
(1973) 07 OHC CK 0023
In the Orissa High Court
Case No : O.J.C. No. 808 of 1971

Banchhanidhi Das

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 12-07-1973

Acts Referred:

Evidence Act, 1872 — Section 115
Orissa Municipal Rules, 1953 — Rule 427, 604

Citation : (1973) 39 CLT 801

Hon'ble Judges : R.N. Misra, J;K.B. Panda, J

Bench : Division Bench

Advocate : L. Rath, for the Appellant; Government Advocate and S. Mohanty, for the Respondent

Judgement

R.N. Misra, J.—The Petitioner was appointed temporarily as a tax clerk by the Notified Area Council, Bhubneswar. Subsequently at a regular selection he was accepted and continued in service. The resignation of the post which the Petitioner held was changed to law and accounts clerk. With effect from 30-9-1952, after the promulgation of the Orissa Municipal Act of 1950, the Notified Area Council of Bhubaneswar came to be governed by that Act. By a resolution of the Notified Area Council on 19-6-1954 the Petitioner was confirmed in the post of law and accounts clerk. With effect from 23-6-1954 the Municipal Rules framed under the Orissa Municipal Act came into force. Under Rule 427 of those Rules the minimum educational qualification required for the post of a lower division clerk was prescribed to be as being a matriculate. Though the Petitioner was not a matriculate his service was not disturbed, according to the Petitioner, because (1) the Rules had no retrospective operation, (2) the Petitioner had been confirmed already, and (3) he had been putting in satisfactory work. The Notified Area Council decided to request the Government to waive the requirement of educational qualification so far as the Petitioner is concerned being under the impression that to the Petitioner the prescription applied, and on 19-7-1955 the Local Self Government Department of the State

Government exempted the requirement. On 21-7-1961 the Petitioner came to be promoted as an upper division clerk. On 3-4-1967, Government passed orders exempting the Petitioner for passing the preliminary accounts test which was another qualification for the promoted post. On 14-7-1969, the Petitioner was allowed to cross the efficiency bar in the higher scale. The Petitioner worked as accounts head-clerk and tax daroga and came to receive higher scales of pay. On 3-10-1969, while the Revenue Divisional Commissioner was inspecting the office of the Notified Area Council he found certain defects in the work of the head-clerk (one Shri P.C. Nanda). Consequently the said Sri Nanda was reverted to the post of lower division clerk. In July, 1970 the representation of Sri N and a against his reversion was rejected by the Notified Area Council. On 27-10-1970, however, while the Petitioner was continuing in the promoted post, Government withdrew the previous orders exempting the Petitioner from being a matriculate and passing the accounts test with a view to treating the said Shri Nanda equally with the Petitioner. On 7-4-1971, the Petitioner was communicated the order of the Chairman of the Notified Area Council that with effect from 15-5-1971 the Petitioner would be reverted to the post of tax clerk in view of the withdrawal of the exemptions. The representations of the Petitioner to the Director of Municipal Administration and the State Government were later rejected but with effect from 15-9-1971, without waiting for the result of the representations, the Petitioner was reverted to the post of tax clerk. It is against this order of reversion that the Petitioner has come before this Court asking for a quashing of the order which is said to be consequent upon the Government direction withdrawing the exemptions.

2. Two separate affidavits have been filed-one by the State (opposite party No. 1) and the other by the Chairman, Notified Area Council (Opp. party No. 2).

3. There is no dispute that the action of the Notified Area Council in reverting the Petitioner to the post of tax clerk is the direct consequence of the Government order withdrawing the exemptions granted to the Petitioner. On 19-7-1955, the following order had been passed by Government in the matter of exempting the Petitioner from the requirement of being a matriculate.

I am directed to say that Government in exercise of the powers conferred by Rule 604 of the Orissa Municipal Rules, have been pleased to relax the educational qualification prescribed by Rule 427 in respect of Shri Banchhanidhi Das (Petitioner), a non-matric L.D. Clerk of the Notified Area Council, Bhubaneswar. (Annexure-2).

On 3-4-1967, the further communication of exemption regarding the passing of preliminary test in accounts was to the following effect:

In continuation of this Department letter dated 15-5-1964 cited above, I am directed to say that after careful reconsideration of the case of Sri B.N. Das of Bhubaneswar Notified Area Council, Government have been pleased to exempt him from passing the preliminary test in accounts for holding the post of U.D.

clerk under the said Notified Area Council. (Annexure-4).

