

(2020) 04 OHC CK 0006

In the Orissa High Court

Case No : Writ petition (C) No. 14746 Of 2018

Dusmanta Kumar Behera

APPELLANT

Vs

Registrar, Orissa High Court And Others

RESPONDENT

Date of Decision : 29-04-2020

Acts Referred:

Odisha District And Subordinate Courts' Non-Judicial Staff Services (Method Of Recruitment And Conditions Of Service) Rules, 2008 — Rule 7, 7(1), 7(3), 7(4), 7(5)
Constitution Of India, 1950 — Article 14

Citation : (2020) 04 OHC CK 0006

Hon'ble Judges : Sanju Panda, J; S.K. Sahoo, J

Bench : Division Bench

Advocate : Shashi Bhusan Jena, Satyajit Behera , Abhijit Mishra, Mruganka Sekhar Sahoo

Final Decision : Dismissed

Judgement

S.K. Sahoo, J

1. The petitioner Dusmanta Kumar Behera has filed this writ application with a prayer to direct the learned District Judge, Malkangiri (opposite party no.2) to issue order of appointment in his favour against unreserved category for the post of Junior Typist.

2. The case of the petitioner, in short, is that the opposite party no.2 issued an advertisement on 13.09.2017 to fill up three posts of Junior Typists, one reserved for Scheduled Caste (men) category; one reserved for SEBC (men) category and another was kept as unreserved category. In pursuance of such advertisement, the petitioner applied for that post under SEBC category. He participated in the selection process and performed well and the merit list of all the successful candidates (both general and reserved categories) for those three posts according to the descending order secured was published in which the name of the petitioner was reflected at serial no.2.

It is the further case of the petitioner that in the category wise merit list of successful candidates for the post of Junior Typists, two names found place in Scheduled Caste category, seven names in SEBC category and four names against unreserved category. As per such merit list in SEBC category, the name of one Bivisan Sahu found place above all the seven candidates and name of the petitioner found place at number 2. Bivisan Sahu was overage but he got relaxation by virtue of SEBC quota and occupied the post which was reserved for SEBC category. It is the case of the petitioner that even though he belonged to SEBC category but since in the merit list of all the successful candidates (both general and reserved categories), his name finds place above all the candidates belonging to unreserved category, he should have been selected against such unreserved category.

It is the further case of the petitioner that that the person who secures higher marks has to be considered against unreserved category. The petitioner secured more marks and in the merit list, his name found place at serial no.2 and only because he belonged to SEBC category, he was not issued with an order of appointment, on the other hand the opposite party no.3 Abinash Mohapatra whose name found place at serial no.3 in such merit list and who belonged to unreserved category was issued with an order of appointment.

According to the petitioner, he belonged to SEBC category and secured more marks but the order of appointment was issued in favour of the opposite party no.3 who was directed to appear before the Registrar of the opposite party no.2 with the original documents and to give undertaking, which is not legally correct.

It is the further case of the petitioner that similar advertisement was issued by the learned District Judge, Kendrapara where three posts of Typists were advertised to be filled up and there the SEBC candidates those who have secured more marks have been selected under the unreserved category.

According to the petitioner, the opposite party no.2 has illegally taken a decision to debar the petitioner from appointment even though he secured more marks only because of the fact that he belonged to SEBC category and only one post was reserved for SEBC category which was given to Bivisan Sahu. The action of the opposite parties in not selecting the petitioner against unreserved category even though he secured more marks than the opposite party no.3 is illegal and arbitrary.

3. While controverting the averments made in the writ petition, the opposite party no.2 in the counter affidavit has stated that the appointment order was issued in favour of Shri Bivisan Sahu (SEBC Candidate) for the post of Junior Typist basing on the basis of sub-rule (5) of Rule 7 of the Odisha District and Subordinate Courts' Non-Judicial Staff Services (Method of Recruitment and Conditions of Service) Rules, 2008 (hereafter '2008 Rules'). Similarly in accordance with the provisions of 2008 Rules, appointment order was issued in favour of the opposite party no.3 from the separate merit list for unreserved

category candidate according to the descending order of total marks secured. Since only one post was vacant for SEBC Category, the petitioner was not issued with the appointment order as he had secured second position in merit list for SEBC category. It is further stated that the appointment process made by the District Judge, Kendrapara is not binding as the appointment of Group 'C' employees including Junior Typists under Malkangiri Judgeship was made in accordance with the prescribed Rules and moreover the contentions in regard to equality suffers from the vice of negative equality.

