
(2000) 06 OHC CK 0017
In the Orissa High Court
Case No : O.J.C. No. 14619 of 1998

Dr. Rajat Mohanty

APPELLANT

Vs

Orissa Public Service Commission and Others

RESPONDENT

Date of Decision : 23-06-2000

Acts Referred:

Citation : (2000) 06 OHC CK 0017

Hon'ble Judges : P.K. Mohanty, J;P.K. Misra, J

Bench : Division Bench

Advocate : Bijayananda Das, S. Mohanty and N.C. Mohanty, for the Appellant; M.R. Mohanty and S. Pattnaik, o.p. No. 1, Y. Das, C. Mohanty, R. Sahu-3, B.P. Mohapatra, B. Panda and P. Dhalm for o.p. No. 4, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Mohanty, J.—The Petitioner calls in question the order of the State Administrative Tribunal, dismissing his Original Application wherein he had challenged the selection of opp. parties 2 and 4 to the post of Junior Teacher (lecturer) in Obstetrics and Gynecology in the Medical Collage of the State, pursuant to the advertisement No. 7 of 1996-97 and non-consideration of the Petitioner's case by the Orissa Public Service Commission, hereinafter called as O.P.S.C..

2. The Petitioner's case in brief is that he was qualified and was eligible for selection and appointment as Junior Teacher (Lecturer) in Obstetrics and Gynecology in terms of the Orissa Medical Service (Recruitment) Rules, 1979 and the Advertisement No. 7 of 1996-97 issued by the O.P.S.C..for the said posts. It is alleged that even though the Petitioner possessed the prescribed qualification and experience, the O.P.S.C. by adopting an illegal method of short-listing in the process of selection is an arbitrary manner, eliminated the eligible candidates like the Petitioner at the threshold and thereby selected ineligible candidates like Opp. parties 2 and 4 in the first phase of selection. According to the Petitioner, the eligible qualification for selection for the post of Lecturer was (a) one should

be an Asst. Surgeon under the State Government undertakings (on deputation) as there is no post of Asst. Surgeon in the Government undertakings (b) he should have at least one year experience as such and (c) he should hold a P.G. Degree in the concerned discipline. The post of Assistant Surgeon is a cadre post in Class-II of Orissa Medical and Health Services carrying a scale of Rs. 2,000 - 3,500/-, which was subsequently revised to Rs. 6,500 - 10,500/- and the recruitments to such post was to be made by the State Government under the 1941 Recruitment Rules. The post of Lecturer is a cadre post in Class.II of the Orissa Medical Education Services carrying a scale of Rs. 2,200 - 4,000/-, which was subsequently revised to Rs. 8,000 - 13,500/- and the recruitment to such post is governed by the 1979 Recruitments Rules. The Petitioner claims that only in service Doctors having Post-Graduate Degree and one year of experience were eligible to hold the post, since the scale attached to the post of Lecturer is higher than that of the post of Assistant Surgeon.

3. According to the Petitioner a reading of Rule 4 (4) of the 1979 Recruitment Rules with sub-paragraph (i) of paragraph-1 of the advertisement, in case of non-availability of Assistant Surgeons, the appointment can be made by direct recruitment, if necessary. The Petitioner was qualified and eligible also in the first phase of selection since he was an Assistant Surgeon of the State Government with effect from 15-2-1991 and thus, had an experience of more than one year as an Assistant Surgeon as on 31-8-1996 and he possessed a Post Graduate Degree in Obstetrics and Gynaecology from Sambalpur University. But the opp. party No, 1, O.P. S.C. illegally did not consider his case and he was arbitrarily not called for the interview. On the other hand, even though opp. parties 2 and 4, who are appointed to the post of Assistant Surgeon only on 20-6-1996 and had possessed experience of only two months and 11 days, were considered and appointed to the said post, for which he had challenged the selection before the learned State Administrative Tribunal, but the Tribunal had on an erroneous consideration, dismissed the case, and hence the present writ application.

