

A STATE OF ORISSA & ORS.
v.
SRI JAGABANDHU PANDA
(Civil Appeal No. 1967 of 2013)

B FEBRUARY 27, 2013
[SURINDER SINGH NIJJAR AND M.Y. EQBAL, JJ.]

Service Law:

C *Ex-cadre post - Created on the basis of a proposal under
a Scheme - Appointment on - Plea of appointee to make it
en-cadre - Held: The post was treated as ex-cadre from the
very inception and it was well within the knowledge of the
appointee - An appointment outside the cadre cannot be*
D *considered to be made to temporary post borne on the cadre.*

The respondent joined the post of 'Ore Dressing
Engineer, in the year 1984. Immediately after joining, he
made several representations stating that he came to
know that the post was ex-cadre, only after joining the
E service and requested for upgrading the same and to
open up promotional avenues. On rejection of the
representations, he approached Administrative Tribunal.
The Tribunal noticed that though the advertisement or
appointment letter did not mention that the post was ex-
F cadre, but the notings in the Secretariat files indicated
that the respondent was holder of ex-cadre post. As
regards the promotional prospects of the respondent, the
Tribunal held that he should be treated at par with other
Class-I Engineers of 1984 Batch. Writ Petition by the
G State against the order of the Tribunal was dismissed on
the ground that the post was described as an ex-cadre
post only in the year 2005 in office-note. Hence the
present appeals by the State.

Allowing the appeals, the Court

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HELD: 1. The finding arrived at by the High Court that the post of Ore Engineer was for the first time treated as ex-cadre post in the year 2005, is absolutely perverse and erroneous. Immediately after joining the post of Ore-dresser, in the year 1984, the respondent started filing representations. It was well within the knowledge of the respondent that the post which he was holding was an ex-cadre post and, therefore, by series of representations he requested the Department to upgrade the said post and to open up the promotional avenues. [Para 22] [1095-C-E]

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C

2. The post of Ore-dressing Engineer was created on the basis of proposal under a Scheme, and appointment was made outside the existing cadre of mining engineers. It was so understood by the respondent that from the inception that he was holding an ex-cadre post, there had been a special reason for recruiting an Ore-dressing engineer for a specific purpose temporarily outside the cadre of mining engineer. A cadre may consist of permanent as well as temporary post and there may be permanent vacancies in permanent as well as temporary post, but it does not follow that appointment made outside the very service and outside the cadre must be considered to be made to temporary post borne on the cadre merely because, the post was likely to continue indefinitely. [Para 23] [1095-E-F, G-H; 1096-A-B]

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T.N. Administrative Service Officers Association and Anr. vs. Union of India and Ors. (2000) 5 SCC 728 - relied on.

G

Case Law Reference:

(2000) 5 SCC 728

relied on

Para 24

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1967 of 2013.

H

A From the Judgment & Order dated 08.10.2010 of the High Court of Orissa at Cuttack in W.P. (C) No. 7963 of 2010.

WITH

C.A. Nos. 1968 of 2013.

B L. Nageswara Rao, Jana Kalyan Das, P.S. Patwalia, Shibashish Misra, Mayank Pandey, Swetaketu Mishra, Sandeep Devashish Das, D.M. Sharma, Parmanand Gaur, Saurabh Agrawal, Samir Ali Khan, Bhakti Vardhan Singh, S. Nayak, B.R. Barik, R.C. Kohli, Anupam Lal Das for the
C appearing parties.

The Judgment of the Court was delivered by

M.Y. EQBAL, J.

D **C.A.No.1967 of 2013 arising out of SLP(Civil) No.20635/2011**

1. Leave granted.

E 2. This appeal at the instance of State of Orissa is directed against the judgment and order dated 08.10.2010, whereby the Division Bench of the Orissa High Court refused to interfere with the order passed by the Orissa Administrative Tribunal in O.A. No.97/2009.