4. Rejoinder to the counter affidavit was filed on behalf of the petitioner stating, inter alia, that the opposite party no.2 has not conducted the selection as per law and it is a clear case of violation of principle decided by the Hon'ble Supreme Court as well as circular issued by the Welfare Department to all the departments of the State Government and with the oblique motive, the opposite party no.2 has debarred the meritorious candidate like the petitioner and appointed the opposite party no.3. It is stated that from the merit list for the post of Junior Typist of Judgeship of Sambalpur District for the same year, Scheduled Tribe candidate has been adjusted against unreserved category since he secured more marks than other unreserved category candidates.

5. While issuing notice to the opposite parties on 13.08.2018, this Court as an interim measure directed that the appointment, if any, to the post of Junior Typist, shall be subject to result of the writ application.

6. Mr. Shashi Bhusan Jena, learned counsel appearing for the petitioner emphatically contended that the petitioner belonged to SEBC category but he had secured more marks than the opposite party no.3 and was placed above the opposite party no.3 in the merit list of all the successful candidates which was meant for both general and reserved categories. Even though the only post reserved for SEBC (men) category was given to one Bivisan Sahu who belonged to SEBC category as his name found place above all the candidates in the merit list but in the same merit list, the name of the petitioner finds place above all the candidates belonging to unreserved category and therefore, he should have been selected against such unreserved category. According to Mr. Jena, this is a glaring case of arbitrary selection whereby the petitioner securing more marks than unreserved category candidates has been deprived of getting an order of appointment. He relied upon a circular dated 15.03.1999 issued by the Welfare Department to all the departments of the State Government which relates to clarification regarding the participation of reserved categories candidates against the unreserved vacancies.

7. Mr. Mruganka Sekhar Sahoo, learned Addl. Govt.

Advocate on the other hand contended that as per sub-rule (1) of Rule 7 of 2008 Rules, after receipt of applications for recruitment examination, career merit lists for general and reserved categories candidates according to the descending order of total of percentage of marks in H.S.C. examination and +2 examination were

prepared. Thereafter considering the marks secured in the written test, one merit list for general candidates and separate merit list for each of the reserved categories were prepared and candidates in each category were called for practical test and the candidates selected in such practical test were called for viva voce test as per sub-rule (3) of Rule 7 of 2008 Rules. Finally, in accordance with the provisions of sub-rule (4) of Rule 7 of 2008 Rules, on the basis of marks secured in the written test, practical test and viva voce test, a merit list of all candidates (both general and reserved categories) was prepared and thereafter separate merit lists for general and reserved categories were prepared according to the descending order of total marks and with due regard to sub-rule (5) of Rule 7 of 2008 Rules, according to the descending order of total marks of each category mentioned in sub-rule (4), not only Bivisan Sahu but also opposite party no.3 who were in the top of the category wise merit list of SEBC and Unreserved respectively were selected for filing of the vacancy. He argued that since the only post vacant for SEBC Category was filled up by Bivisan Sahu, there was no scope for the petitioner who secured second position in merit list for SEBC category for getting selected. The name of the opposite party no.3 found place in top in the category wise merit list for unreserved category and accordingly one post for such category was given to him and hence, there is no irregularity in the selection of candidates for the post of Junior Typists. Learned counsel for the State relied upon the decision rendered by a nine Judge Bench of the Hon'ble Supreme Court in the case of Indra Sawhney -Vrs.- Union of India reported in A.I.R. 1993 S.C. 477 so also in the case of Pradeep Singh Dehal - Vrs.- State of Himachal Pradesh reported in 2019 (9) Supreme Court Cases 276.