4. The opp. party No. 1 has filed a comprehensive Counter affidavit controverting the assertions and the allegations made in the writ application. It is the case of the opp. parties that on the basis of the requisition and draft advertisement received from the Government of Orissa in Health Department, the O.P.S.C. issued Advertisement No. 7 of 1996-97 for filling up of 190 posts of Junior Teachers in different disciplines including 5 posts of Junior Teachers in the discipline of Obstetrics and Gynaecology, out of which two posts were reserved for Scheduled castes and Scheduled tribes and remaining 31 were kept for unreserved category. The advertisement also contemplated that 1/3rd of the vacancies in each of the cadres were reserved for woman candidates and where adequate number of eligible women candidates would not be available, the remaining vacancies are to be filled up by male candidates Opp. party No. 1 has specifically asserted that in paragraph 9 (v) of the advertisement in question, it was stipulated that where the number of applications were received in respect of that advertisement is large and it is not convenient for the Commission for

interviewing all those candidates, the Commission may restrict the number of candidates for interview for reasonable limit by making preliminary selection, either on the basis of the evaluation of their career or by conducting a preliminary written tests. 104 candidates had applied for the discipline Obstetrics and Gynaecology as against the advertised vacancies of five, the Commission having found that neither it is convenient nor necessary to interview all those candidates, in terms of paragraph 9(v) of the Advertisement, a preliminary selection was made to short-list the candidates to be called for the interview/ viva voce test. The short-listing was done on the basis of evaluation of the academic career of the candidates on the basis of the performance at the H.S. C., H.S. S.C. (+ 2) and M.B. B.S. examinations. The average of marks (worked out in percentage terms) secured by the candidates was taken to determine their relative ranking for the purpose of short-listing. This, according to the opp. party No. 1, was done in accordance with the established practice of the Commission for career assessment of the candidates for different posts and services followed over a long period of time. On short- listing of those candidates, only 18 candidates from different categories were called to the viva voce test. Separate list of scheduled caste and scheduled tribe candidates was prepared for being called to the interview in view of the reservation. It is asserted that the last general woman candidate, who was called to the interview had secured 65.850%. whereas the Petitioner secured 83.935% of marks. Between Petitioner and the last general woman candidate called to the interview, there are 55 other candidates, who had secured higher percentage of marks than the applicant. The interview was held on 8-1-97, 29-1-97 and after completion of the recruitment process, the O.P. S.C. submitted their recommendation to the State Government by their letter dated 29-1-1997.

5. With regard to the experience of opp. party No. 2 Dr. Subhara Ghosh and opp. party No. 4 Dr. Kirtirekha Mohapatra, it has been asserted that they had more than one year of experience as Assistant Surgeon and they had also furnished such certificate from the Director of Health Services as required under the Rules. It is submitted that the posts of Assistant Surgeon and that of Junior Lecturers are two separate and distinct cadres. One is under the Director of Medical Education and Training whereas the other under the Director of Health Services and the pay scales of both the posts are separate. A Junior Lecturer is

regulated by the U.G. C. scale of pay and the Assistant Surgeon is paid a normal Class-II Officer of the State Government, inasmuch as the recruitment to the Junior Lecturer is by way of direct recruitment in terms of the Recruitment Rules and is not a promotion from the post of Assistant Surgeon.

6. The main thrust of the argument of Sri Bijayananda Das, learned Counsel for the Petitioner is that the action of opp. party No. 1, Orissa Public Service Commission in shortlisting the candidates and the method of such short-listing was arbitrary, illegal and hit by the provisions of Articles 16 and 309 of the Constitution of India, so far as it has eliminated the eligible candidates like the

Petitioner as the threshold and that aided for selection of ineligible candidates like opp. parties 2 and 4 in the first phase of selection. Secondly, opp. parties 2 and 4 having experience of less than one year as Assistant Surgeon, they lacked the prescribed experience of one year in terms of the Recruitment Rules, 1979 and therefore were not eligible to be called to the interview and being selected, but illegally not only they have been called to the interview, but they have also been selected and appointed in the post and therefore their selection and appointment has to be quashed. The learned Counsel has submitted that the Petitioner was qualified and had the requisite qualification and as such, ought to have been called to the interview, but the opp. party No. 1 by adopting an illegal method of short-listing, has deprived him from selection and consequent appointment.

7. Now coming to the first contention of the learned Counsel as to the legality of the method of short-listing deployed by opp party No. 1 in the process of selection, let us consider the criteria of selection as stipulated in the Orissa Medical Education Service (Recruitment) Rules, 1979 (hereinafter called as "O.M. E. S Rules, 1979"). - Rule 4 of the O.M. E.S. Rules, 1979 may be quoted hereunder:

4. Appointment of Lecturer-

(1) Appointment of junior teaching posts in the service shall be made by selection from amongst the Assistant Surgeons under the State Government or State Government undertakings with at least one year's experience as such through the Public Service Commission which shall invite applications and process them:

Provided that the recruitment may also be made from amongst the Lecturers for the junior teaching posts, in any other speciality or higher speciality subject to the condition that seniority in the new speciality or higher speciality subject to the condition that seniority in the new speciality or higher speciality, as the case may be, shall be determined from the date of appointment in the new discipline in accordance with the placement given by the Commission and accepted by the Government.