F 3. The facts of the case in brief are as under:

G 4. The respondent was appointed pursuant to the advertisement dated 5.4.1984 on the post of Ore Dressing Engineer in Class-1 Junior Grade of the State Services in the pay scale of Rs.850-1450. The respondent in response to the appointment letter dated 2.11.1984 joined in the said service on 14.11.1984. Between 18.6.1996 and 19.6.2001 he was deployed in Steel and Mines Department on certain terms and conditions, but he was to draw the salary from the Directorate of Geology. He was again deployed as officer on Special Duty
H

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in Steel and Mines Department between 10.9.2003 to 8.9.2006 on certain terms and conditions and he was also drawing the salary and other service benefits from the Directorate of Geology. The post of Ore Dressing Engineer in the office of the Directorate of Geology was temporarily upgraded on 1.9.2008 as OSD-cum-Deputy Director in the scale of Rs.9350-14550/- and he was allowed to continue in the upgraded post. However, this post was termed as ex-cadre and the post of OSD-cum-Deputy Director was to lapse on his retirement. The respondent filed Original Application before the Tribunal with a prayer that he should be re-designated as OSC-cum-Deputy Director (Steel) instead of OSD-cum-Deputy Director (ex-cadre). All the representations in this regard were rejected by the department for which the opposite party had to approach the Tribunal.

5. The said application of the respondent before the Tribunal was resisted by the State on the ground that the post of Ore Dressing Engineer advertised by OPSC was an ex-cadre post and that the respondent continued in ex-cadre post through out. It was admitted by the respondent that the services of the opposite party had been placed with Steel and Mines Department, but he was reverted back to the Directorate of Geology since his services in the Department of Steel and Mines was not found to be useful. There being no scope of promotion in the ex-cadre post held by the respondent, the government decided to upgrade the same as Ore Dressing Engineer (ex-cadre) in the Directorate of Geology and re-designated the same as OSD-cum-Deputy Director (ex-cadre). The respondent having availed the benefits of the said upgraded post, requested for re-designating the said post as OSD-cum-Deputy Director (Steel).

6. Mr.L.Nageshwar Rao, learned senior Advocate appearing for the petitioner/Sate referring to several documents and rules submitted that the post of Ore Dressing Engineer in

- A Class-1 Junior Grade is not available in the Directorate of Geology. The cadre rules do not provide such a post and, therefore, from the beginning the said post was treated as ex-cadre post. According to the learned counsel, the respondent was appointed against the said ex-cadre post and continued as such till his services were placed in the Department of Steel and Mines for certain period. After being reverted to the Directorate of Geology, he again continued in the said ex-cadre post. However since there being no scope of promotion, the Government decided to upgrade the post held by the respondent and re-designated it as OSD-cum-Deputy Director (ex-cadre) and the respondent accepted the same and has been continuing in the said post. It was further submitted by the learned Additional Solicitor General that the respondent having worked against an ex-cadre post all through, he cannot claim that the said post be included in the cadre.

7. Per contra, Mr. Patwalia, the senior Advocate for the respondent at the very outset submitted that the case of the State that the post of respondent is an ex-cadre post is baseless, misleading and malafide which is evident from the documentary evidence including the letter of appointment. According to the learned counsel when the post of Ore Dressing Engineer was sanctioned in the year 1981 it was sanctioned as an ex-cadre post. Accordingly he submitted that the ex-cadre post can be created to meet the urgent need of department for a shorter period and such post cannot be allowed to be continued on ex-cadre basis for indefinite period. It was contended that the respondent has been working as OSD (Ore Dressing Engineer) for the last 26 years itself shows that the post is not an ex-cadre post but a cadre post. It was, further, submitted that the different pay-scales between the cadre post and ex-cadre post cannot be the sole criteria for deciding the nature of particular post as an ex-cadre post. The appellant State has been wrongly treating the post of the respondent as an ex-cadre post only because of the different pay scales. The

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action of the appellant State in treating the post of the respondent as an ex-cadre post is wholly illegal and malafide.

8. We have heard the learned counsels for the parties at length and considered the facts of the case and the documents in support of their respective cases.

9. The sole question that falls for consideration is as to whether the post held by the respondent is an ex-cadre post. In order to find out the correct factual position, we have to examine the facts of the case in detail.