The impugned Government order dated 27-10-1970 which led to the reversion of the Petitioner is as follows:

I am directed to say that as it is noticed from the service books of Shri Puma Chandra Nanda and Sri Banchhanidhi Das, employees of Bhubaneswar N.A.C. Sri Nanda is senior to Sri Das. But Sri Das supersedes Sri Nanda at present as he has been exempted from having requisite qualifications to hold the posts of lower division clerk and other upper division posts under the N.A.C. In order to treat them equally under the N.A.C. establishment it has been considered necessary to revoke the orders of exemption of Sri Das. As such the orders communicated in Development (L.S.G.) Department letter No. 5179-L.S.G. dated 19-7-1955 and Health (L.S.G.) Department letter No. 6222-L.S.G. dated 15-5-1964 and No. 5698-U.D. dated 3-4-1967 exempting him from having requisite qualifications are revoked. Sri Banchhanidhi Das may be adjusted against the post for which he actually is qualified under the rules. This may be implemented immediately and compliance be reported. It may be ensured that in no case departure is made from the rules and appointments made.

4. Mr. Rath for the Petitioner raises three contentions in the main.

(1) The requirement of educational qualification is contained in the Orissa Municipal Rules which came into force with effect from 23-6-1954. The Petitioner had by then been confirmed in the post of law and accounts clerk. As the Rules are not retrospective the prescription of qualification in the Rules would not apply to the Petitioner.

(2) Exemption had been granted in exercise of powers under Rule 604 of the Orissa Municipal Rules and such power having been exercised and exemption having been granted the present order was wholly unjustified.

(3) Government having granted exemption so far as the requirement of being a matriculate is concerned in the year 1955 (that is, 15 years before the impugned order) and exempting the Petitioner from passing the account test in 1967 (more than 3 years before the impugned order) are estopped from passing the present order so far as the Petitioner is concerned. If the prescription of qualification applied to the Petitioner and exemption had been granted the Petitioner could have found out any other employment by quitting service under the Notified Area Council. Having extended a benefit to the Petitioner after long 15 years the exemption could not be withdrawn and that again without affording any opportunity to the Petitioner of representing his case in that regard. It is contended with vehemence that an advantage had accrued to the Petitioner from the exemptions and evil consequences were bound to follow from the withdrawals of the exemptions. That justified at least an opportunity being provided to the Petitioner of being heard in the matter before the impugned order could have been made.

5. Each of these contentions may now be examined.

Point No. 1- Rule 427 provides,

(1) No person shall be appointed to any of the posts under a Council specified in column (1) of the subjoined Table, unless he possesses the qualification laid down in the corresponding entry in column (2) thereof.

In sub-joined Table for various posts different qualifications have been prescribed. For ministerial posts in the lower division matriculation of a recognised university is a prescribed qualification. Under Note No. 2 appended to the Table the State Government have been authorised to exempt any person holding a post in the Engineering, Medical or health Departments under Municipal Council from any of the qualifications prescribed for the post in the above rules on the recommendation of the Municipal Council and the Head of the Department. The question for consideration is as to whether the qualifications prescribed in Rule 427 and the subjoined Table would apply to employees already in service and particularly those who had been confirmed in their posts before the Rules came into force.

The learned Government Advocate and Mr. S. Mohanty appearing for the opposite parties conceded-and in our view rightly-that there is no express provision in Rule 427 to make it applicable for persons already in the employment of a Council. The Petitioner being already confirmed before the Rules came into force the qualifications prescribed under the Rules could not be extended. The first contention of Mr. Rath, therefore, is sound. It must, however, be indicated that while that was so in regard to the post of lower division clerk, the promotion which the Petitioner had to the upper division subsequent to the enforcement of the Rules must be governed by the Rules.

6. Point No. 2-Rule 604 of the Orissa Municipal Rules provides-

If any difficulty arises in the interpretation of these rules or, in giving effect to these the State Government may, by order as occasion may require, do anything which appears to them necessary to remove the difficulty. The order of the State Government shall be final and shall not be challenged in any proceedings.

We are not called upon to examine the validity of this Henry VIII clause in these Rules. But on a bare look at the Rule it appears to be wholly inapplicable to the situation. On the earlier occasion when exemption was granted this rule could not have been invoked. No difficulty arises in the matter of interpretation of the rules or in giving effect to the rules when the order of exemption was made. The Note under Rule 427 did not authorise exemption in regard to qualification of employees in office establishment. The grant of exemption as such on both the occasions seems to have been without any authority. The stand of the opposite parties that the orders of exemption were without authority appears to be correct. The second contention of Mr. Rath, therefore, has no force.

