

(2009) 08 OHC CK 0027

In the Orissa High Court

Keshab Chandra Das and Another

APPELLANT

Vs

Union of India (UOI) and Another
 Union of India
(UOI) and Another Vs Keshab Chandra Das and Another

RESPONDENT

Date of Decision : 05-08-2009

Acts Referred:

Constitution of India, 1950 — Article 15, 16, 335

Citation : (2009) 2 OLR 807 : (2009) 2 OLR 80 : (2010) 3 SLR 180

Hon'ble Judges : L. Mohapatra, J;B.N. Mahapatra, J

Bench : Division Bench

Judgement

L. Mohapatra, J.—Both the petitioners in W.P. (C) No. 4242 of 2007 were applicants before the Central Administrative Tribunal, Cuttack Bench in O.A. No. 1173 of 2004. The said Original Application having been dismissed by the Tribunal by order dated 7.7.2006, they have approached this Court challenging the same. The Railway administration has also challenged the operating part of the said judgment in W.P.(C) No. 16151 of 2006.

2. Both the applicants who are Diploma Holder in Civil Engineering in pursuance of an advertisement issued by the Railway Recruitment Board (RRB), Bhubaneswar, applied for being appointed as I.O.W. Grade-III and having been selected for the post, they joined in the year 1994. A notification was issued on 5.3.2001 for formation of Group-B panel for the post of AEN (Group-B) through a process of limited Departmental Competitive Examination against 34 vacancies of the Civil Engineering Department. Those who had completed five years of regular service in the scale of Rs. 5000-8000/- as on 1.11.2000 in the Civil Engineering Department were eligible to be included in the panel. There were 28 vacancies out of which 20 were unreserved, 5 were reserved for Scheduled Caste and 3 were reserved for Scheduled Tribe candidates. Both the applicants were in the scale of Rs. 5000-8000/- and accordingly they appeared in the written test. In the written test, 9 candidates were declared qualified who were subsequently called for viva voce test and all the 9 of them were selected in order of merit.

The dispute arose so far as selection of Scheduled Caste and Scheduled Tribe candidates are concerned. It was claimed that a pre-selection coaching had not been extended to the Scheduled Caste and Scheduled Tribe candidates as a consequence of which some of the aggrieved persons moved the Jabalpur Bench of the Central Administrative Tribunal questioning the validity of the said panel. During pendency of the case before the Jabalpur Bench of the Tribunal, the Railway Board accepted the claim and approved for holding a supplementary written test after giving them pre-selection coaching. In the supplementary test, 42 eligible candidates were allowed to participate out of whom 33 including both the applicants appeared. 13 candidates including both the applicants were declared qualified in the written test and they were called for a viva voce test. The names of both the applicants did not figure in the final select list though they claimed to have done much better than other candidates. A panel of 17 qualified candidates was prepared taking into account 9 candidates who were selected earlier. Out of the 17 candidates selected, 8 belong to the general category, 8 belong to the Schedule Caste community and one to the Scheduled Tribe community. As stated earlier, out of 28 vacancies, 5 have been reserved for Scheduled Caste and 3 for Scheduled Tribe but all the 8 Scheduled Caste candidates secured more marks than the last candidate belonging to the general category and thus they were included against the general category and the 5 posts reserved for Scheduled Caste remained unaffected. According to the applicants, since those 5 posts were available to be filled up, they could have been given appointment against the reserved quota. According to them, the applicant No. 1 had secured 23 marks and the applicant No. 2, 18 marks out of 25 marks allotted for A.C.Rs. and consequently they ran short of few marks in the viva voce test resulting in their non-selection.

3. The Railway administration who were respondents before the Tribunal filed a counter affidavit stating therein that in the year 2000-2001, a selection test was conducted for filling up 28 vacancies out of which 20 were meant for unreserved category, 5 for Scheduled Caste and 3 for Scheduled Tribe candidates. 564 candidates including the applicants appeared in the written test on 14.10.2001 and only 9 candidates qualified in the written test and the interview was held on 9.11.2002. All the 9 were selected and out of the said 9 candidates, 8 were from unreserved category and one was from Scheduled Caste category. Since some of the Scheduled Caste candidates approached the Jabalpur Bench of the Central Administrative Tribunal claiming that they had not been extended the mandatory pre-selection coaching, a decision was taken to extend the said facility to them. After preselection coaching, 33 candidates including the applicants appeared in the supplementary written examination held on 16.5.2004 and 13 candidates including the applicants could qualify in the written test. They were interviewed on 16.5.2004 and the selection Board recommended 8 candidates for empanelment thus making of a total of 17 selected candidates. Both the applicants having failed to secure minimum qualifying marks under the head of record of service and viva voce, their names did not figure in the panel.