(2) No person shall be eligible to be appointed as a Lecturer unless he has acquired a post-Graduate Degree in the concerned speciality or any other equivalent degree qualification prescribed by the Council.

(3) In selection of candidates, Commission shall give due regard to the candidate's academic attainments, experience, aptitude and ability to teach.

(4) If candidates with the prescribed qualifications are not available or appointment cannot be made in the manner prescribed in Sub-rule (1), appointments may be made by direct recruitment through the Commission, if necessary, in relaxation of the prescribed qualifications.

(5) The Lecturers shall perform such duties as are specified in they schedule to

these rules and any other duties as may be specified by Government from time to time by general or special order.

8. In terms of the aforesaid Rules, the Public Service Commission by its advertisement No. 7 of 1996-97 invited applications in the prescribed form for filling up the post of Lecturers in different faculties including Obstetrics and Gynecology. Clause 9 of the Advertisement in Sub-clause (v) reads thus:

9. Other conditions/Information/Instructions:

(i) xx xx xx

(ii) xx xx xx

(iii) xx xx xx

(iv) xx xx xx

(v) Where the number of applications received in response to an advertisement is large with reference to the number of vacancies advertised and it may not be convenient for the Commission to interview all the candidates, the Commission may restrict the number of candidates for interview to a reasonable limit by making preliminary selection either on the basis of evaluation of their career or by conducting a preliminary written test.

Thus, it is abundantly clear that the O.P.S.C. indicated in the advertisement itself that in case of the number of applicants is large, with reference to the number of vacancy advertised, the Commission may restrict the number of candidates for interview to a reasonable limit by making preliminary selection either on the basis of evaluation of their career or by conducting a preliminary written test.

9. Undisputedly, the advertised for five vacancies in the discipline of Obstetrics and Gynecology, for which the Petitioner had also applied and 104 applications were received. Out of these five vacancies, two posts were reserved for scheduled caste and scheduled tribe candidates and three were unreserved. It is the stand of the that in terms of Clause 9(v) of the advertisement, a preliminary selection was made to short-list the candidates to be called for the interview/viva voce test. The short-list was done on the basis of the evaluation of the academic career of the candidates beginning from the stage of H.S.C., H.S.S.C. (+2) and M.B.B.S. examinations. The average of marks secured by the candidates were taken to determine their relative ranking for the purpose of short-listing and this was done in accordance with the established practice of the Commission for career assessment of the candidates for different posts and services followed for a long period of time. It is asserted by the O.P.S.C. that the last general (woman) candidate, who was called to the interview had secured 65.850% of marks, whereas the Petitioner secured 54.935%. Between the Petitioner and the last general (woman) candidate called to the interview, there were 55 other candidates, who were secured higher percentage of the marks than the applicant and therefore, the Petitioner did not have a chance, even it two of the candidates

namely opp. parties 2 and 4 were eliminated from the process.