10. In the year 1981, a proposal was made by the Commissioner-cum- Secretary of Mining and Geology Department for creation of post of Ore Dressing Engineer in Class-1 rank in the pay scale of Rs.850-1450/- for the scheme "Applied Mineral Research" during 1981-82. In the said proposal it was mentioned that the assessment of mineral resources of the State constitute a most important objective of the Directorate of Mines. Apart from geological investigations in the field, it is necessary to determine the grades of different ores and minerals encountered during the course of such investigations. For such purposes certain facilities were developed in the research laboratory of the Directorate of Bhubaneswar. In order to take up the investigation with regard to study of the possibility characteristics of China Clay etc. it was proposed to create a post of Ore Dressing Engineer. The proposal was materialized and creation of one post of Ore Dressing Engineer temporarily in the pay scale of Rs.850-1450/- was sanctioned. Accordingly, the Directorate of Mines, Govt. of Orissa vide communication dated 26th September 1981 informed the Mines and Geological Department, Bhubaneswar about the creation of post. In the said letter it was mentioned that the post of Ore Dressing Engineer should be treated as an ex-cadre post. For better appreciation the letter dated 26th September 1981 is reproduced hereinbelow:

A "Directorate of Mines
ORISSA
No.25217/Mines,Bhubaneswar: 26th Sept.1981

From

B B.K.Mohanty
Director of Mines.

To

C The A.F.A.-cum-Under Secretary to Govt.
Mining & Geology Department,
Bhubaneswar

Sub: Filling up the post of Ore Dressing Engineer

D Sir,

In inviting the reference to your letter No.10780 MG dated the 26th Sept.1981, I am to say that the post of Ore Dressing Engineer should be treated as an ex-cadre post. The job chart of the post is as follows:

E "The Ore Dressing Engineer will be required to working
the Research Laboratory of the Directorate of Mines at
Bhubaneswar. He may also be required to original and
take the Ore dressing/beneficiation tests in the field as
F may be necessary. He will be responsible for maintenance
and operation of the ore dressing equipment and
instruments. He will conduct tests under the supervision of
the Minerals Technologist and Joint Director of Projects,
as may be assigned and report the results of such tests
G from time to time, as may be required by the Director of
Mines.

Yours faithfully
Sd/-Illegible
Directorate of Mines"

H

11. The post was accordingly advertised by the Orissa Public Service Commission on 5th April 1984. By the said advertisement, applications in the prescribed form were invited for one post of Ore Dressing Engineer, Class-1 Junior Grade of State Service in the pay scale of Rs.850-1450/-. In the said advertisement, it was mentioned that the post is temporary but likely to be made permanent in due course. The respondent on being selected was issued an appointment letter and pursuant to the said appointment letter the respondent joined in the said post. In the year 1985, the Government sanctioned three advance increments to the respondent in the pay scale of Rs.850-1450/- as per the terms and conditions of the advertisement.

12. Immediately after joining the said post the respondent started filing representation for making his ex-cadre post en-cadre to "The Orissa Mining and Geology Service Rules" which is now an ex-cadre post. The said representations dated 28.6.1985 and 5.9.1985 followed by another representations dated 7.3.1986 and 16.4.1986 to the Secretary to Government of Orissa, Mining and Geology Department, the respondent stated that only after joining he came to know that the Ore Dressing Engineer was an ex-cadre post. He claimed that post of Ore Dressing Engineer is en-cadre post and the next promotion was to Joint Manager. By another representation submitted by the respondent on 19.9.90 wherein respondent alleged that Ore Dressing Engineer post is being treated as an ex-cadre post.

13. By another representation dated 11.2.93 to the Commissioner-cum-Secretary to the Government of Orissa, Steel & Mines Department, the respondent categorically stated that he was working as Ore Dressing Engineer in the Directorate of Mining and Geology in an ex-cadre post having no prospect of promotion in this Directorate. The said letter needs to be re-produced hereinbelow:

A "From:

Jagbandhu Panda, B.Sc (Gng) Met)
Ore Dressing Engineer,
Directorate of Mining and Geology,
Orissa Bhubaneswar.

B

To

The Commissioner-cum-Secretary to Govt.
Steel and Mines Department, Orissa,
Bhubaneswar.

C

(Through Proper channel)

Sub:- Creation of the post of Joint Director, Steel by way
of up-gradation of the existing post of Ore Dressing
Engineer under Steel and Mines Department.