8. We have carefully considered the submissions advanced by the learned counsel for the parties and perused the documents available on record. We find the following undisputed factual aspects from the entire scenario of the case:

(i) An advertisement was issued by the opposite party no.2 on 13.09.2017 to fill up three posts of Junior Typists i.e. one reserved for Scheduled Caste (men) category, one reserved for SEBC (men) category and another was kept as unreserved category;

(ii) The petitioner applied under SEBC category and he participated in the selection process and as per the merit list of successful candidates (both general and reserved categories) for that post, the name of the petitioner found place at serial no.2;

(iii) The name of one Bivisan Sahu who applied under SEBC category found place above all the candidates in the merit list referred to under (ii) and also in the category wise merit list of SEBC and he was selected for the post reserved for SEBC category;

(iv) The opposite party no.3 Abinash Mohapatra whose name found place at serial no.3 as per the aforesaid merit list referred to under (ii) but at serial no.1 in the category wise merit list of unreserved category was issued with an order of

appointment;

(v) The petitioner's place though was above the opposite party no.3 in the merit list, but he was not selected as the only post reserved for SEBC (men) category went in favour of Bivisan Sahu.

9. The question that now crops up for consideration is whether any illegality has been committed in selecting the opposite party no.3 Abinash Mohapatra for the post of Junior Typist whose name found place at serial no.3 as per the merit list of successful candidates (both general and reserved categories) for the said post in preference to the petitioner whose name was at serial no.2 in the said merit list and whether the name of the petitioner could have been considered against unreserved category.

At this stage, it would be profitable to refer to the relevant sub-rules of Rule 7 of 2008 Rules which are extracted herein below:

7. Manner of Selection of Candidates-(1) After receipt of applications for recruitment examination, career merit lists for general and reserved categories according to the descending order of total of percentage of marks in H.S.C. examination and +2 examination or their equivalent examinations shall be prepared.

(2) From each category of career merit list, candidates upto 20 times of actual vacancy in each category shall be called to appear at the written test.

(3) Considering the marks secured in the written test, one merit list for general candidates and separate merit list for each of the reserved categories shall be prepared and candidates up to ten times of vacancy in each category shall be called for computer science test (practical), short hand and type writing test, as the case may be, and the candidates selected in such practical selected in test shall be called for viva voce test.

(4) On the basis of marks secured in the written test, practical test as provided in sub-rule (3) and the viva voce test, a merit list of all the candidates (both general and reserved categories) shall be prepared and thereafter separate merit lists for general and reserved categories shall be prepared according to the descending order of total marks.

(5) Candidates according to the descending order of total marks of each category mentioned in sub- rule (4) shall be selected for filling of the vacancy.

Thus on a careful scrutiny of the aforesaid sub-rules of Rule 7, it appears that at first career merit lists are to be prepared separately for the general and for each of the reserved categories taking into account total of percentage of marks in H.S.C. examination and +2 examination or the equivalent examinations according to the descending order. On the basis of career merit list, candidates in each category are to be called to appear at the written test as provided in sub-rule (2). After the written test is conducted, considering the marks secured in

such written test, one merit list for general candidates and separate merit lists for each of the reserved categories shall be prepared. On the basis of marks secured in such written test, candidates in each category are to be called to face the practical test as provided in sub-rule (3). The candidates selected in such practical test shall be called for viva voce test. After viva voce test, on the basis of marks secured in the written test, practical test and viva voce test, a merit list of all the candidates (both general and reserved categories) shall be prepared. Then separate merit lists for general and for each of the reserved categories shall be prepared according to the descending order of total marks and from that separate merit lists, candidates for each category as per the descending order shall be selected for filling of the vacancy.

10. It is not in dispute that the petitioner, Bivisan Sahu and some others applied under SEBC category and they participated in the selection process and as per the merit list of successful candidates (both general and reserved categories) for that posts of Junior Typists, the name of Bivisan Sahu found place at serial no.1 and that of the petitioner found place at serial no.2. Similarly when category wise merit list of the SEBC category was prepared as provided in sub-rule (4) of Rule 7, names of seven persons found in it but the position of Bivisan Sahu and that of the petitioner remained unchanged. Bivisan Sahu was overage but getting relaxation by virtue of SEBC quota, he was selected for the only post which was reserved for SEBC category. Thus no more post under SEBC category was available for the petitioner.

In the case of Indra Sawhney (supra), the Hon'ble Supreme Court has held as follows:

"..... It may well happen that some members belonging to, say Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates."

Following the decision rendered in the case of Indra Sawhney (supra), the Hon'ble Supreme Court in the case of Pradeep Singh Dehal (supra) held as follows:

"14.....Every person is a general category candidate. The benefit of reservation is conferred to Scheduled Castes, Scheduled Tribes and OBC category candidates or such other category as is permissible under law. It is a consistent view of this Court starting from Indra Sawhney (supra) that if a reserved category candidate is in merit, he will occupy a general category seat...."