10. If the number of candidates for a post is large, the selecting authority are not prohibited from short-listing the candidates by a proper procedure of eliminating the less meritorious candidates. This question directly came up for consideration of this Court in the case of *Dr. Tophan Pati v. State of Orissa* 1998(2) O.L.R. 502. The very same advertisement No. 7 of 1996-97 issued by the O.P.S.C., which is the subject matter in the present writ application was under consideration with regard to the selection in the faculty of Psychiatry. This Court held that if the Public Service Commission with its own modality for year's together has been following the procedure that in absence of the written examination, career marking would be made and with this process, the interview would take place for the other three aspects and the marks obtained in the interview will be added to the career mark, there is no infraction of any statutory guideline or violation of any statute. The Court took note of the decision in the case of *Secretary (Health) Department of Health and Family Welfare and Anr. v. Anita Puri and Ors.* 1997(1) A.T. T. (S.C.) 178 of the Apex Court, which held that the expert body like the Public Service Commission is quite competent to assess the suitability and in absence of any statutory criteria, it has any discretion evolving its mode of evaluation of merit and selection of the candidate. The competence and merit of a candidate is adjudged not on the basis of the qualification he possess but also taking into account the other necessary factors like career of the candidate throughout his educational curriculum, experience in the field in which the selection is going to be held, is aptitude for showing extra-curricular activities, personalities and other germane factors which the expert body evolves for assessing authority are necessary to be assessed by the expert body. In that view of the matter, the contention of the learned Counsel with regard to the illegality committed by the Public Service Commission in short-listing the candidates and the method adopted for short-listing has to be rejected. If the Public Service Commission has evolved a method of short-listing the candidates on the basis of the career and on the assessment of the career, if it has been found that the Petitioner is much below the persons called for the interview, such action cannot be faulted. The contention of the learned Counsel for the Petitioner that the academic attainment of the candidate from the very beginning to the date they filed the application for the post, ought to have been taken and that the academic attainment till M.B.B.S. Degree only could not have been taken, cannot be accepted. It must be borne in mind that at the Post Graduate Medical Examination, no class or grade is assigned to a candidate and as such had the mark in the Post Graduate been added, then it would have been equal for all the candidates there being no grading like 1st, 2nd, or 3rd class or any other classification thereof. In that view of the matter, we do not find any illegality in the action of the O.P.S.C. in short-listing the candidates on the basis of the academic attainment.

11. So far as the contention of the learned Counsel for the Petitioner with regard to ineligibility of the opp. parties 2 and 4 on the ground of lack of service

experience of one year in terms of the recruitment Rules, it is not in dispute that a candidate in order to be eligible for consideration to the post of a Lecturer should have at least one year of experience as on Assistant Surgeon. It is the submission of the learned Counsel that the opp party No. 2 Dr. Subhra Ghosh was appointed as an Assistant Surgeon on ad hoc basis and posted to a P.H. C. on 16-11-1994 and there was technical breaks, of one day between the spells of appointment and she was appointed on regular basis on 20-6-1996 on the recommendation of P.S. C. and therefore on the date of receipt of the application i. e. on 30-4-1996 she did not have experience of one year as Assistant Surgeon. Similarly, Dr. Kirtirekha Mohapatra (opp. party No. 4) was Assistant Surgeon on ad hoc basis from 30-12-1993 to 2-7-1996 against a post of L.T. R.H. O. in the District Headquarters Hospital, Bhawanipatna and regularly appointed on the recommendation of the P.S. C. on 2-7-1996 and thus she could not have the requisite experience by- 31-8-1996 from the date she was appointed regularly on the recommendation of the P.S. C. The learned Counsel emphatically submits that the appointment of ad hoc Surgeon is unknown to the 1941 Orissa Medical Service Recruitment Rules of the State Government for recruitment of Assistant Surgeon and therefore since the opp. parties 2 and 4 were admittedly held ad hoc appointments which are fortuitous and stop gap appointment dehors the corresponding 1941 Orissa Medical Service Recruitment Rules of the State Government, the period of such appointment cannot be reckoned towards their eligibility of one year appointment as Assistant Surgeon as required under Rule 4(1) of 1979 Recruitment Rules. The learned Tribunal while considering this aspect of the matter, took note of the Orissa Public Service Commission (Limitation and Function) Regulations, which contemplates an appointment to any such post without consultation with the Public Service Commission not exceeding one year and therefore rejected the contention of the Petitioner that such appointment should not be considered for the purpose of experience of one year as contemplated under the Rules. The Tribunal has rightly rejected such a plea. It is well-established that pending selection by the Public Service Commission, the State Government is not precluded or prohibited from making any appointment to a post ad hoc basis and a person appointed on ad hoc basis also functions in the post as a regularly appointed Assistant Surgeons and once the appointment is regularized by the recommendation of the Public Service Commission, the period served on ad hoc basis has to be reckoned for the purpose of experience. The Tribunal has also taken note of the decision of the Government in Health and Family Welfare Department in Resolution dated 9-7-1992, wherein the break periods are condoned in respect of the ad hoc employees. A reference may be made to the case in Ajit Kumar Rath Vs. State of Orissa and Others, . In that case, the Hon'ble Apex Court, following the constitutional bench decision in The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others, held that if the initial appointment is not made by following the procedure laid down by Rules, but the appointee is continued in the post uninterruptedly till the regularization of the service is accordance with the Rules, the period of officiating services will be

