

(2001) 01 OHC CK 0005
In the Orissa High Court
Case No : O.J.C. No. 2256 of 1999

Parthadev Ray

APPELLANT

Vs

The State of Orissa and Others

RESPONDENT

Date of Decision : 10-01-2001

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2001) 92 CLT 71 : (2001) 1 OLR 145

Hon'ble Judges : Pradipta Ray, J;A.S. Naidu, J

Bench : Division Bench

Advocate : J.M. Mohanty, for the Appellant; D. Das, A.G.A. and D.R. Patnaik, for the Respondent

Final Decision : Allowed

Judgement

A. S. Naidu, J.—The" petitioner challenges the order dated 14-12-98 (Annexure-3) passed by the Orissa Administrative Tribunal in Original Application No. 3057(c) of 1994.

2. The dispute centres round the process of selection to the post of Fishery Production Officer in the establishment of the Director of Fisheries, Orissa. Admittedly, the post of Production Officer is an ex-cadre post. The said post fell vacant with effect from 30-6-90 due to superannuation of the incumbent who was holding the post and opposite party No. 3 was kept in charge. In the year 1994, opposite party No. 3 filed O. A. No. 3057(C) of 1994 before the State Administrative Tribunal praying for issuance of a direction to regularise him in the post with effect from 1-7-99 i. e. the date from which he is continuing as in-charge, with all consequential benefits. It was alleged in the Original Application that as the Government, without regularising the services of the applicant (opposite party No. 3), directed to fill up the post through selection and invited options, he was constrained to move the Tribunal.

3. The State Government filed a counter before the Tribunal repudiating the

claims of the Applicant. It was averred that there were ample adverse remarks against the applicant (opp. party No. 3) and his performance in the post was never satisfactory. It is stated that the post of Fishery Production Officer being a Gazetted Post, the same has to be filled up by Government in consultation with the Public Service Commission, In view of the fact that there were no Recruitment Rules nor any Resolution or Circular prescribing the eligibility criteria for the post, the General Administration Department directed to frame a set of rules prescribing the guide-lines for filling up the post. It was also averred that the case of the applicant was duly considered by the Departmental Promotion Committee more than once, but he was found unsuitable for the post.

4. The present petitioner, who was not impleaded before the Tribunal, filed a petition for intervention and the same being allowed, he was impleaded as opposite party No. 3 in the original application. He also filed a counter stating that he being better qualified having Post-Graduate Degree in Microbiology from the University of Baroda, he is more suitable for the post of Fishery Production Officer than the applicant i. e. opposite party No. 3.

5. The applicant (opposite party No. 3) mainly prayed . for two reliefs before the Tribunal i. e. (i) fixation of his salary in the scale of pay of Fishery Production Officer and payment of the same to him on the principle of equal pay for equal work as he was discharging the duties attached to the post since July, 1990; and (ii) since his services have been utilised in the post of Fishery Production Officer for so many years and his qualification is not less than that of the last regular incumbent Shri R. Ch. Roy, he should be regularly appointed in the post of Fishery Production Officer.

6. The Tribunal, after hearing the parties, disposed of the Original Application by directing that the applicant is entitled to the minimum scale attached to the post of Fishery Production Officer from the date on which he was put in-charge. However, he shall not be entitled to, get increments in those scales. The Tribunal directed the opposite parties 1 and 2 to work-out the differential salary and pay the same within, six months from the date of receipt of the order. It is pertinent to mention here that the State Government has not challenged the said portion of the order before this Court.

7. So far as, the second claim of the applicant is concerned, the Tribunal held that the post should be filled up according to the eligibility criteria in vogue at the time when the vacancy occurred i. e. the 13th June, 1990 and directed to fill up the post taking into consideration the case of the applicant along with others who satisfied the criteria as on 30-6-1990 i.e. the date on which Shri R. Ch. Roy retired. The said order of the Tribunal is impugned in the present writ application by the petitioner who was opp. party No. 3 before the Tribunal.

8. Bereft of all unnecessary details, the main contention of the petitioner is that the Tribunal erred in law in holding that the post of Fishery Production Officer should be filled up taking into consideration the eligibility criteria which was

existing on the date on which the post fell vacant. It is submitted that according to the settled position of law, the eligibility criteria fixed on the date on which the process for recruitment started should guide the field. It is further submitted that the case of the opp. party No. 3 was considered along with others and he was found unfit and this fact was not kept in mind by the Tribunal while deciding the Original Application.

