

(2012) 04 OHC CK 0012

In the Orissa High Court

Case No : Writ Petition (C) No's. 1770, 1771, 1796, 1798, 1951, 1952, 1953, 2622, 2307, 2584, 2590, 2598, 2600, 2585, 1801, 1815, 1092, 6074, 4816, 5188, 5307, 8301 and 29715 of 2011

Bidyadhar Roul and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 20-04-2012

Acts Referred:

Citation : (2012) 113 CLT 1049

Hon'ble Judges : B.P. Das, J;B.K. Nayak, J

Bench : Division Bench

Advocate : Pravash Ch. Jena, S.J. Das, A. Barik, A. Das, S. Dwibedi and Ors, for the Appellant;

Judgement

B.K. Nayak, J.—The common question that arises for consideration in this batch of writ applications is whether after the process of

recruitment for contractual appointment of Multi Purpose Health Worker (Male) (in short "MPHW(M)") in World Bank supported Malaria

Project started or became complete, the Government can deny appointment to the selected candidates by changing eligibility criteria for such

appointment and re-issue a further advertisement stipulating new eligibility criteria for the purpose of appointment to such posts. The post of

MPHW (M) being a District Cadre Post, the Chief District Medical Officers of the districts are competent to make recruitment for their respective

districts in accordance with the norms/guidelines issued by the State Government. W.P.(C) No. 6074 of 2011 is taken up as an illustrative case for

description of facts and circumstances under which the aforesaid question arises.

2. The Petitioners in the writ application have made a prayer for quashing the

advertisement under Annexure-5 issued by the CDMO, Mayurbhanj for contractual engagement of MPHWS (M), Malaria Project with a further prayer to direct the Opp. Parties-State authorities to issue appointment order in their favour, process for which was initiated in pursuance to advertisement under Annexure-1. It is asserted by the Petitioners that the CDMO, Mayurbhanj (Malaria Wing) published advertisement on 27.08.2008 under Annexure- 1 for contractual engagement of MPHWS (M), Malaria Project and invited applications from candidates for Mayurbhanj District. The number of posts advertised was 98 and the last date of receipt of application was 08.09.2008. The qualification prescribed under the advertisement was 10th pass or equivalent examination. In pursuance to the advertisement, the Petitioners applied within the stipulated time. Thereafter, vide letters dated 02.09.2010 under Annexures- 2 and 2/1, the Petitioners were called for verification of their original certificates/ documents. After verification of documents a preliminary database was published in the district website (<http://Mayurbhanj.nic.in/publicinfo.htm>) vide Annexure-4 and a further notice was published inviting objections from the candidates. The Petitioners, who are Scheduled Tribe persons were shown at SI. No. 11 and 17 in Annexure-3, database. It is further stated that the list was finalised and while the Petitioners were waiting for appointment, the CDMO issued a fresh advertisement on 21.02.2011 vide Annexure-5 for the said posts by cancelling the advertisement under Annexure-1. In the advertisement (Annexure-5) the qualification for the post was shown as Diploma in Pharmacy from a Government recognized institution of Orissa registered with the Orissa Pharmacy Council. It is also stated in the writ application that so far as the district of Nuapada is concerned, advertisement (Annexure-7) for the post of MPHWS (M) has been published in the Odia daily ""The Samaj"" on 1.1.2011 where the qualification has been prescribed as Class-X pass or equivalent examination. It is further stated that in the district of Balasore the persons having passed Class-X or equivalent examination were selected and they have been already given appointment. In the circumstances, it is contended on behalf of the Petitioners that not giving appointment to the Petitioners, who were selected in pursuance of advertisement under Annexure-1 and issuing a fresh advertisement under

Annexure-5 cancelling the previous advertisement is arbitrary, unreasonable and discriminatory.