Therefore, the remaining vacancies, if any, could not be filled up and the case of the applicants could not have been considered because of their performance in the viva voce test.

4. A reply to the counter affidavit was filed by the applicants before the Tribunal reiterating that 5 posts meant for Scheduled Caste candidates could not be filled up as all the 8 Scheduled Caste candidates selected were accommodated against the general category and therefore, there was no reason on the part of the Railways in not selecting both the applicants against the 5 posts meant for Scheduled Caste candidates.

5. The Tribunal in the impugned judgment held that the posts come under the purview of safety category and no leniency could be shown in the matter of selection but considering the fact that the applicants had secured qualifying marks in the service record but unfortunately failed with a margin of 2/3 marks in the viva voce test directed for a fresh viva voce test.

6. Shri G.A.R. Dora, the learned Senior Counsel appearing for the applicants submitted that in terms of Article 335 of the Constitution of India, the Scheduled Caste and Scheduled Tribe candidates are entitled for relaxed standards and such relaxed standard has not been extended to both the applicants. According to him, both the applicants had qualified in the written test and had also obtained the qualifying marks so far as A.C.Rs. are concerned. Only in course of interview, they ran short of the qualifying marks. Had the relaxed standard been extended to them, they would have qualified for appointment to the post of AEN Group-B. The learned Counsel Shri Dora drew the attention of this Court not only to Article 335 of the Constitution of India but also different establishment serials prescribing qualifying marks as well as a decision of this Court in the case of *Mrutunjaya Nayak v. State of Orissa and Ors.* reported in 2008 (II) OLR 314 to substantiate his contention. The learned Counsel for the Railways supported the findings on the ground that AEN Group-B post come within the safety category and no relaxation can be extended for appointment against safety category posts. Both the applicants though qualified in the written test, having failed to secure the qualifying marks in the viva voce test, were rightly excluded from the panel and they cannot claim relaxed standards to be extended to them specially when the posts against which they are seeking for appointment, belong to safety category. The learned Counsel appearing for the petitioners in W.P.(C) No. 16151 of 2006 challenging the operating part of the impugned judgment also submitted that the applicants having failed to secure qualifying marks in the viva voce test, could not be allowed another chance.

7. Article 335 of the Constitution of India reads as follows:

Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of

services or posts in connection with the affairs of the Union or a State.

The said provision came for consideration in the case of *Mrutunjaya Nayak v. State of Orissa and Ors.* (supra) and this Court referring to several Supreme Court decisions held that Article 335 specifically provides for maintenance of efficiency in administration. The benefit of vertical reservation can be denied to S.C., S.T. and O.B.C. if it adversely affects the maintenance of efficiency of administration. Only in exceptional cases, in compelling circumstances and in the interest of the reserved category candidates, the State may relax the qualifying marks after identification by weighing the comparable data, without affecting general efficiency of service as mandatorily provided under the said Article. The Court further held that reservation in educational institution and in employment can be provided under Articles 15(1) or 16(1), or 16(4) of the Constitution of India. But both the provisions enable the Competent Authority to provide for reservation, they are merely enabling provisions, while Article 335 is in mandatory language. The constitutional limitation of efficiency under Article 335 can be relaxed but not obliterated. Admittedly the O.Ps. had not extended the relax standard for Scheduled Caste and Scheduled Tribe candidates when such candidates were empanelled for written test. No objection what so ever was raised by the applicants at that point of time and they participated not only in the written test but also in the viva voce test. Having failed to secure the minimum qualifying marks in the viva voce test, is it now open for the applicants to challenge the selection criteria and submit that the relaxed standards were not extended to them. In this connection, reference may be made to a decision of the Supreme Court in the case of *I.L. Honnegouda v. State of Karnataka and Ors.* reported in AIR 1978 SC 28. The Hon"ble Supreme Court in the said decision held that as the petitioner therein had taken the benefit of the statutory rules by taking a chance of being selected and also appeared in the interview, he could not be permitted to challenge the constitutional validity of the said rules. In the case of *State of Orissa and others Vs. Narain Prasad and others, etc. etc.,* , the Supreme Court held that a party cannot be permitted to either turn round of the contractual obligation nor can be allowed to challenge the validity of those obligations or the Rules which constitute the terms of contract. The High Court should not have exercised its extraordinary jurisdiction in aid of such purpose.

