scheme for integration of services of teachers in different types of schools—Dispute regarding terms thereof relating to seniority and contributory Provident Fund. Act of State.

C **A number of the princely States, situated within the territories of the present State of Orissa, were merged with effect from January 1, 1948, with the Province of Orissa as it then existed. On such merger, the High Schools within the said princely States came under the jurisdiction of the Province of Orissa. The Schools belonged to two** D **categories—'A' type schools which were full-fledged High schools sending candidates for the Matriculation examination and 'B' type schools which were incomplete schools, not sending candidates for the Matriculation examination. On the said schools being taken over by the Province of Orissa the teachers of the schools came under the control of the Government of Orissa. The Orissa Government issued a letter dated** E **5.1.1949 to the Director of Public Instruction in connection with the subject of regulation of the services of the teachers.**

The appellant was an assistant teacher in one of the 'B' type schools on June 15, 1953, after the commencement of the Constitution of India, and continued to work as such in the 'B' type school till August F **1, 1964, when the State Government of Orissa published a rationalisation scheme for integrating the services of the teachers in the different types of High Schools in the State. Aggrieved by the terms of the Scheme relating to (i) the seniority of the teachers working in the 'B' type High Schools and (ii). The contributory Provident Fund, the appellant filed a writ petition in the High Court. The High Court upheld the** G **validity of the Scheme and dismissed the Petition, while recommending, however, to the Government to modify the terms relating to the Provident Fund Scheme applicable to the teachers of 'B' type High Schools. The appellant then moved this Court by special leave against the decision of the High Court.**

H **Disposing of the appeal, the Court,**

HELD: It is true that till the commencement of the Constitution of India, the position of the 'B' type High Schools and the teachers working in them was being requlated in accordance with the terms contained in the order dated 5.1.1949. But on the commencement of the Constitution of India, all the territories which immediately before the commencement of the Constitution were either comprised in the Province of Orissa or were being administrated as if they formed part of that Province, became and constituted the State of Orissa. The State Government was under obligation to discharge its executive functions with respect to education in respect of all the schools including 'B' type High Schools. A High school which once belonged to a princely state became a Government High School with effect from the commencement of the Constitution and it could not be anything else and the teachers working therein became teachers holding posts under the Government. It is well-settled that the doctrine of an "act of State" cannot be pleaded by a State as a defence against its own citizens. An 'act of State' is an act done in relation to a foreigner by a Sovereign power of a country. Such an act cannot be questioned in any court of law, but such a situation would not arise between the State Government and a citizen like the appellant who joined service after the commencement of the Constitution. The High Court was in error in upholding the plea that the order dated 5.1.1949 could not be questioned by the appellant who had joined service after the commencement of the Constitution. [657A—E, GH; 658A]

There is also no rational basis for refusing to give the benefit of the service rendered by a teacher working in a 'B' type High school after January 26, 1950, either for purposes of seniority or for purposes of computing the retirement benefits. It may be open to the State Government, while integrating the services of teachers working in different kinds of institutions, to introduce a scheme of rationalisation which may have the effect of modifying the conditions of service of different groups of government servants. But the Government cannot by a stroke of pendeny the benefit of the entire past service rendered by one group of such government servants. The effect of the government scheme was that all the teachers who had been in Government Schools immediately prior to June 1 1964—the date of coversion of the High Schools to government schools—became senior to the teachers working in the 'B' type High Schools, Ex-District Board High Schools and Ex-Anchal High Schools. The scheme appears to be an irrational one. The High Court was in error in upholding the terms of the scheme in so far as the question of the seniority was concerned. The judgment of the High Court, in so far as the validity of the terms of the scheme, pertaining to