3. The Chief District Medical Officer, Mayurbhanj-Opp. Party No. 3 has filed a counter affidavit stating that before appointment was given to the

Petitioners, the State Government by its letter No. 37.18/H dated 07.12.2010 (Annexure-A/3) issued revised guidelines for engagement of

MPHW (M) specifying that the minimum educational qualification of candidates is Diploma in Pharmacy and therefore, the selection committee

decided to re-advertise the posts, so that candidates possessing qualification as per the revised guidelines could be selected. It is also stated that

the advertisement made by the CDMO, Nuapada District was erroneous and, therefore, the Government of Odisha in another letter on

11.01.2011 (Annexure-B/3) addressed to all the CDMOs of the State intimated that the recruitment of MPHW (M) will be made as per the

revised guidelines. So far as the engagement of candidates having qualification of Class-X pass in Balasore district is concerned, it is stated that

such engagement was made prior to issuance of revised, guidelines by the Government. It is stated that advertisement under Annexure-1 was

cancelled since the select list in pursuance to such advertisement had not been finalised by the Chairman, Selection Committee by the time the

revised guidelines under Annexure-A/3 stipulating qualifications of Diploma in Pharmacy was issued.

4. The State Government has also filed a counter affidavit stating that the Government took a conscious policy decision to change the existing

norms and qualifications from 10th pass to Diploma in Pharmacy with the object of providing quality health service to the citizens. It was ""decided

that the qualification of 10th pass was inadequate for the post in question, which should be discontinued. This conscious decision was taken on

09.07.2010 vide Annexure-A/1, the proposal for which had been mooted by the Director Health Services vide his letter dated 24.11.2009

(Annexure-B/1).The resolution under Annexure-A/1 superseded-all previous instructions/guidelines. It is also stated that the proposed engagement

was purely contractual engagement which does not confer a right on a candidate to appointment, particularly when the Government has taken a

conscious policy decision for better public interest. It is further stated that the information collected from CDMOs shows that there is no violation

of the revised guidelines and that if in any district there is any inadvertent violation of the same, it would be dealt with appropriately as per the revised policy decision.

5. Learned Counsel for the Petitioners having placed reliance on some decisions of the Apex Court, contended that norms and rules of selection

existing on the date when the selection process begins will control such selection and any alteration/amendment to such norms-or rules would not

affect the continuing process unless the same were given retrospective effect. Learned Additional Government Advocate, on the other hand,

contended that a selected or successful candidate does not acquire any indefeasible right to be appointed against the existing vacancies and that

though the process of recruitment Is to continue as per the rules/norms those existed at the time of initiation of the process, it is open for the

Government to decide not to fill up the vacancies for bona fide and appropriate reasons and that in the instant case the Government took a

conscious decision that the object of providing better quality health services to the people would be achieved by employing persons having

qualification of Diploma in Pharmacy and that mere passing of matriculation by candidates would be inadequate to achieve the objective.

6. In the case of N.T. Bevin Katti, etc., Vs. Karnataka public Service Commission and others, the Apex Court observed as follows:

11. There is yet another aspect of the question. Where advertisement is issued inviting applications for direct recruitment to a category of posts,

and the advertisement expressly states that selection shall, be made in accordance with the existing rules or government orders, and if it further

indicates the extent of reservations in favour of various categories, the-selection of candidates in such a case must be made in accordance with the

then existing rules and government orders. Candidates who apply, and undergo written or viva voce test acquired vested right for being considered

for selection in accordance with the terms and conditions contained in the advertisement, unless the advertisement itself indicates a contrary

intention. Generally, a candidate has right to be considered in accordance with the terms and conditions set out in the advertisement as his right

crystallises on the date of publication of advertisement, however he has no absolute right in the matter. If the recruitment Rules are amended

retrospectively during the pendency of selection, in that event selection must be held in accordance with the amended Rules. Whether the Rules have retrospective effect or not, primarily depends upon the language of the Rules and its construction to ascertain the legislative intent. The legislative intent is ascertained either by express provision or by necessary implication; if the amended Rules are not retrospective in nature the selection must be regulated in accordance with the rules and orders which were in force on the date of advertisement. Determination of this question largely depends on the facts of each case having regard to the terms and conditions set out in the advertisement and the relevant rules and orders. Lest there be any confusion, we would like to make it clear that a candidate on making application for a post pursuant to an advertisement does not acquire any vested right of selection, but if he is eligible and is otherwise qualified in accordance with the relevant rules and the terms contained in the advertisement, he does acquire vested right of being considered for selection in accordance with the rules as they existed on the date of advertisement. He cannot be deprived of that limited right on the amendment of rules during the pendency of selection unless the amended rules are retrospective in nature.

