

(1985) 02 OHC CK 0020

In the Orissa High Court

Case No : Original Jurisdiction Case No. 483 of 1978

Bipreswar Sahu

APPELLANT

Vs

The Chairman, Cuttack Municipality and Others

RESPONDENT

Date of Decision : 05-02-1985

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Regulation of the Board of Secondary Education — Regulation 16(4)

Citation : (1985) 1 OLR 570

Hon'ble Judges : G.B. Pattnaik, J; B.N. Misra, J

Bench : Division Bench

Advocate : Bijaya Mohanty, for the Appellant; B. Rath, G.A.R. Dora, P.K. Misra and Addl. Standing Counsel, for the Respondent

Judgement

G.B. Pattnaik, J.—Petitioner, a trained science graduate, was appointed as an Assistant Teacher in I. A. C. T. scale in the Municipal City High School Rajabagicha, on 17.9.1959. The letter of appointment has been annexed as Annexure-1 to the writ petition. In this writ petition he challenges the promotion of opposite party No. 4 to the post, of a trained science graduate teacher and further challenges the promotion of opposite party No. 5 to a post in trained graduate scale as per Annexure-10 to the writ petition. Petitioner has also prayed to quash the appointment of opposite party No. 5 on 19.9.1975 as being contrary to the Rules. "The petitioner further prays for a direction to opposite party No. 2 to promote the petitioner to a trained graduate scale with effect from June, 1972.

2. The case of the petitioner is that though he was a trained science graduate, yet he was appointed temporarily as an assistant teacher in I. A. C. T. scale in the Municipal City High School, Rajabagicha, as per Annexure-1. Under the Cuttack Municipality, there are several secondary schools and the teaching staff of all the schools form one cadre and the posts are inter transferable. The petitioner came to know that a trained science graduate teacher's post was lying vacant in the Municipal Girl's High School at Thoriasahi and since he was duly qualified, he

filed a representation on 4.1.1970 for being promoted to the said post. At that point of time opposite party No- 4 who was merely an Intermediate in Science was discharging the job of a science teacher in Thoriasahi Girls' High School being absorbed in a Matric C. T. post. Without considering the representation of the petitioner, he was transferred to the Municipal Proposed High School at Mansinghpatna as a science teacher in the same I. A. C. T. scale on 5.10.1972. The order of transfer has been annexed as Annexure-5 to the writ petition. On 2.1.1973, as per Annexure-6 under orders of the Executive Officer, Cuttack Municipality, opposite party No. 4 was transferred to the Municipal City High School against a post in I. A. C. T. scale. On 12.9.1973, the Municipal Council promoted opposite party No. 4 to the trained science graduate post in the Municipal Girls' High School, Thoriasahi, as opposite party No. 4 had by then acquired the qualification of a trained graduate. On 29.3.1974, the petitioner represented against the aforesaid appointment of opposite party No. 4, but did not receive any reply. The petitioner also made further representations on 26.4.1974 and 27.6.1974 but the said representations did not receive any attention of the employer, the Cuttack Municipality, and hence the petitioner was compelled to take recourse to the filing of the present writ application.

So far as opposite party No. 5 is concerned, the petitioner's case is that his initial appointment on 19.9.1975 is bad in law being in contravention of Rule 408 of the Orissa Municipal Rules as he was admittedly more than 28 years of age. His further case is that opposite party No. 5 being junior to him, he should not have been given the trained graduate scale on 28.3.1977 retrospectively with effect from 19.9.1975 although the petitioner was promoted to the post of a trained science graduate on 2.8.1976. According to the petitioner, the order giving opposite party No. 5 the trained graduate scale as per Annexure-10 is one of promotion and, therefore, Rule 426 of the Orissa Municipal Rules should have been strictly complied with and the petitioner should have been promoted since he is admittedly senior to opposite party No. 5. The petitioner also made a representation against the said promotion of opposite party No. 5 and ultimately as per Annexure-13, the State Government, cancelled the selection held on 18.9.1975 and, therefore, the selection of opposite party No. 5 must be held to be bad in law.