A seniority of the teachers in the schools referred to in it, is concerned, is reversed. the clause in the scheme which reads: "But for the purpose of reckoning their seniority in Government service, their services will be counted from the date of conversion of the schools into Government schools" is void. The State government is directed to treat, on and after January, 26, 1950, the service of the teachers of the 'B' type High B schools, ex-District Board High Schools and ex-Anchal High Schools as the service under the State Government. It is open to the State Government to evolve a reasonable formula for integrating the cadres of these teachers with the cadres of the teachers in the High Schools which have been under the Government all along. Before bringing about such an integration, the government may formulate reasonable principles for equating the posts in the Government High Schools with the posts in the C 'B' type High Schools, ex-District Board High Schools and ex-Anchal High Schools having regard to the minimum qualification for the posts, pay, responsibilities, etc. In the light of the said principles, the government shall prepare a seniority list, whereafter it shall proceed to make promotions of the teachers to the higher cadre. In view of the stand D taken by counsel for the appellant and other teachers in 'B' type High schools, ex-District Board High Schools and the ex-Anchal High schools, regarding their not insisting upon promotions with retrospective effect, etc., the State government shall promote these teachers to the higher posts as and when the vacancies arise hereafter, on the basis of their rank in the seniority list, if they are found fit for such E promotion. The government is at liberty, if it finds it convenient, to treat, as submitted by the teachers' counsel, the two groups of teachers as belonging to separate cadres and reserve certain percentage of posts for being filled up only by the teachers of 'B' type High Schools, ex-District Board High Schools and ex-Anchal High schools, as was the case in *State of Punjab* v. *Joginder Singh,* [1963 (Supp. 2) SCR F 169]. The order of the High Court is modified to the above extent and the State Government shall prepare the seniority list and make promotions accordingly within six months in the light of the above observations. [659C-G; 660C-H; 661A-D]

No opinion is expressed on the question of Contributory Provi- G dent Fund Scheme, the same having been satisfactorily settled by the State. [661D-E]

Johnstone v. *Pedlar*, [1921] 2 A.C. 262, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 661 H of 1971.

From the Judgment and Order dated 28.10.1969 of the Orissa High Court in O.J.C. No. 165 of 1966. A

S.P. Pandey for the Appellant.

G.S. Chatterjee for Respondent No. 1.

B

R.K. Garg and J.R. Dass for Respondent No. 2.

The Judgment of the Court was delivered by

VENKATARAMIAH, J. With effect from 1.1.1948 a number of princely States which were situated within the territories of the present State of orissa were merged with the Province of Orissa as it then existed. On such merger the High Schools within the said princely States also came under the jurisdiction of the Province of Orissa. The said High Schools belonged to two categories—namely 'A' type schools which were full-fledged High Schools which were actually sending candidates for the matriculation examination and 'B' type schools which were incomplete schools not sending candidates for the matriculation examination. On the said High Schools being taken over by the Province of Orissa, the teachers serving in the said High Schools came under the control of the Government of Orissa. It then became necessary to make an order to regulate the services of the said teachers. The Government of Orissa in the Education Department issued a letter dated 5.1.1949 to the Director of Public Instruction on the subject. The relevant pertion thereof is extracted below:- C D E

> "In the States the High Schools other than those at District Headquarters mentioned above will be of two types. The complete High Schools will be 'A' type High Schools and the incomplete High Schools 'B' type High Schools. F
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> The 'A' type schools will be similar to Government High Schools other than those at District Headquarters. The services of the staff of such High Schools will be pensionable and transferable and the teachers will get pay and dearness allowances at the rates prescribed for Government servants. Government will bear the whole of the recurring and non-recurring costs. G
>
> 'B' type High Schools will be Government managed. H

The staff will get pay and allowances at rates prescribed for Government servants. The Headmasters of those schools will be in the upper division of the S.E.S. The services of those teachers will not be pensionable. They will have the benefits of the Contributory Provident Fund to which Government will contribute at the rate of Re. 1 in the rupee of the salary. As regards recurring expenses of those schools Government will meet the difference between the standard cost and income from fees and other local subscriptions. As regards non-recurring expenditure Government will meet two-thirds of the cost.

The standard cost for the 'B' type Government managed High Shools will consist of the following items:-

(a) .....

(b) The total contribution on Provident Fund deposited at the rate of Re.-/1/- in the rupee, and

(c) .....

The Inspector of Schools will be the managing agent on behalf of the Government and the Headmaster will be the correspondent of a 'B' type Government managed High School."

The appellant was appointed as an Assistant Teacher on a pay of Rs.70 per month in the pay scale of Rs.70-140 plus admissible dearness allowance in one of the 'B' type High Schools by the Inspector of Schools on 15.6.1953 after the commencement of the Constitution of India. He continued to work as an Assistant Teacher in one or the other of the 'B' type High Schools to which he was transferred until August 1, 1964 when the State Government published a rationalisation scheme for integrating the services of the teachers in different types of High Schools in the State of Orissa, namely, Zilla Schools, 'A' type Government High Schools, 'B' type High Schools, Ex-District Board High Schools and Ex-Anchal High Schools hereinafter collectively referred to as integrated High Schools. The relevant part of the scheme reads thus:-"No. 18027-E Government of Orissa

Education Department Resolution
1st Aug., 1964
Sub:-Rationalisation of High
Schools in the State.