For coming to such conclusion, the Apex Court placed reliance on the earlier decisions reported in *Y.V. Rangaiah and Others Vs. J. Sreenivasa*

Rao and Others, 1988 Supp SCC 740 A.A. Calton Vs. Director of Education and Another, and held as follows:

13. It is a well accepted principle of construction that a statutory rule or government order is prospective in nature unless it is expressly or by necessary implication made to have retrospective effect. Where proceedings are initiated for selection by issuing advertisement, the selection should normally be regulated by the then existing rules and government orders and any amendment of the rules or the government order pending the selection should not affect the validity of the selection made by the selecting authority or the Public Service Commission unless the amended Rules or the amended government orders, issued in exercise of its statutory power either by express provision or by necessary intendment indicate that amended Rules shall be applicable to the pending selections.

7. In the case of *State of Bihar and Others Vs. Mithilesh Kumar*, the Apex Court

accepted the proposition that the change in the norms of the recruitment could be applied prospectively and could not affect those, who had been selected for being recommended for appointment after following the norms as were in place at the time when the selection process was commenced.

8. Learned Additional Government Advocate placed reliance in the case of Dr. Ramulu and another, etc. Vs. Dr. S. Suryaprakash Rao and

others, , where the Apex Court was considering the question whether the promotional vacancies in the post of Assistant Director in Animal

Husbandry Department of the Andhra Pradesh Government for the year 1995-96 where the Government had already taken a conscious policy

decision to amend the 1977 Rules governing promotion and not to fill up the promotional vacancies until the rule was amended, were required to

be filled up according to the un-amended rules. The amendment to the 1977 Rules was effected with effect from 12.06.1996. There was also no

mandate in 1977 Rules to fill up the promotional vacancies every year. In the aforesaid circumstances, the Apex Court held that not taking up the

case of promotion to the post of Assistant Director in Animal Husbandry Department for the vacancies of the year 1995-96 was not illegal and

that the eligible candidates from the feeder cadre as per the 1977 Rules, had no right to be considered for promotion as per the pre amended

Rules of 1977.

The decision, however, has no application to the facts and circumstances of the case, which relates to original recruitment for which the process of

selection had already commenced as per the norms/guidelines of the Government existing then. Even assuming that it has application to the present

case, it is to be seen whether the Government has taken a conscious decision to give retrospective effect to the new norms.

9. Learned Additional Government Advocate also placed reliance in the case of Union of India and others Vs. K.V. Vijesh, , - wherein after the

select list, for the. post of Diesel Assistant was prepared for a number of vacancies, the Government took a policy decision to reduce the number

of vacancies because of impending absorption of Steam surplus staff, and consequently a certain number of ""bottom persons were removed from

the select list and the remaining selectees were given appointment according to

their merits, In such circumstances, the denial of appointment to the persons removed, from the select list was held to be not arbitrary or discriminatory. The decision emphasizes the proposition that where the Government took a policy decision to absorb under compulsion some Steam surplus staff in the post of Diesel Assistant and the select list already prepared for Diesel Assistant was reduced to the extent of the number of Steam Surplus staff, who were absorbed, not giving appointment to some selectees would be justified. This was, however, not a case of change of norms or qualification for recruitment after the recruitment process was commenced.

10. Also reliance has been placed by the Learned Additional Government Advocate on the Constitution Bench decision of the Apex Court in- the case of Shankarsan Dash Vs. Union of India, where the Apex Court observed as follows:

7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can; be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in The State of Haryana Vs. Subash Chander Marwaha and Others, Miss Neelima Shangla, Ph. D. Candidate Vs. State of Haryana and Others, or Jatinder Kumar and Others Vs. State of Punjab and Others, .

This decision does not relate to a case of change of norms or qualifications for selection after the commencement of the selection process with which we are concerned in the present lis. Even otherwise, we have to see

whether the Government at all has taken a decision not to fill up the vacancies.