counted for the purpose of seniority and experience. In *Shri L. Chandrakishore Singh Vs. State of Manipur and Others*, , the Apex Court held that the seniority itself based upon length of service is an acquired right of an employee which entitles him to be considered for further promotion. The length of service may be on the basis of the difference of continuous officiation or on the basis of the difference of substantive appointment in the cadre of grade or service which may be reckoned from the date of confirmation on the basis of regulatsation. Even in case of probation or officiating appointments, which are followed by a confirmation, unless a contrary rule is shown, the services rendered on officiating appointment or on probation cannot be ignored for recruitment and for determining his place in the seniority list, where first appointment is made by not following the prescribed procedure and such appointee is approved later on, the approval would mean his confirmation by the authority shall relate back to the date on which his appointment was made and the entire service will have to be completed in reckoning the seniority according to the length of continuous officiation. It is the admitted position that opp. party No. 2 Dr. Subhra Ghosh was appointed as an Assistant Surgeon on ad hoc basis and posted to P.H. C. on 16-11-1994 and she continued on ad hoc basis with technical breaks of one day between the spells of appointments and was appointed on regular basis on the recommendation of the Public Service Commission on 20-6-1996. Dr. Kirtirekha Mohapatra (o.p. No. 4) was appointed as an Assistant Surgeon on ad hoc basis on 30-12-1993 in the District Headquarters Hospital, Bhawanipatna and regular appointed on recommendation of the Public Service Commission on 2-7-1996 and therefore, there is no legal expedient in counting the period of ad hoc services for the purpose of experience in terms of Rule 4(1) of the 1979 Recruitment Rules and therefore the view taken by the Tribunal that the said opposite parties had the requisite experience of one year as an Assistant Surgeon to be considered for being appointed as Junior Teacher (Lecturer) under the Orissa Medical Education Service (Recruitment) Rules, 1979 cannot be faulted.

12. Coming to the case of the Petitioner, it is not disputed that he had the requisite qualification and experience in terms of Advertisement No, 7 of 1996-97 and the 1979 Recruitment Rules more specifically, Rule 4(I). But the question is whether he has been rightly denied the right of facing the interview/viva voce by the Public Service Commission. Nothing has been brought on record to show that on the basis of the career assessment mark, the Petitioner obtained or would have obtained more than 54.935% of marks nor it has been shown that the last general (woman) candidate, who was called to the interview had secured less than 65.850% of marks and there were 55 other candidates who had secured higher percentage of marks than the applicant at the career assessment marks by the P.S. C.. If the persons having secured 65.85.% of marks on the career assessment were called to the interview and the Petitioner's name did not find place in the short list so prepared by the Commission, action of the Commission cannot be faulted for having not called the Petitioner to the interview. A

contention has been made that the recruitment to the post of Junior Lecturer is a promotion from the rank of Assistant Surgeon and as such, the Petitioner ought to have been considered in that line. At the outset, the contention has to be rejected. The appointments to the post of Lecturers are made under the Orissa Medical Education Service (Recruitment) Rules, 1979 and are regulated by the U.G.C.

Scales of pay as applicable to the Lecturers of general colleges, where as an Assistant Surgeon is allowed pay scale of normal State Government Class-II Officers. The recruitment to the Junior Lecturer is a direct recruitment by selection and therefore cannot be construed as a promotional post from the rank of Assistant Surgeon in terms of the 1979 Recruitment Rules. At this stage, a reference may be made to Rule 4(1) of the 1979 Rules which has been extensively quoted in the earlier paragraph. The appointment of Lecturer (Junior Teacher) post in the service shall be made by selection from amongst the Assistant Surgeon under the State Government Undertakings with at least one year's experience as such through the Public Service Commission, which shall invite application and process them. Under Sub-rule (4), if candidates with prescribed qualification are not available or appointment cannot be made in the manner in Sub-rule (1), the appointment may be made by direct recruitment through Commission, if necessary, by relaxation of the prescribed qualification. Since the candidates with prescribed qualification are available in plenty, there is no occasion for resorting to the recruitment under Sub-rule (4). Thus, the contention of the learned Counsel is misconceived and has to be rejected.

13. In that view of the matter, we do not find any merit in the writ application to interfere with the impugned order of the learned Tribunal. Accordingly, the writ application is dismissed, but in the circumstances, there shall be no order as to cost.

Ch. P.K. Misra, J.

14. I agree.

Writ application dismissed.