

(2006) 03 OHC CK 0039
In the Orissa High Court
Case No : O.J.C. No. 5017 of 2000

Muralidhar Mallick and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 22-03-2006

Acts Referred:

Citation : (2006) 1 OLR 557

Hon'ble Judges : L. Mohapatra, J; B.P. Das, J

Bench : Division Bench

Advocate : Kali Prasanna Mishra, J.K. Khandayatray and S. Dash, for the Appellant; B.K. Mohanty, N.K. Praharaj and B. Routray, D. Mohapatra, D. Mohapatra, for the Respondent

Judgement

L. Mohapatra, J.—Some of the employees of Bhubaneswar Development Authority have filed this writ application for quashing Annexure-3 in which the opposite parties 4 to 11 have been promoted from the posts of Junior Assistant to the posts of Senior Assistants and for a direction to the opposite parties 1 to 3 to follow 80-Points Model Roster and fill up the vacancies in the rank of Senior Assistants.

2. The petitioners are working as Junior Assistants under Bhubaneswar Development Authority (in short "B.D.A.") and belong to the Scheduled Caste and Scheduled Tribe community. As per the Service Condition Regulation, 1995 meant for the employees of the B.D.A., vacancies are required to be reserved and filled up by candidates belonging to the Scheduled Caste and Scheduled Tribe Community in terms of the provision of the Orissa Reservation Vacancies Act, 1975 and Rules made thereunder. According to the 80-Points Model Roster, out of the 14 vacancies available in the rank of Senior Assistants, seven vacancies are to be filled by the Scheduled Caste and Scheduled Tribe candidates. However, ignoring the 80-Points Model Roster, B.D.A. authority had given promotion to the aforesaid opposite parties to the posts of Senior Assistants and thereby violated the provisions of the Orissa Reservation

Vacancies Act (hereinafter called the "O.R.V. Act").

Petitioners 1 to 3 were initially appointed as Junior Assistants with effect from 6.2.1997, petitioners 4 to 10 were similarly appointed as Junior Assistants with effect from 9.10.1998 and petitioner No. 11 was appointed to the said post with effect from 15.10.1998. While they are continuing as such, 14 (fourteen) posts of Junior Assistants were upgraded to Senior Assistants on 26.7.1999. According to the petitioners, as per the provision of the O.R.V. Act as well as Regulation 8 of the Service Condition Regulations, 1995, out of the 14 upgraded posts, seven should have been filled up from amongst the Scheduled Caste and Scheduled Tribe Junior Assistants. But unfortunately, all the 14 posts have been filled up by the general candidates. Further, according to the petitioners, they were eligible for promotion to the posts of Senior Assistants when the posts of Junior Assistants were upgraded and their cases having been ignored, they have approached this Court in this writ application.

3. A counter affidavit has been filed by the opposite party No. 3 in which it is stated that as per the notification issued by the Government in General Administration Department dated 11.4.1994, 90 per cent of the vacancies in the rank of Senior Assistants are to be filled up by eligible Junior Assistants on being selected by the Departmental Promotion Committee. Clause-13 (2) of the said notification stipulates that no Junior Assistant shall be promoted to the rank of Senior Assistant unless he has put in at least three years of continuous service as Junior Assistant and considered fit to perform the duties of a Senior Assistant. According to the principles followed by the Government, a ratio is maintained between the Junior Assistants and Senior Assistants. Each section is headed by a Section Officer/Head Assistant and under him four Senior Assistants and two Junior Assistants work. But in the year, 1999, it was found that there were sixty six Junior Assistants in the Establishment whereas the posts of Senior Assistants were forty three. In view of the above, it was decided to upgrade some posts of Junior Assistants to that of Senior Assistants to maintain the ratio properly. Keeping the above in mind, the authority of the B.D.A. in its 70th meeting held on 26.7.1999, decided to upgrade fourteen Junior Assistants to that of Senior Assistants and accordingly, the posts were upgraded and the incumbents holding the posts continued on the basis of their seniority. The further stand taken in the counter affidavit is that when the posts were upgraded, the 80-Points Model Roster is not required to be followed and so also the provisions of the O.R.V. Act. Apart from the above, a further stand is taken in the counter affidavit saying that as on 17.12.1999 none of the petitioners had got requisite years of service to his credit for the purpose of either up-gradation or promotion and accordingly, their cases could not have been considered.