11. Admittedly, in the present case earlier advertisement was issued as per the Government norms fixing the qualification as 10th pass

(Matriculation) for the purpose of selection and appointment of MPH(W) on contract basis and accordingly the process of selection was

initiated. It is also not denied that in some districts already selection of matriculation candidates has been made and they have been appointed. One

such appointment letter which has been brought on record is Annexure-7 in W.P. (C) No. 1770 of 2011 which relates to district of Bhadrak which

reveals that renewal of the contractual appointment can be considered subject to satisfactory performance and the engagement/appointment can be

terminated on giving one month notice for unsatisfactory performance. It is to be seen as to what is the tenor/implication of the Government

decision dated 09.07.2010 (Annexure-A/1 to State's counter) in order to decide whether the Government decision to change the qualification is

intended to be prospective or retrospective.

12. The Government decision dated 09.07.2010 (Annexure-A/I), which is the Minutes of the meeting of Officers presided over by the Secretary,

Health and Family Welfare, reveals that it was taken feeling the growing need for providing quality health care to the people that was being

discussed at the Government level from time to time. It also reveals that matriculates on appointment as MPH(W) were required to undergo

training for one year, which was found inadequate to provide quality health care to the people and, therefore, it was decided to give contractual

engagement to candidates having qualification of Diploma in Pharmacy against the vacant posts of MPH(W). Clause (ix) of the decision relates

to discontinuance of the practice of taking matriculates as MPH(W) forthwith. Vide note sheet of Health Department file (Annexure-D/1), the

aforesaid decision was finally approved by the Hon'ble Chief Minister on 04.11.2010 where after the Government Resolution No. 37128/H dated

07.12.2010 (Annexure-A/3 to the counter affidavit of Opp. Party No. 3) changing the eligibility from matriculation to Diploma in Pharmacy for

appointment to post of MPH(W) was circulated to all concerned. The said Resolution was brought into force with immediate effect, that is to

say, with effect from the date it was issued, i.e., 07.12.2010. Neither the Minutes dated 09.07.2010 of meeting of Officers presided over by the

Commissioner-cum-Secretary, Department of Health and Family Welfare, nor the Government Resolution dated 07.12.2010 stipulates that the

revised criteria will have retrospective effect or that all on going selection process initiated by the C.D.M.Os as per the existing (pre-revised)

norms would be stopped/ cancelled. There is also no decision to cancel all advertisements issued as per the existing norms for appointment of

matriculates as MPHWS (M). Therefore, the District Selection Committee had no authority to take a decision to cancel the advertisement under

Annexure-1 and re-advertise as per the revised guidelines. Therefore, issuance of fresh advertisements as per the revised guidelines for filling up

the posts for which process had already started and even Petitioners were selected and the cancellation of earlier advertisements are arbitrary,

unreasonable, illegal and unsustainable.

13. The plea raised by the Opp. Parties that the Petitioners should have approached the Administrative Tribunal at the first instance cannot be

accepted as the service is contractual one. Besides, the plea is raised at the belated stage though these writ applications have been pending for

over a year and interim orders have been passed. To direct the Petitioners to approach the Tribunal at this stage would further delay the matter and

the public interest of providing health services to the people of the State would suffer a set back. Moreover, this Court also does not lack

jurisdiction to decide the Writ Petitions. In the aforesaid view of the matter, we issue the following directions:

(a) All fresh advertisements as per the revised guidelines/ Govt. Resolution in respect of posts already advertised as per the pre-revised

norms/guidelines and all orders or advertisements cancelling such previous advertisements in different districts stand quashed.

(b) The selection process for appointment as MPHWS(M) of candidates having matriculation qualification wherever taken prior to 7.12.2010 i.e.,

the date of coming into effect of the revised guidelines/norms should be completed expeditiously and the selected candidates be given appointment

as per the pre-revised norms, if there is no other impediment.

(c) Posts for which selection process had not been initiated prior to 07.12.2010

may be filled up as per the revised norms/ guidelines.

The Writ Petitions are accordingly disposed of. No costs. B.P. DAS, J. I agree.