9. After receiving notice, counter-affidavit was filed by the State Government reiterating the averments made before the Tribunal. Relying upon a letter dated 24-5-79 (Annexure-E/1), it is averred that the post of Fishery Production Officer required a literary flair and the candidate should have more than average proficiency in Oriya language, he should have put in more than 20 years of regular service in the Directorate and should be drawing pay in the scale of Rs. 400-620/- and above, he should be below 50 years of age and possess good command over various departmental activities viz. radio, press, films as well as organising capacity. It is submitted that taking into consideration all these conditions, Shri R. Ch. Roy was selected and appointed as Fishery Production Officer in August, 1980. After retirement of Shri R. Ch. Roy, steps have been taken for filling up the post and the case of all eligible employees were considered. The Government in Fisheries & A. R. D. Department by its letter dated 14-5-97 prescribed certain criteria for selection and appointment of a suitable person from amongst persons holding the posts of (i) Assistant Production Officer, (ii) Section Officer, Level-I & II, (iii) Assistant Law Officer and (iv) others posts in the Directorate of Fisheries, Orissa, catrying the pay scales identical to the posts mentioned at (i) to (iii). A copy of the letter dated 14-5-97 is annexed as Annexure-B/1 to the counter filed by the Government.

10. In consonance with the said letter, a notice was issued on the 31st December, 1997 (Annexure-1) prescribing the selection criteria which are as follows :

"(i) Candidate must be a graduate and must have completed at least 20 years of regular service under Fisheries Directorate.

(ii) He/She must have sufficient knowledge in Oriya Literature. Candidate having contribution to Departmental Publicity in Television, Radio, Press and Films etc. will be. given preference,

(iii) While filling up the vacancy the provision laid down in the O. R. V. Act, 1975 and rules framed thereunder and the provisions as per O. C. S. (Zone of Consideration for Promotion) Rule-1988 shall be followed.

(iv) Person selected for the post shall retain his lien in his original post."

It is submitted by the learned Additional Government Advocate that the case of opposite party No. 3 was considered by the Departmental Promotion Committee along with others. However, neither he nor any other employee was found suitable. The Government thereafter thought it just and proper to relax the

completed years of service from 20 to 18 keeping all other criteria as the same so as to enlarge the zone of consideration. This decision was taken with a view to give opportunity to other candidates who were better qualified and satisfied all other eligibility criteria. Accordingly, another notice was issued inviting options on 3rd August, 98 (Annexure-8).

IT was reiterated that the case of opposite party No. 3 was also considered along with other eligible candidates by the Departmental Promotion Committee on all the occasions, but he was not found suitable for the post.

Opposite party No. 3 appeared and filed a counter-affidavit supporting the judgment passed by the Tribunal and emphatically submitted that the eligibility criteria which was existing on the date on which the post fell vacant should not have been changed subsequently. It is also alleged that in order to show favour to the petitioner, the Government changed, the eligibility criteria.

11. We have carefully considered the rival submissions advanced by all the parties. We have also perused the pleadings of the parties as well as different orders passed by the Director of Fisheries and the State Government which are annexed to the writ application and counter-affidavits. We are conscious of the fact that, while exercising power under Article 227 of the Constitution of India, this Court cannot sit on appeal over the findings recorded by the Orissa Administrative Tribunal. Law is no more res-integra that, if on perusal of the impugned order this Court comes to a conclusion that the Tribunal has committed a manifest error in law and has ignored to take into consideration certain relevant materials, or has taken into consideration materials which are not sustainable or, if this Court comes to the conclusion that on the basis of materials it is not possible for a reasonable man to come to a conclusion arrived by the Tribunal, then this Court will be fully justified in interfering with the finding of the Tribunal (see 2000(II) O. L. R. (S. C.) 684, Shama Prasant Raje v. Ganpatra and others).

12. Keeping in view the aforesaid principles of law after hearing the learned counsel for the parties and on perusal of the pleadings, we thought it just and proper to call upon the State Government to produce the relevant file, which was produced before us by the learned Additional Government Advocate. Scrutiny of the file reveals that, after retirement of Shri R. Ch. Roy, who was holding the post of Fishery Production Officer, the Director of Fisheries by letter No. 3036-E-11-ATP-13/-91 dated 17-11-91 suggested the name of opposite party No. 3, who was holding the substantial post of Assistant Production Officer .and three others who were holding the posts of Publicity Literary Assistant to the Government for consideration for promotion to the post of Fishery Production Officer along with their bio-datas. In view of the fact that there were no statutory rules prescribing the procedure, guide-line and the eligibility criteria, the Government on 14-5-97 prescribed the eligibility criteria for selection and appointment of suitable persons working in the Directorate. The said letter is annexed as Annexure-B/1 to the counter-affidavit. The conditions fixed under

Annexure-B/1 are almost identical to the conditions/guide-lines adopted prior to 1990, as would be evident from a perusal of Annexure-E/1.