D

Sir,

Respectfully, I beg to state that following facts for
your kind considerations. That the proposals for the Steel
Plants for our State is under active considerations of Govt.
In order to coordinate and synthesize all the activities for
this, I came to learn that a cell has been constituted in the
Department of Steel and Mines and a number of non-
technical personnel have been inducted in to this cell. In
view of Technical consultancy of IPICOL and other
agencies, I felt that there is a need to avail services of a
Metallurgical Engineer in the above cell which is lacking
at present.

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I am a Metallurgical Engineering Graduate, presently
working as Ore Dressing Engineer in the Directorate of
Mining and Geology in an ex-cadre post having no prospect
of future promotion in this Directorate. I feel that my
experience and expertise in the field of extractive
metallurgy (Iron & Steel) can be better utilized if a post
Joint Director (Steel) can be created under this

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Department and I am given the opportunity to man this post to coordinate all the activities of the proposal Steel Plants in the Directorate level. I urge upon you to consider the above facts in the right earnest and provide me the appropriate job opportunity as per the above proposal for which I shall be ever obliged.

Yours faithfully
Sd/- Illegible
11.02.1993
(J.B. Panda)"

14. On the basis of representations filed by the respondent, the Government decided to allow the respondent to work as Officer on Special Duty in the Department of Steel & Mines subject to the following conditions:

1. The tenure of Sri Panda as OSD in the Department of Steel & Mines will be for a period of 6 months from the date of his joining.
2. Sir Panda will draw his salary and other service benefits as usual in the post of Ore Dressing Engineer from the Directorate of Mining and Geology.
3. His further continuation as OSD will be reviewed on the basis of his performance and needs of the Department.

15. By another communication dated 30.11.1993 issued by the Department of Steel & Mines, Govt. of Orissa the respondent was conferred Ex-Officio Secretariat status and was designated as Officer on Special Duty and Ex-Officio Under Secretary to Government, Department of Steel & Mines. However, it was mentioned in the said communication that the ex-officio Under Secretary status was ceased with effect from the date his term of appointment as OSD in the Secretariat is

A over. It appears that after the completion of tenure as OSD Ex-
 Officio Under Secretary the respondent was reverted back to
 his parent establishment i.e. Directorate of Geology with
 immediate effect vide Office Order dated 8th September 2006.

B 16. After the aforesaid order of reversion was passed, the
 respondent then filed a representation on 5.5.2007 requesting
 for upgradation of the post to OSD & Ex-Officio Deputy
 Secretary. The representation was considered by the
 Government and vide communication dated 10.8.2007 the
 C respondent was informed that his request for upgradation of
 post Ore Dressing Engineer (Ex-cadre) could not be
 considered for the present. This letter also worth to be quoted
 herein-below:

D "Department of Steel & Mines
 No.7107/S.M. Bhuvaneswar, the 17.08.2007

From:

E D.S. Jena, OAS
 Under Secretary to Government

To

F Sri Jagabandhu Panda,
 Ore Dressing Engineer
 Directorate of Geology,
 Orissa, Bhuvaneswar.

Sir,

G I am directed to invite a reference to your
 representation dated 05.05.2007, regarding upgradation
 of your post to OSD & Ex-Office-Deputy Secretary and to
 say that you joined Government service in the Ex-cadre
 H post of Ore Dressing Engineer (Jr. Class-I) on 14.11.1984

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in the erstwhile Directorate of Mining and Geology after A
being selected by the OPSC.

You were sanctioned 3 advance increments in the
scale of pay of Rs. 850-1450- at the time of joining the
post of Ore Dressing Engineer. Your present pay scale is B
Rs. 8000-13,500/-. Your case is not same as the case of
other qualified Geologists and Mining Engineers, who
joined the State Government in Class-II posts. Mining
Engineers & Geologists appointed in Class-II posts have
to serve a long period to get promotion to the Junior Class-
I rank. They do not get advance increments on C
appointment or promotion.

You were deployed as OSD & Ex-Officio Under
Secretary to Government of Steel and Mines Department
from 1997 to 2001 and again from 2003 to 08.09.2006. D
As your continuance in the Department was felt to be of
no necessity you have been reverted to your parent post
of Ore Dressing Engineer (Ex-Cadre) in the Directorate
of Geology w.e.f. 08.09.2006 (A.N.).