3. The stand of opposite parties 1 and 2 in the counter affidavit is that there is no inter-transfer between the teachers of the Girls' High School and the teachers of the Boys' High School within the Cuttack Municipality. The post of science graduate teacher in Municipal Girls' High School, Thoriasahi, was not vacant when the petitioner made his representation. Under the Regulations of the Board of Secondary Education, if a trained science graduate is not available, then an I Sc. could be appointed against the post. When opposite party No. 4 was appointed in the year 1965, there was no trained science graduate available and, therefore, the Board selected him taking into consideration his past experience, as would appear from Annexure-A/1 to the counter affidavit. The work of opposite party No. 4 was found to be very satisfactory and he was allowed to

continue in the said post until further orders as per Annexure-D/1 to the counter affidavit. Opposite party No. 4 passed his B. Sc. examination in August, 1970 and then on taking study leave he went for B. Ed, training. He was permitted to re-join his former post on 13.7.1972 after he obtained his B. Ed. as per Annexure-G/1 to the counter affidavit. Thus according to the opposite parties, opposite party No. 4 was appointed on being selected by a selection committee to man the post of a science teacher and he discharged his duties as a science teacher efficiently and, therefore, there was no vacancy against which the petitioner could have been considered. The said opposite party No. 4 having duly qualified himself as a trained graduate was given the trained graduate scale and the petitioner cannot make any grievance on that score.

4. So far as opposite party No. 5 is concerned, it was stated in the counter affidavit that he was never appointed to a post in I.A.C.T. scale. The said opposite party No. 5 was appointed as Headmaster, but his scale of pay had not been fixed at the time of appointment. Subsequently after receiving clarification from the Inspector of Schools, his scale of pay was fixed in the trained graduate scale as per Annexure-10. Thus it was not a case of promotion, but a case of initial recruitment to the post of Headmaster in trained graduate scale and consequently opposite party No. 5 could not be declared junior to the petitioner, as contended in the writ petition. So far as violation of Rule 403 of the Orissa Municipal Rules is concerned, it was averred that the Municipal council itself while requesting the Employment Exchange to send names indicated that candidates whose age exceeded 28 years might also be sponsored since the municipality was in search of an experienced person had accordingly names of candidates whose age had exceeded 28 years, which included the name of opposite party No. 5, had been sponsored by the Employment Exchange. The said appointment of opposite party No. 5, it was contended, could not be challenged after lapse of so many years. So far as Annexure- 13 is concerned, the stand of the opposite parties is that the order of cancellation under Annexure-13 relates to the selection of Headmaster on the basis of promotion and the said order does not in any way affect the selection of a direct recruit like opposite party No. 5 and, therefore, the decision of the selection committee selecting opposite party No. 5 remained valid notwithstanding the order of the State Government in Annexure-13.

5. Opposite party Mo. 4 filed a counter affidavit reiterating the stand taken by opposite parties 1 and 2. On behalf of opposite party No 5, Mrs. Padhi submits in Court that the stand taken by opposite party No. 5 in an earlier writ petition (O.J.C. No.482 of 1983. 1958 (1) GLR 413 Smt. Pramodini Dash v. The Chairman, Cuttack Municipality and others, may be adopted in this case since his appointment is being impugned on identical grounds.

6. The appointment of opposite party No.5 which was also challenged by another teacher on identical grounds in O. J. C. No. 482 of 1933 has been held to be valid by us, in our judgment delivered today in the said case. It has been held in that

case that Sri Kamal Kumar Misra (opposite party No. 5 herein) was directly recruited to the post of Headmaster and the scale of pay for the said post was fixed in trained graduate scale on 28. 3. 1977 as per Annexure-10 giving it effect from 19. 9. 1375, the date of appointment of the said opposite party No. 5 and in that view of the matter opposite party No.5 cannot be held to be junior to the petitioner. It has further been held in the said case that the initial appointment of opposite party No. 5 cannot be said to be had in law even though he had exceeded the age of 28 years as contemplated in Rule 408 of the Orissa Municipal Rules. For the reasons indicated by us in O. J, C. No. 432 of 1978, we have no hesitation to reject the petitioner's prayer to quash the appointment of opposite party No, 5 in this case.