A separate counter affidavit has also been filed by the opposite parties 12 to 18 who are intervenors in this writ application as have been allowed to continue as Senior Assistants after upgradation. Almost the same stand is taken by the opposite parties 12 to 18 as that of the opposite party No. 3 and therefore, it is

not required to repeat the stand taken by the said opposite parties.

4. In the case of Union of India v. V.K. Sirothia reported in 1999 SCC 938 the question that rises for consideration is as to whether in case of up-gradation, the provision for reservation for Scheduled Castes and Scheduled Tribes is attracted or not. After examining several decisions, the Apex Court held that so far as reclassification or readjustment is concerned, no additional posts are created and if it is a case of up-gradation, the principle of reservation will not be applicable. In the case of All India Non-SC/ST Empl.Assn. (Railway) v. V.K. Agarwal and Ors., 2002 (1) SCALE 542. , the view taken is quoted below :

It appears from all the decisions so far that if as a result of reclassification or readjustment, there are no additional posts which are created and it is a case of upgradation, then the principle of reservation will not be applicable. It is on this basis that this Court on 19.11.1998 had held that reservation for SC and ST is not applicable in the upgradation of existing posts and Civil Appeal No. 1481 of 1996 and the connected matters were decided against the Union of India. The effect of this is that where the total number of posts remained unaltered, though in different scales of pay, as a result of regrouping and the effect of which may be that some of the employees who were in the scale of pay of Rs. 550-700 will go into the higher scales, it would be a case of upgradation of posts and not a case of additional vacancy or post being created to which the reservation principle would apply. It is only if in addition to the total number of existing posts some additional posts are created that in respect of those additional posts the reservation will apply, but with regard to those additional posts the dispute does not arise in the present case. The present case is restricted to all existing employees who were redistributed into different scales of pay as a result of the said upgradation.

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The Delhi High Court in the case of R.S. Chawla v. University of Delhi and Ors. reported in 1999 (5) SLR 404 also took the similar view and held as follows :

The question that should be established by the University of Delhi i.e. the Appointing Authority having control over the affairs is whether the post should be given to a Scheduled Caste candidate. Except stating that it is to be filled up by the Scheduled Caste candidate in the counter affidavit nothing has been mentioned. Though in the letter dated 27.12.1996 reference is made to 40-point roster, the University had not considered whether that could apply to a case of upgradation. The University must be aware of the difference between the promotion and upgradation. Promotion involves a candidate being appointed from the lower cadre to a higher cadre and by that process vacancy is created in the lower cadre but in the case of upgradation no vacancy is created. The person serving in the lower cadre is given benefits of the upgradation and that is what has been done by the University in this case. To such a situation, there is no question of applying of 40-point roster. That is the mistake committed by the

Deputy Registrar (Estab.) while writing a letter dated 27.12.1996. The third respondent asserts that the Deputy Registrar had taken the correct view and since the upgradation of the posting 1990 no Scheduled Caste candidate can be appointed as Senior Technical Officer and the claim of the Scheduled Caste candidate has been ignored and now the chance of the third respondent sought to be defeated by the claim of the petitioner. According to the learned Counsel for the third respondent in law the claim of the third respondent alone shall be considered. The learned Counsel for the respondent referred to the judgments of the Supreme Court in T. Devadasan Vs. The Union of India (UOI) and Another, and S.S. Sharma and Others Vs. Union of India (UOI) and Others, . Having regard to the circumstances in which the two posts have been upgraded by the University in 1990 and the qualification of the third respondent the claim of the third respondent cannot at all be accepted. The Supreme Court in Post Graduate Institute of Medical Education and Research, Chandigarh Vs. Faculty Association and Others, , had considered the scope of the 40-point roster. However, when we are concerned with the case of upgradation the ratio decidendi in the judgments of the Supreme Court would not at all apply and, therefore, I am of the view that it is not necessary to dilate of the facts and circumstances under which those cases had arisen, the petitioner alone is entitled to be considered for the post of Technical Officer.