The post of Ore Dressing Engineer (Ex.Cadre) was E
originally created in the Directorate of Mining and Geology
with a definite purpose. As per the job chart, Ore Dressing
Engineer is requested to work in the Research Laboratory
and look after to organize and take up Ore Dressing F
beneficiation test in the field as and when necessary under
the direct supervision of Joint Director of Geology.

The proposal of upgradation of post of Ore Dressing
Engineer (Ex.Cadre) to the rank of OSD & Ex-Officio
Deputy Secretary or Deputy Director, Steel & Ex-Officio G
Deputy Secretary was examined. It was observed that after
upgradation, the original post of Ore Dressing Engineer
will stand abolished and the very purpose of creation of
the post will be defeated.

H

A Further neither there is any post of Deputy Secretary
belonging to Mining Cadre in the Orissa Secretariat nor
there is any post of Deputy Director. Ore Dressing in the
Directorate to consider your case for promotion to the
higher rank. There is no necessity now to upgrade the post
B of Ore Dressing Engineer (Ex.Cadre).

In view of above facts, your representations for
upgradation of the post of Ore Dressing Engineer
(Ex.Cadre) could not be considered at present.

C Yours faithfully,

Sd/ Illegible
10.08.2007
Under Secretary to Government"

D

17. However after about an year vide Notification dated
1.9.2008 issued by the Steel & Mines Department Govt. of
Orissa a post of Ore Dressing Engineer (Ex-Cadre) was
E temporarily upgraded and redesignated as OSD-cum-Deputy
Director (Ex-cadre) for a period of six months or till receipt of
recommendation of the Commissioner whichever earlier. The
Notification dated 1.9.2008 reads as under:

F "Government of Orissa
Steel and Mines Department,
No.XII (DG)SM-65/2006/SM Bhubaneswar,

NOTIFICATION

G The only post of Ore Dressing Engineer (Ex.Cadre) in the
office of the Directorate of Geology carrying the pay scale
of Rs. 8000-275-13,500/- is temporarily upgraded and re-
designed as OSD-cum-Deputy Director (Ex-cadre) in the
pay scale of Rs.9350-325-14550) from the date of issue
H of this order. Sri J.B. Panda, at present holding the post

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of Ore Dressing Engineer (Ex.Cadre) is allowed to continue in the upgraded post of OSD-cum-deputy Director (ex-cadre) in the above pay scale for period of six month or till receipt of recommendation of OPSC whichever is earlier. A

The post of OSD-cum-Deputy Director (ex-cadre) shall be co-terminus with the retirement of Sri J.B. Panda and thereafter the post of Ore Dressing Engineer (Ex.Cadre) will be reviewed automatically in the Directorate of Geology in the scale of pay of Rs. 8000-275-13500/-. B C

By order of Governor M. R. Pattanaik

Joint Secretary to Government Memo No.6269/dated 01.09.2008

Copy forwarded to the Directorate of Geology Orissa Bhubaneswar/ person concerned for information and necessary action. D

Sd/- Illegible
Joint Secretary to Government E

Memo No...../Dt.

Copy forwarded to the AG, Orissa/Spl, Secretary, OPSC, Cuttack, Finance Department/GA (SE) Department for information and necessary action. F

Joint Secretary to Government"

18. After receipt of the Notification the respondent submitted another representation claiming that he was to be designated as Deputy Director (Steel) but instead of issuing Notification to that effect, it was wrongly notified that the post was temporarily upgraded as OSD-cum-Deputy Director (Ex-cadre). F

19. The Government finally by communication dated 26- H

A 12-2008 informed the respondent that after careful consideration of the earlier representations, the Notification was issued upgrading his designation. The respondent was advised to adhere to the order passed by the Government and stopped making unnecessary correspondence with the Government.

B 20. From perusal of the order passed by the Tribunal, it reveals that although the Tribunal noticed that neither in the advertisement nor in the appointment letter it was mentioned that the respondent was appointed to an ex-cadre post but from the notings produced from the Secretariat file, it does indicate
C that the respondent was a holder of ex-cadre post. The Tribunal further held that the prayer of the respondent to allow him to work in Administrative Department as OSD-cum-Deputy Director cannot be endorsed as to whether the services of a particular official against a particular post is required by the
D Government. It is for the Government to determine. The Tribunal, therefore, refused the prayer of the respondent for permitting him to work in the Administrative Department as OSD-cum-Deputy Director (Steel). However, as regards the promotional prospect the Tribunal held as under :-