Government have under their own management quite a few types of High Schools in which conditions of service of the employees vary category to category. This ununiformity in the patterns and in the conditions of service has not only evoked public criticism but also created certain administrative difficulties and tends to lowering of standards in the institutions. It is for these reasons that Government had for some time past under their consideration the question of rationalisation of the following different types of High Schools in the State whose number is noted against each.

1.	Zilla Schools	— 18
2.	'A' type Govt. High School.	— 52
3.	'B' type High Schools	— 22
4.	Ex-District Board High Schools.	— 17
5.	Ex-Anchal High Schools.	— 6

After careful consideration Government have now decided that the five types of High Schools mentioned above should be converted into a single type of Govt. School with effect from 1st June, 1964.

Since the employees of the 'B' type High Schools are in receipt of pay and allowances on the scales applicable to Government servants the question of fixation of their pay and allowances does not arise. They will continue to draw their salary that they are drawing on the date of conversion.

In respect of the incumbents of 'B' type High Schools who are governed by the contributory provident fund rules, their subscriptions, if any, in the fund together with the Government contribution on the date of conversion may either be refunded to them or be credited to the General Provident Fund account to be opened afresh according to their option and all the employees may be brought under the Orissa General Provident Fund Rules. After conversion Government shall not contribute anything towards the Employees' Contributory Provident Fund. *All the employees of 'B' type High Schools will be brought over to pensionable service from the date of conversion of the Schools into Government Schools.*

.....

The seniority of the 'B' type, Ex-District Board and Ex-Anchal Schools as among themselves will be determined by their length of continuous service in their respective cadres in the old Schools. But for the purpose of reckoning their seniority in Government service, their services will be counted from the date of conversion of the Schools into Government schools ....."

(Underlining by us)

Aggrieved by the terms of the rationalisation scheme referred to above relating to (i) the Contributory Provident Fund and (ii) the seniority of teachers who were working in 'B' type High Schools, the appellant filed a writ petition in the High Court of Orissa questioning the discriminatory treatment meted out to him and other teachers in 'B' type High Schools. The appellants contended that even though he had been appointed in a 'B' type High School he should be treated as having entered the service under the State Government on 15.6.1953 when he was appointed as an Assistant Teacher in a 'B' type High School, that the clause in the scheme of 1964 which provided that for the purpose of reckoning seniority in Government service the services of teachers in 'B' type High Schools would be counted from the date of conversion of the schools into Government schools which had the effect of wiping of the previous service put in by them in the said schools was discriminatory and that the terms relating to the Contributory Provident Fund were invalid. The petition was resisted by the State Government pleading *inter alia* that the decision of the Government dated 5.1.1949 being an 'act of State' its effect could not be challenged by the appellant even though he had entered service in the year 1953. The High Court upheld the validity of the scheme and dismissed the writ petition. It, however, recommended to the Government to modify the terms relating to the Provident Fund scheme applicable to the teachers of 'B' type High Schools. Aggrieved by the judgment of the High Court, the appellant has filed this appeal by special leave.

It is urged on behalf of the appellant that the State Government was wrong in treating him as having entered the service under the State Government only from June 1, 1964 although he had been appointed by the Inspector of Schools in the year 1953. It is argued that merely because the appellant was appointed in a 'B' type High School which once belonged to a princely State he could not be denied the benefits available to all other teachers in Government service. It is further submitted that the case of the Government that the Government was