13. In consonance with the decision, the names of four employees including the name of: opposite party No. 3 and the petitioner were forwarded to the Government on 20th June, 1997 vide Annexure-A/1. In the said letter it was mentioned that out of the four employees, only Shri Krushna Chandra Barik, Assistant Law Officer has completed 20 years of regular service. Shri Patnaik, Advocate for opposite party No. 3 vehemently argued that there was an apparent error on the face of the record inasmuch as opposite party No. 3 whose name finds place at serial 3 was appointed in the year 1965 as Junior Clerk and had completed 20 years of regular service in the Fishery Directorate and thus fulfilled the criteria fixed by the Government. To decide this controversy we referred to the file submitted by the learned Additional Government Advocate.

It appears that a Departmental Promotion Committee was convened on 11-6-98 for filling up the post of Fishery Production Officer. A copy of the resolution passed by the Departmental Promotion Committee is available in the file at page 177/c. It clearly reveals that the Departmental Promotion Committee considered the case of five employees and rejected the case of three employees who did not possess 20 years of completed regular service under the Fishery Directorate. Thereafter, the Committee considered the cases of two eligible candidates i.e. Shri Padma Charan Panda (opp. party No. 3) and Shri Krushna Chandra Barik. After perusal of the C. C. Rs. and other relevant materials, the Committee felt that the candidates for an important post like Fishery Production Officer of the Directorate should have creative faculties, academic back-ground etc. On consideration of the materials available, the Departmental Promotion Committee found that both the employees did not possess or satisfy the required text or criteria. The Committee, therefore, after conscious consideration found opposite party No. 3 and Shri Krushna Chandra Barik not suitable for the post of Fishery Production Officer. The submissions made by Shri Patnaik, Advocate for opposite party No. 3, are thus not correct on facts revealed from the original file.

14. The Government, thereafter, decided to relax the length of regular service prescribed vide para 2(1) of the department letter dated 14-5-97 (Annexure-/B1) so as to enlarge the span of consideration. Accordingly the length of regular service was reduced to 18 years from 20 years vide letter dated 21-7-98 (Annexure-D/1). Thereafter, a revised notice was issued on 3rd August, 1998 (Annexure-8,).

In consonance with the revised notice, Annexure-8 options were invited and once again a Departmental Promotion Committee was convened for filling up the post of Fishery Production Officer in the Directorate of Fisheries. The memorandum appearing at page 187/c of the file reveals that the names of five employees were sponsored for the said post. On scrutiny of the applications of the five applicants on the basis of the norms fixed, only three applicants were found eligible for consideration i. e. (i) Shri Padma Charan Panda (opposite party No.

3), (ii) Shri Krushna Chandta Barik, Assistant Law Officer and (iii) Shri Parthadev Roy (petitioner). The cases of the aforesaid three persons along with their C. C. Rs. and other materials were placed before the Departmental Promotion Committee held on 17-10-98. For the sake of brevity, the resolution of the Committee is quoted herein below from the file.

"On scrutiny of the applications Sl. 1 to 3 were only found eligible for consideration as per the stipulations already referred to. On detailed examination of the CCRs for five years, publicity technical and creative writings and academic background, Shri Parthadev Ray, D. S. F. was found suitable for the post and D.P.C. recommends his selection as Production Officer."

Thus, it is clear from the records that the case of the opposite party No. 3 was all along considered by the successive Departmental Promotion Committees along with other eligible employees, but he was found not suitable for the post of Fishery Production Officer.

15. Law is well settled that an employee cannot claim promotion as a matter of right. However, if he satisfies the eligibility criteria, he has a right to be considered along with others. Perusal of the file clearly reveals that the case of Shri Padma Charan Panda (opposite party 3) was considered on all occasions when the Departmental Promotion Committee was convened for filling up the post of Fishery Production Officer but he was found not suitable for the said post.

16. Admittedly the post of Fishery Production Officer, is an ex-cadre Gazetted post and there were neither any recruitment rules nor resolutions, or circular prescribing the eligibility criteria for filling up the post. The Director's letter dated 24th May, 1979 (Annexure-E/1) clearly stipulated that the post should be filled up from amongst non-gazetted employees having more than 20 years of regular service in the Directorate by way of promotion. It further reveals that the post required a literary flair and the candidate should have more than average proficiency in Oriya language as well as good command over various departmental activities such as radio, press, films and organising capacity. Thus an employee who possesses 20 years of regular service only may not be found eligible for the said post, if he does not satisfy other requirements/criteria.