E "As regards his promotional prospects it is clear from the documents at Annexure 1 and 2 that the applicant was termed as a hold of ex-cadre post only after his actual appointment and no mention was made therein regarding
F his appointment against an ex-cadre post. We, therefore, suggest that the Directorate of Geology may consider the case of the applicant for career advancement vis-à-vis other comparable Class-I Engineers in service appointed in 1984 in the erstwhile Directorate of Mining an Geology
G (and later the Directorate of Geology) on the same footing as if he was appointed at par with other Engineers in 1984 and treating him as the junior most of that batch and consider him for promotion from the date his junior was so considered from time to time."

H 21. The aforesaid order of the Tribunal was challenged by

the appellant by filing a writ petition. The Division Bench dismissed the Writ Petition mainly on the ground that the post against which the respondent was appointed was described as an ex-cadre post only in September, 2005 and there is no office note prior to the said date indicating that the post of Ore-dressing Engineer has ever been treated as an ex-cadre post prior to 2005.

22. After giving our anxious consideration in the matter prima facie, we are of the view that the finding arrived at by the High Court that the post of Ore Engineer was for the first time treated as ex-cadre post in the year 2005, is absolutely perverse and erroneous. As noticed above, immediately after joining the post of Ore-dresser, the respondent started filing representations viz., 28.06.1985, 05.09.1985, 07.03.1986 and 16.04.1986. The respondent stated that only after joining he came to know that the post he was holding was an ex-cadre post. It is well within the knowledge of the respondent that the post which he was holding was an ex-cadre post and, therefore, by series of representations he requested the Department to upgrade the said post and to open up the promotional avenues.

23. It is not in dispute that the post of Ore-dressing Engineer was created on the basis of proposal initiated from the Commissioner level under a Scheme "Applied Mineral Research 1981-82". In the said proposal it was mentioned that the assessment of the mineral resources of the State constituted a most important objective of the Directorate of Mines. In order to take up the investigation with regard to the study of minerals it was proposed to create a post of Ore-dressing Engineer under a scheme. It is, therefore, clear that the post of Ore-dressing Engineer was created and appointment was made outside the existing cadre of mining engineers. It was so understood by the respondent that from the inception that he was holding an ex-cadre post there had been a special reason for recruiting an Ore-dressing engineer for a specific purpose temporarily outside the ex-cadre of mining engineer. It is well settled that a cadre may consist of

- A permanent as well as temporary post and there may be permanent vacancies in permanent as well as temporary post, but it does not follow that appointment made outside the very service and outside the cadre must be considered to be made to temporary post borne on the cadre merely because, the post was likely to continue indefinitely.

24. In *T.N. Administrative Service Officers Association and Another vs. Union of India and Others* (2000) 5 SCC 728 this Court was considering a case where the Members of the State Administrative Services made a claim that a number of ex-cadre or temporary posts which were temporary in nature and some of them were created under the State Enactments which required their manning by IAS Officers. It was contended that on account of failure of the Central Government to timely review the cadre strength as statutorily required, the promotion of the promotees got inordinately delayed and they lost their seniority in the promoted cadre. The rule does not confer any right on the petitioners to seek a Mandamus for encadring those ex-cadre/temporary posts. Any such Mandamus would run counter to the statutory provisions governing the creation of cadre and fixation of cadre strength which was held that asking the State or the Central Government for encadrement of the ex-cadre/temporary posts will amount to asking the Government to create more posts.

25. In the background of the law well settled by this Court, we are of the definite opinion that the direction issued by the Tribunal and the order of the High Court affirming the order of the Tribunal is wholly without jurisdiction. The impugned orders passed by the Tribunal as also by the High Court are, therefore, liable to be set aside.

26. For the aforesaid reasons, we allow this appeal and set aside the orders passed by the State Administrative Tribunal in O.A. No.97 of 2009 and the impugned order passed by the High Court.

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C.A. No.1968 of 2013 arising out of SLP(Civil) No.8676/ 2013 A

27. Leave granted.

28. This Civil Appeal is disposed of in terms of judgment passed in Civil Appeal No. 1967 of 2013 arising out of SLP(Civil) No.20635 of 2011. B

K.K.T.

Appeals disposed of.