8. Apart from the above, learned Counsel for the applicants relied on an Establishment serial bearing No. 61 of 2000 to substantiate his argument that such relaxed standard had been extended in the said establishment serial for Scheduled Caste and Scheduled Tribe candidates and therefore, there was no reason not to follow the same. The Establishment Serial No. 61 of 2000 speaks about instruction of the Railway Board for grant of relaxation in qualifying marks in promotional category posts in favour of Scheduled Castes and Scheduled Tribes. The Ministry of Railways after careful consideration have decided that relaxation in qualifying marks shall stand withdrawn from the date of issue of the said letter dated 27.3.2000. It was emphasized to clarify that the withdrawal is for relaxations in qualifying marks only and the Scheduled Castes/Scheduled

Tribes candidates continue to be judged by excluding the seniority marks wherever they are required to be taken into consideration both in safety/non-safety category posts. Though the above submission was made on behalf of the applicants, it appears that by Establishment Serial No. 225 of 2000, considering introduction of the proviso to Article 335 of the Constitution of India, the said Establishment Serial No. 61 of 2000 became inoperative w.e.f. 3.10.2000. It was decided in the said establishment serial that in pursuance of the enabling proviso to Article 335 of the Constitution, relaxation/concession in the matter of promotion to candidates belonging to Scheduled Caste/Scheduled Tribe category by way of lower qualifying marks/lesser standards of evaluation which existed prior to 27.3.2000 be restored. However, this circular does not specify as to whether the same shall be made applicable to safety category of posts. Shri Dora, learned Counsel appearing for the applicants submitted that by the time the selection process started in the year 2001, the Board had already decided for extending the relaxed standard for Scheduled Caste and Scheduled Tribe category candidates even in respect of safety category posts. We are unable to accept such a contention considering what has been stated in the Establishment Serial No. 225 of 2000 in which the Railway Board's earlier letter dated 27.3.2000 (Establishment Serial No. 61 of 2000) had been made inoperative which had withdrawn the relaxation in qualifying marks from the date of issuance of the said letter and only that Establishment Serial No. 61 of 2000 speaks of safety and non-safety categories. The Establishment Serial No. 225 of 2000 dated 29.12.2000 being silent about the safety category, we are unable to accept the contention of the learned Counsel for the applicants.

9. Admittedly the posts for which the applicants have sought for promotion belong to the safety category and the question as to whether relaxed standards should be adopted for Scheduled Caste and Scheduled Tribe communities for promotion to such safety category post or not, depends on the employer. If the employer decides not to extend the relaxed standards in respect of safety category posts specially in Railway administration, no fault can be found with such decision. We are therefore, of the view that the stand taken by the Railways before the Tribunal that there can be no compromise in respect of safety category posts since it involves health hazards and safety of passengers was rightly accepted by the Tribunal. However, the Tribunal having accepted such contention of the Railways could not have directed for a fresh viva voce test because the applicants fall short of few marks in qualifying the viva voce test or that the 6 vacancies meant for Schedule Caste and 3 for Scheduled Tribe candidates were still lying vacant. If the Tribunal accepted the contention of the Railways that against safety category posts no relaxed standard can be adopted, it could not have also given an opportunity to the applicants to take the viva voce test again who had admittedly failed in obtaining the qualifying marks.

10. For the reasons stated above, we dismiss W.P. (C) No. 4242 of 2007, a Now W.P. (C) No. 16151 of 2006 and set aside the impugned judgment.

B.N. Mahapatra, J.

I agree.