7. Point No. 3 :-The next point raised by Mr. Rath is that the State Government

and the Notified Area Council are estopped from acting to the prejudice of the Petitioner by withdrawing the exemptions at this belated stage and in enforcing the same so as to revert the Petitioner to the lower post merely on the ground that he does not possess the requisite qualification.

That the Petitioner does not have those qualifications as prescribed is not disputed, nor is it a case where the employer had no notice of lack of qualification. After careful examination the exemptions had been granted. As already indicated the first exemption was of 1955 and the second was of 1967. On the basis of these exemptions the Petitioner had been promoted and in the promoted post the Petitioner had continued for well over 15 years by the time the order of withdrawal of the exemption was made. The question for consideration in this setting is as to whether the opposite parties are not estopped from acting in the manner they have. In *Union of India v. Anglo Afghan Agencies* AIR 1968 S.C. 718 the learned Judges dealing with the question of estoppel quoted with approval the observation of Jenkins, C.J. in *Municipal Corporation of the City of Bombay v. Secy. of State* (1804) 29 ILR Bom 580 to the following effect:

The doctrine involved in this phase of the case is often treated as one of estoppel, but I doubt whether this is a correct, though it may be a convenient name to apply.

It differs essentially from the doctrine embodied in Section 115 of the Evidence Act, which is not a rule of equity but is a rule of evidence that was formulated and applied in Courts of law; while the doctrine with which I am now dealing, takes its origin from the jurisdiction assumed by Court of Equity to intervene in the case of, or to prevent fraud.

The Supreme Court continued,

This case, in our judgment, is a clear authority that even though the case does not fall within the terms of Section 115 of the Evidence Act, it is still open to a party who has acted on a representation made by the Government to claim that the Government shall be bound to carry out the promise made by it, even though the promise is not recorded in the form of a formal contract as required by the Constitution.

This principle has been further advanced in *Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another*, , and *Turner Morrison and Company v. Hungerford Investment* (1972) 1 S.C.W.R. 887. Recently this Court also in the case of a similar dispute relating to an employee under the Jharsuguda Municipality accepted the plea of estoppel.

If Government and the Notified Area Council were of the view when the Rules came into force with the prescribed qualifications that the Petitioner could not continue in employment in view of his not satisfying the requirements of qualification, the Petitioner could have found out some alternate employment.

Having continued in service almost two decades by now and having reached an advanced age near about superannuation, if on the plea of lack of qualification which once stood waived, the Petitioner is demoted it is certainly to his prejudice. He is made to face a situation where he has no scope for obtaining relief. The principles upon which the plea of estoppel is allowed to be raised are fully satisfied in this case. Government having once rightly or wrongly passed an order of exemption at this belated stage should not be permitted to withdraw the order of exemption and force the Petitioner to face the consequences of the situation. It is not a case where Government are being forced by some other agency to withdraw the exemption. The withdrawal order is by them at their own instance. The reason given in the order of withdrawal, namely, placing the Petitioner at par with Shri Nanda, the other demoted employee, does not seem to be germane also to the dispute raised over the Petitioner's qualification. The third contention of Mr. Rath, therefore, must succeed.

8. The other contention which Mr. Rath had also raised is relating to want of an opportunity for the Petitioner to be heard before the impugned order was made. Admittedly the impugned order has evil consequence so far as the Petitioner is concerned. In fact the direction contained in the impugned order having been enforced it has already led to an order of reversion. In the setting of events in this particular case we think the Petitioner was indeed entitled to a hearing before the impugned order could be made. But in the view we have taken on the question of estoppel it is not necessary to examine this aspect of the case any further because we do not intend to send back the matter to Government for being dealt with again for opportunity of hearing to the Petitioner.

9. The ultimate conclusion to reach in this case, therefore, is that the impugned order of 1970 with drawing the exemptions is bad and must be quashed. The consequential order which is also impugned, namely, reverting the Petitioner to the post of tax clerk must also be quashed. The writ application is allowed with costs. Hearing fee Rs. 100/- to be collected by the Petitioner from the State of Orissa and not from the Notified Area Council.

K.B. Panda, J.

10. I agree.