running 'B' schools as merely agents was wholly untenable. A

It is no doubt true that the 'B' type High Schools were formerly in the princely States and that on the merger of the States the then Government of the Province of Orissa passed an order on 5.1.1949 stating that the 'B' type High Schools would be governed and managed by the Inspector of Schools on behalf of the Government and the B Headmasters would be the correspondents of 'B' type Government managed High Schools. It is also true that till the commencement of the Constitution of India the position of 'B' type High Schools and the teachers working in them were being regulated in accordance with the terms contained in the order dated 5.1.1949. But on the commencement of the Constitution of India all the territories which immediately before the commencement of the Constitution were either comprised C in the Province of Orissa or were being administered as if they formed part of that Province became and constituted the State of Orissa (vide Entry No. 10 in the First Schedule to the Constitution of India.) The State Government was under an obligation to discharge its executive functions with respect to education by virtue of Entry 11 of the D Seventh Schedule to the Constitution as it then existed in respect of all the schools including 'B' type schools. A High School which once belonged to the princely states became a Government High School with effect from the commencement of the Constitution and it could not be anything else. The Inspector of Schools could no longer function as the managing agent on behalf of the State Government and the E 'B' type High School could no longer be a 'Government managed High School'. The teachers working therein became teachers holding posts under the Government since there was no other authority which owned the 'B' type High Schools after January 26, 1950 because there were no territories within the State of Orissa which could be considered as territories administered by the Government as if they formed F a part of the State which was the case until January 26, 1950. Though the princely States were subject to the paramountcy of the British Crown, they were considered to be foreign States by the British Indian Provinces. Any action taken in respect of them or their subjects by the British Indian Provinces was an act of State but its effect could not be extended beyond January 26, 1950 because after that date there was no G longer any foreign Government. The princely States had gone out of existence. It is well-settled that the doctrine of an 'act of State' cannot be pleaded by a State as a defence against its own citizens. An 'act of State' is an act done in relation to a foreigner by the sovereign power of a country or its agent either previously authorised or subsequently ratified. Such an act cannot be questioned or made the subject of legal H

A proceedings in any Court of law. But such a situation would not arise between the State Government and a citizen like the appellant who joined service after the commencement of the Constitution.

It is appropriate to refer here to the decision of the House of Lords in *Johnstone* v. *Pedlar*, [1921] 2 A.C. 262 in which the nature of B an 'act of State' arose for consideration. Lord Atkinson observed at pages 278-279 thus:

> "The best definition, I think, of an act of State, as well as the descriptions of the consequences flowing from it, is that given in the judgment of Lord Kingsdown in the C case of *Secretary of State for India* v. *Kamachee Boye Sahaba*. (13 Moo. P.C. 22). In that case, the Rajah of Tanjore, a native independent sovereign, who was, by virtue of certain treaties, under the protection of the East India Company, in exercise of their sovereign power and in trust for the British Government, seized the Raj of Tanjore D and the whole property of the deceased Rajah as an escheat, on the ground that the dignity of the Raj was extinct for want of a male heir, and that this property lapsed to the British Government. It was held first, as it was held in *Buron* v. *Denman* (2Ex. 167), that an act done by an agent of the Government, though in excess of his authority, on E being ratified and adopted by the Government, was of the same authority as if it had originally been directed by the Government, that the effect of the ratification is, in the language of Parke B. In *Buron* v. *Denman* (Ibid. 188-9), this, that it only leaves a remedy against the Crown (such as it is), and exempts from all liability the person who com- F mits the trespass, and, second, that the seizure made by the British Government acting as a sovereign power through its delegate, the East India Company, was an act of State to inquire into the propriety of which a municipal Court had no jurisdiction. Lord Kingsdown, in delivering the judgment of the Privy Council said (13 Moo. P.C. 77, 86); G "Acts done in the execution of these sovereign powers were not subject to the control of the municipal courts, either of India or Great Britain."

In the same decision Lord Phillimore said at page 295 thus;

H "The defence set up in the present case is sometimes

called the defence of an act of State. As regards this way of looking at it, I cannot put the matter better or more tersely than as I found it put in one of the reasons given by the successful plaintiffs in their case as respondents before the Privy Council, in *Walker* v. *Baird*, [1892 A.C. 491, 494): "Because between Her Majesty and one of her subjects there can be no such thing as an act of State." And this proposition was finally accepted in the case of *Walker* v. *Baird*, [1892 A.C. 491, 494)"

The High Court was, therefore, in error in upholding the plea that the order dated 5. 1. 1949 could not be questioned by the appellant who had joined service after the commencement of the Constitution.