7. We would now examine the correctness of the submissions raised by the learned counsel for the petitioners, challenging the appointment of opposite party No. 4. Mr. Mohanty for the petitioner contends that the petitioner having been appointed as a teacher in I. A. C. T., scale on 17.6.1969 and he being a trained science graduate, the municipal authorities could not have ignored his case for being appointed as a science teacher in trained graduate scale when the said post fell vacant and the concerned authorities committed serious error in disregarding the petitioner's claim and in giving trained graduate scale to opposite party No. 4 only after he acquired the requisite qualification. Mr. Dora appearing for the municipal council submits that the post of science teacher in the Municipal Girls' High School, Thoriasahi, was never vacant and at any rate, the teachers of Girls' High School and the teachers of Boys school belonged to two different cadres and consequently petitioner had no right to be considered for the post of science teacher of the Girls' High School. It has been held by us in O. J. C, No. 482 of 1933 that the teachers of Boys' school and the teachers of Girls School under the Cuttack Municipality formed one cadre and, therefore, we shall only consider whether the stand of the opposite parties that the post of science teacher in Thoriasahi Girls' High School was not vacant, is tenable so as to reject the claim of the petitioner.

8. From the facts averred in the writ petition and the counter affidavit, as well as the documents annexed, it transpires that in the Municipal Girls' High School, Thoriasahi, the post of science teacher fell vacant. Under the staffing pattern fixed by the Board of Secondary Education, a High School must have a science teacher with the qualification of a trained science graduate and the Municipal Girls' High School, Thoriasahi, being a High School, the said school must have a science teacher with trained science graduate qualification in order to get recognition from the Board of Secondary Education. Sub-clause (iii) of Clause (4) of Regulation 15 of Chapter-IX of the Regulations of the Board of Secondary Education, Orissa, Provides :

"A trained graduate. (If a trained graduate is not available, an untrained graduate may be appointed temporarily)."

When opposite party No. 4 was selected as per Annexure-A/4, he was a plucked

B. Sc. The selection committee after interviewing several candidates could not find any trained science graduate for the post of science teacher and, therefore, appointed opposite party No. 4 to the post of science teacher in the school. This appointment of opposite party No. 4 was in accordance with the Regulation referred to earlier to meet the contingency of non-availability of a trained science graduate. The petitioner was a science graduate from the inception of his recruitment in the year 1969. The true import of the Regulation referred to earlier is that when a trained science graduate is not available, then a science graduate, may be temporarily appointed and when a science graduate is not available, then an I. Sc. may be temporarily appointed as a science teacher. But that appointment must be of ad hoc nature and should be replaced as soon as a candidate with minimum qualification of trained science graduate is available. In that view of the matter when the petitioner, a science graduate, became available to the municipality on 17.9.1969, he was entitled to be posted against the trained science graduate post in the Municipal Girls' High School, Thoriasahi. Mr. Dora's contention that the said post was not vacant is based on the ground that opposite party No. 4 had been appointed to that post and was manning that post which was permissible under the Regulation referred to supra Mr. Dora further submitted that the word "temporarily" must mean "till such time the appointee acquires the minimum qualification. We are unable to accept the said submission of the learned counsel. The Regulation enables the authorities to appoint a person who does not possess the minimum qualification of a trained science graduate only as a temporary measure, when no trained science graduate becomes available and the said arrangement must be discontinued as soon as the employer gets a trained personnel for the post. No doubt, opposite party No. 4 had been managing the post of a science teacher efficiently, but he did not have the requisite qualification for the post and, therefore, his appointment in 1965 was on an ad-hoc measure which should continue only so long as a trained personnel is not available. As soon as a trained science graduate like the petitioner became available and was recruited as a teacher, the petitioner should have been absorbed against the post of science teacher in the Municipal Girl's High School, Thoriasahi. We have already rejected the stand of the Municipality with regard to the existence of two different cadres, one for the teachers of Boys School and another for teachers of Girls' school. In that view of the matter, the conclusion becomes irresistible that the petitioner is entitled to get the trained graduate scale with effect from the date of his appointment. The municipal council could not have continued opposite party No. 4 in a lower scale as a science teacher until he acquired the qualification of a trained graduate in 1973 and then promoted him to the trained graduate scale with effect from 12.9.1973. We are told that in the meantime, the petitioner has also been given the trained graduate scale. In this view of the altered prevailing position, the question of setting aside the promotion of opposite party No. 4 would not arise, as both petitioner and opposite party No. 4 have now been adjusted against trained graduate scale, but at the same time we would direct the municipal council to pay the petitioner in the trained graduate scale with effect from June,

1972, in accordance with his prayer in the writ petition. Subject to the aforesaid direction, all other prayers in the writ petition are rejected.

9. In the result, therefore, the writ application is partly allowed, out in the facts and circumstances of the case, there, would be no order for costs.

B.N. Misra, J.

10. I agree.