Even though Bivisan Sahu was in the top of the merit list of successful candidates (both general and reserved categories) for the posts of Junior Typists so also in the category wise merit list of the SEBC category but he did not get selected in the open competition field on the basis of his own merit but getting relaxation as provided under SEBC quota and therefore, he cannot be treated as open competition candidate. Once he takes away the only post reserved for the

SEBC category, no more post under SEBC category was available for the petitioner. The rest of the persons left out in the SEBC category merit list cannot be considered under unreserved category as for that category, a separate merit list as per sub-rule (4) of Rule 7 has been prepared and the only post kept unreserved has to go to one of the candidates of that list according to the descending order. Rule 7 is clear and there are no ambiguities in it to require departure from the Rule of literal construction. In *Hiralal Rattanlal -Vrs.- Sales Tax Officer* reported in (1973) 1 Supreme Court Cases 216, the Hon'ble Supreme Court observed as follows:

"22.....In construing a statutory provision, the first and foremost rule of construction is the literary construction. All that we have to see at the very outset is what does that provision say? If the provision is unambiguous and if from the provision, the legislative intent is clear, we need not call into aid the other rules of construction of statutes. The other rules of construction are called into aid only when the legislative intent is not clear."

We are of the humble view that if the left out persons in the SEBC category merit list are considered under unreserved category, the persons whose names find place in the merit list of unreserved category will be seriously prejudiced and it would affect them as they compete strictly on the basis of the merit. Moreover, there would be no purpose in preparing such list under unreserved category. There is a purpose behind preparation of separate merit list for each of the reserved categories so also a separate list for the unreserved. One candidate in one of the reserved categories cannot encroach upon the other category merely because he was not selected on the basis of merit list prepared for his own category.

In the case of *Satyabrata Sahoo and Ors. -Vrs.- State of Orissa* reported in (2012) 8 Supreme Court Cases 203, when the appellants, who have appeared in the entrance examination for Postgraduate (Medical) Selection, 2012, Odisha challenged the validity of Clause 11.2 of the prospectus for selection of candidates for postgraduate (medical) courses in the government medical colleges of Odisha for the academic year 2012, as violative of Article 14 of the Constitution of India, the Hon'ble Court held that there can be no encroachment from one category to another and candidates of in-service category cannot encroach upon the open category, so also vice versa. While allowing the appeal and setting aside the judgment of the Division Bench as well as learned Single Judge of this Court, the Hon'ble Court directed the State of Odisha, the Medical Council of India and the respondents 1 to 4 therein to take urgent steps to rearrange the merit list and to fill up the seats of the direct category, excluding in-service candidates who got admission in the open category on the strength of weightage.

The notification of the Welfare Department dated 15.03.1999 annexed to the rejoinder affidavit filed by the petitioner dealt with the question, "whether the unreserved vacancies are reserved for a specified class of candidates" and the

answer was given that, "the unreserved vacancies are not reserved for any general, S.C., S.T., O.B.C. or other specified class of candidates. This has to be filled up strictly on the basis of the 'select list' prepared by the Board of selection or the Departmental Promotion Committee, following the relevant recruitment rules".

Since the select list prepared in the present case is category wise merit list of successful candidates following Rule 7 of 2008 Rules and the selection of the opposite party no.3 for the post of Junior Typist from the unreserved category is on the basis of his top position in such category, we find no infirmity or irregularity in the same. The prayer of the petitioner to issue order of appointment in his favour against unreserved category is totally misconceived.

The grounds taken by the petitioner that in two of the districts i.e. Kendrapara and Sambalpur, in the similar posts of Junior Typists, reserved category candidates securing more marks have been adjusted against unreserved category are not sufficient to grant relief to the petitioner as it suffers from the vice of negative equality as averred in the counter affidavit. Article 14 of the Constitution does not envisage a negative equality. It does not countenance repetition of a wrong action to bring both wrongs at par. Since the happenings of those two districts in the matter of selection of Junior Typists are not challenged before us now, we refrain to make any observation in that respect.

11. In view of the foregoing discussions, we find no merit in the writ petition which is accordingly dismissed. The interim order dated 13.08.2018 stands vacated. No costs.