There is also no rational basis for refusing to give the benefit of the service rendered by a teacher working in a 'B' type High School after January 26, 1950 either for purposes of seniority or for purposes of computing the retirement benefits. It may be open to the State Government while integrating the services of teachers working in different kinds of institutions to introduce a scheme of rationalisation which may have the effect of modifying the conditions of service of different groups of Government servants. It cannot, however, by a stroke of pen deny the benefit of the entire past service rendered by one group of such Government servants. The effect of the Government scheme was that while for purposes of inter se seniority amongst the teachers of 'B' type High Schools, Ex-District Board High Schools and Ex-Anchal High Schools, that is, integrated High schools the length of continuous service in their respective cadres in their old schools was to be counted, for purposes of reckoning seniority vis-a-vis teachers in Government schools their service was to be counted, only from the date of conversion of those High Schools to Government Schools, i.e., from June 1, 1964. Consequently all teachers who had been in Government Schools immediately prior to June 1, 1964 became seniors to the teachers working in 'B' type High Schools, Ex-District Board High Schools and Ex-Anchal High Schools. The scheme put forward by the Government appears to us to be an irrational one. We may at this stage mention that when this case was heard earlier by a bench of three learned Judges of this Court consisting of V.R. Krishna Iyer, R.S. Pathak (as he then was) and O. Chinnappa Reddy, JJ. it was observed by the learned Judges on January 31, 1980 thus:

"We have been taken through the judgment of the High

A Court and the relevant facts by Shri Sikri and we are satisfied that the reasons given by the High Court are far from satisfactory. On the other hand, no serious consideration of the ground of discrimination in ignoring the past service of the teachers has been given by the High Court."

B After making the above order the learned Judges granted time to the State Government to evolve a fresh scheme for integration of the services of the teachers in the schools referred in the scheme of 1964 with the teachers employed in the High Schools which were Government Schools all along. It is reported to us that the Government was not willing either to modify the existing scheme or to formulate a new scheme in a reasonable way. We respectfully agree with the above C observations made by the three learned Judges. We are of the view that the High Court was in error in upholding the terms of the scheme insofar as the question of seniority was concerned. We are, therefore, constrained to reverse the judgment of the High Court insofar as the question relating to the validity of the terms of the scheme pertaining D to the seniority of the teachers working in the schools referred to in it is concerned. We hold that the clause in the scheme which reads: "But for the purpose of reckoning their seniority in Government service, their services will be counted from the date of conversion of the schools into Government schools" is void. We direct the State Government to treat on and after January 26, 1950 the service of the E teachers of 'B' type High Schools, Ex-District Board High Schools and Ex-Anchal High Schools as the service under the State Government. It is open for the State Government to evolve a reasonable formula for integrating the cadres of these teachers with the cadres of teachers in High Schools which have been under the Government all along. Before bringing about such integration, the Government may formu- F late reasonable principles for equating the posts in the Government High Schools with the posts in the 'B' type High Schools, Ex-District Board High Schools and Ex-Anchal High Schools having regard to the minimum qualification for the posts, pay, responsibilities etc. In the light of the said principles, the Government shall prepare a seniority list. Thereafter it shall proceed to make promotions of teachers to G higher cadres. We may at this stage state that the learned counsel for the appellant and other teachers woking in 'B' type High Schools, Ex-District Board High Schools and Ex-Anchal High Schools has submitted that these teachers do not insist upon promotions being given to them with retrospective effect even if it is found that they are entitled to it but they only pray that they may be promoted to the vacancies H which may occur in the higher cadres hereafter. We express our

appreciation of the stand taken by the learned counsel in this regard. The State Government shall, therefore, promote these teachers to higher posts as and when vacancies arise hereafter on the basis of their rank in the seniority list if they are found fit for such promotion. The learned counsel has further submitted that if the State Government finds it difficult to integrate the teachers belonging to 'B' type High Schools and teachers of other integrated schools with the teachers working in Government High Schools, the State Government may at least consider the question of treating the two groups of teachers as belonging to separate cadres and reserve certain percentage of posts for being filled up only by the teachers of 'B' type High Schools, Ex-District Board High Schools and Ex-Anchal High Schools as was the case in *State of Punjab* v. *Joginder Singh,* [1963] Supp. 2 S.C.R. 169. The Government is at liberty to do so if it finds it to be convenient. The order of the High Court is, therefore, modified to the above extent and the State Government shall prepare seniority list and make promotions accordingly within six months from today in the light of the above observations.

As regards the question of the Contributory Provident Fund Scheme is concerned, we are informed that it has been satisfactorily settled by the State Government. We, therefore, express no opinion on that question.

The appeal is disposed of accordingly.

S.L. Appeal disposed of