5. Learned Counsel for the petitioners has not cited any decision either of the Apex Court or any other High Court taking a contrary view. In view of the above decision of the Apex Court, it is clear that in case of upgradation of posts, no vacancies are created and, therefore the principle of reservation will not be applicable. Faced with such situation, the learned Counsel for the petitioners submitted that the order impugned before this Court clearly states that the opposite parties were promoted to the posts of Senior Assistants from Junior Assistants and it was not up-gradation as claimed by the opposite parties. In view of such a stand taken by the petitioners, the Court directed the opposite party No. 3 to produce the records and accordingly the records were produced.

The learned Counsel for the petitioners drew attention of the Court to Annexure-3, which is impugned before this Court, and referring to the said Annexure, it was submitted that the opposite parties were promoted from the posts of Junior Assistants to Senior Assistants. Though the term "promotion" is used in the order in Annexure-3, to decide as to whether it was promotion or upgradation, it is necessary to look into a little background under which a decision was taken to increase the strength in the rank of Senior Assistants and fill up the same either by promotion or upgrading certain posts of Junior Assistants.

As per pattern adopted in different Departments in the Orissa Secretariat the ratio of Section Officer, Senior Assistant and Junior Assistant will be 1:4:2. So far as the B.D.A. is concerned, there were 14 (fourteen) posts of Section Officers, 46 (forty six) Senior Assistants and 44 (forty four) Junior Assistants. As per the

yardstick, the requirement was 15 (fifteen) posts of Section Officers, 60 (sixty) Senior Assistants and 30 (thirty) Junior Assistants. In view of the above, to maintain the ratio, the authority in its 70th meeting approved creation of two posts of Section Officer Level-II and 14 posts of Senior Assistants by upgrading the equal number of posts in their respective lower grades. Though such a decision was taken by the Board, in the office note it was mentioned that in view of increase in the above strength of Senior Assistants promotions have to be given from Junior Assistants cadre and it was suggested that reservation policy should-be followed. On the basis of the said note, the matter was processed and ultimately names were sent to the Departmental Promotion Committee for recommendation. The Board having decided to upgrade fourteen posts of Junior Assistants to that of Senior Assistants, there was no necessity to put forth such note and create a confusion as to whether it will be promotion or upgradation. It goes without saying that when the strength of a particular cadre is increased, the posts are to be created and such additional posts are to be filled up by promotion or direct recruitment as the rules provide for. But when there is no creation of posts the only alternative is to upgrade certain posts from the feeder cadre to maintain the ratio. Undisputedly in the present case the strength of Senior Assistants had not been increased by creation of posts. Since there was no creation of posts, the question of promotion does not arise. It is obvious that fourteen posts of Junior Assistants were upgraded to Senior Assistants and the up-gradation was done on the basis of seniority of officers in the rank of Junior Assistants. In view of the discussions made earlier, in case of upgradation, vacancies are not created and, therefore reservation policy is not required to be followed. We are, therefore of the view that though the matter was processed as if it was a promotion, as a matter of fact, there was no such decision of the Board to create additional posts in the rank of Senior Assistants and fill up by way of promotion. Rather, the decision was to upgrade fourteen posts of Junior Assistants to Senior Assistants. Merely because there was a mistake in the office note treating the same to be promotion and sending the records for recommendation to D.P.C. will not make it promotion since there was no creation of additional posts in the rank of Senior Assistants.

6. In view of the reasons stated above, this is a case of upgradation and not promotion. We, therefore do not find any illegality in the action of the opposite parties specifically the B.D.A. authorities in not following the reservation policy while upgrading the posts from Junior Assistants to Senior Assistants.

7. It was contended by the learned Counsel for the petitioners that if the posts are upgraded and all the posts are held by the Officers belonging to general category, there will be again an imbalance in the rank of Senior Assistants. This submission made by the learned Counsel for the petitioners deserves consideration. In this regard, we are of the opinion that while giving further promotion from the posts of Senior Assistants, the vacancy created in the said rank should be filled up in such a manner that the number of posts which should have been made available to the reserved category should be filled up by

promoting officers belonging to the reserve category in the rank of Junior Assistants.

With the above observations, the writ application is disposed of

B.P. Das, J.

8. I agree.