17. The view taken by the Tribunal that the eligibility requirement for filling up a post always should be the date on which the post fell vacant is no more a good law, in view of catena of decisions of the Apex Court in the cases of Ashok Kumar Sharma and Others Vs. Chander Shekhar and Another, , A.P. Public Service Commission, Hyderabad and Another Vs. B. Sarat Chandra and Others, ; District Collector and Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram and Another Vs. M. Tripura Sundari Devi, ; Mrs. Rekha Chaturvedi (Smt) Vs. University of Rajasthan and Others, ; Dr. M.V. Nair Vs. Union of India (UOI) and Others, ; U.P. Public Service Commission U.P., Allahabad and Another Vs. Alpna, and Bhupinderpal Singh and Others Vs. State of Punjab and Others, the settled position of law is (i) cut-off date by reference to which the eligibility

requirement must be satisfied by the candidate seeking a public employment is the date appointed by the relevant service rules and if there be no cut-off date appointed by the rules, then such date as may be appointed for the purpose in the advertisement calling for the applications and (ii) that if there be no such date appointed then the eligibility criteria shall be applied by reference to the last date appointed by which the applications have to be received by the competent authority.

The decisions cited by Shri Patnaik are thus distinguishable. In most of the cases as the facts reveal there were statutory rules guiding the field and stipulating the cut-off date fixing the eligibility requirement,

Shri Patnaik has filed xerox copies of two decisions i. e. *Rajender Gandhi, Deputy Accountant v. Union of India* and Ors. 1984(1) S. L. J. 437 and another unreported judgment of this Court in the case of *Gayadhar Sahoo v. State of Orissa* and Ors., (O. J. C. No. 811 of 1990). In both the aforesaid cases, as the facts reveal, a recruitment Rule was in vogue when the post fell vacant/process of selection commenced. Subsequently, however, the said recruitment rule underwent amendment. The Punjab & Haryana High Court as well as this Court relying upon a decision of the Apex Court in the case of *Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others*, held that the vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules. The said principle is not applicable to the case at hand, inasmuch as admittedly there were no recruitment rules for filling up the post of Fishery Production Officer and the ratio enunciated in the case of *Bhupenderpal Singh* (supra) would be squarely applicable.

The contentions raised by Shri Patnaik are thus not acceptable.

18. In the present case, admittedly there being no recruitment rules nor regulations prescribing any criteria, the eligibility criteria fixed by the Government as on the date on which options were invited i. e. the process of recruitment commenced should be taken to be the required eligibility criteria.

Thus, the view taken by the Tribunal that in the absence of recruitment rules and regulations, the criteria which was on vogue on the day when the post fell vacant should govern the field, would be looking at the matter" from a narrow and wrong angle. In the absence of any recruitment rules, when a policy is declared by the State, keeping in view the requirements and changed circumstances, the eligibility criteria fixed for filling up the post on the date when the recruitment process commenced had to be sacrosanctly followed.

19. Be that as it may, in the present case, there are certain special features which need to be considered for imparting justice by invoking the jurisdiction under Article 227 of the Constitution of India.

Law is well settled that the administrative authority has a right to choose the best talent available for filling up any post in furtherance of public interest. For

the said purpose all the employees who otherwise satisfy the eligibility criteria had to be considered. The decision taken by the Government can be interfered with only on the ground of unreasonableness i. e. if the decision is so unreasonable that no sensible person would have arrived at such a decision. If reasonable procedure has been followed, the decision should "not be interfered with except on the ground of unreasonableness.

20. In the present case, as has been stated earlier, opposite party No. 3 has no right to the post of Fishery Production Officer, However, he has a right to be considered for the post along with others. Perusal of the file clearly reveals that the case of opposite party No. 3 was considered along with all other eligible employees time and again. Further, the authorities after being satisfied that the opposite party No. 3 and others are not suitable for the post and there are no other eligible employees satisfying the eligibility criteria, decided to enlarge the zone of consideration. In the absence of any recruitment rules, regulations or guidelines, the authorities were empowered to stipulate the eligibility criteria before commencement of the process of selection.

21. In that view of the matter, the decision of the Tribunal so far as it relates to the direction to the authorities to once again consider the case of all the eligible employees restricting the eligibility criteria as it stood on 30-6-90 is not sustainable and the same is hereby set aside. It appears, the Departmental Promotion Committee has already considered the case of the eligible employees along with opposite party No. 3 in accordance with the notice dated 3rd August, 1998 (Annexure-8). The authorities are free to appoint whomsoever is found most talented and suitable by the Departmental Promotion Committee.

In the result, the writ petition is allowed. However, there will be no cost.

Pradipta Ray, J.

22. I agree.

23. Writ petition allowed.