

(2011) 07 OHC CK 0027

In the Orissa High Court

Case No : Writ Petition (C) No. 11096 of 2010

Pradeep Kumar Bai

APPELLANT

Vs

District Judge and Another

RESPONDENT

Date of Decision : 19-07-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 21, 226

Citation : (2011) 2 OLR 419

Hon'ble Judges : V. Gopala Gowda, C.J;B.N. Mahapatra, J

Bench : Division Bench

Final Decision : Allowed

Judgement

B.N. Mahapatra, J.—In the present writ petition challenge has been made to the order dated 07.06.2010 under Annexure-5 passed by the learned District Judge, Koraput by which the service of the Petitioner has been terminated.

2. The case of the Petitioner in a nutshell is that opposite party No. 1-District Judge, Koraput vide its advertisement dated 14.08.1992 invited applications for filling up of the posts of Junior Clerk, Junior Typist and Junior Stenographers. The Petitioner applied for the post of Junior Clerk. He appeared in the written examination as well as viva-voice test. Thereafter, a selection list of Junior Clerks was published on 13.10.1993 comprising of 119 candidates, wherein the Petitioner found placed at serial No. 25. Pursuant to the said selection list, 19 candidates were appointed vide order dated 02.11.1993. The Petitioner's grievance is that one Sabita Kumari Patri, whose serial No. 22, was appointed on ladies quota out of turn even if the said advertisement was silent about any reservation for ladies. Similarly one M. Srinivas Rao whose serial number was 61 got appointment on 05.01.1995 on physically handicapped quota pursuant to the order of this Court dated 02.11.1993 passed in O.J.C. No. 9860 of 1993. Another person, namely, Nimain Charan Biswal whose serial number being 14 also got appointment on 04.09.1997 pursuant to the order of this Court dated 19.08.1997 passed in O.J.C. No. 6987 of 1995 wherein this Court directed

opposite party No. 1 to offer appointment to Sri Biswal by relaxing his age as he was over-aged at the time of appointment.

3. The Petitioner approached this Court in O.J.C. No. 2466 of 1995 and this Court vide order dated 10.08.1995, disposed of the said writ petition with a direction that no fresh general candidate will be appointed to the post of Junior Clerk till the present list of October, 1993 is exhausted. It was further directed that the order given in the list will be followed while issuing appointment orders. Pursuant to the said order, appointment was given to the candidates. The Petitioner waited till appointment of the candidate having serial No. 24 was given on 08.10.1996. Since no appointment order was issued to the Petitioner, he filed a Misc. Case No. 3767 of 1997 arising out of O.J.C. No. 2466 of 1995 before this Court for his appointment. This Court vide order dated 16.07.1997 disposed of the said Misc. Case observing that since the candidate occupying 24th position in the select list has got appointment, the next vacancy would obviously go to the Petitioner.

4. On coming to know that there was still regular vacancy for the post of Junior Clerk, but the opposite parties were intentionally not issuing any appointment order to him, the Petitioner filed a fresh writ petition bearing O.J.C. No. 17131 of 1997 for his appointment, which was disposed of by this Court vide order dated 10.09.1998, directing opposite party No. 1 to issue appointment order in favour of the Petitioner for the post of Junior Clerk in the regular vacancy. Thereafter, the order of appointment was issued in favour of the Petitioner on 25.09.1998, consequently, his service book was opened as he was holding the permanent post. The G.P.F. A/c Number of the Petitioner is 88943 A.J. (O) & G.I.C. No. 9301, which are reflected in the service book.

5. While the matter stood thus, opposite party No. 1 filed Civil Review No. 40 of 1999 for modification of the order dated 10.08.1995 passed in O.J.C. No. 2466 of 1995 as there was specific order that no fresh general candidates would be appointed to the post of Junior Clerk till the list of October, 1993 is exhausted. This Court allowed the said review petition and set aside the order dated 10.08.1995 passed in O.J.C. No. 2466 of 1995 and reopened the writ petition for hearing afresh. On the basis of the order of the Civil Review No. 40 of 1999, O.J.C. No. 2466 of 1995 was referred to the Full Bench comprising of three Hon"ble Judges, who heard the matter along with other similar pending writ petitions filed by other candidates of the selection list of the year 1993 and have not got their appointment. By a common judgment, this Court vide order dated 29.07.2009 held that the selection list can not remain in force on the expiry of one year. The life of the select list is one year from the date of its publication according to the rules and on this ground, the writ petitions were dismissed.

6. After obtaining a copy of the judgment dated 29.07.2009, opposite party No. 1 issued a letter to the Registrar (General) of this Court vide letter No. 99 dated 06.01.2010 and sought for necessary instructions regarding follow up action to be taken at his end in the matter of appointment of the Petitioner-Pradeep Kumar Bai and 8 others to the post of Junior Clerks beyond one year validity

period of the select list. In reply to the said letter, Deputy Registrar (Administration & Protocol) of this Court intimated to opposite party No. 1 vide letter dated 07.04.2010 "to act in accordance with the final order of this Court passed in the concerned writ matters". Consequently, opposite party No. 1 passed the impugned order on 07.06.2010. Hence, the present writ petition has been filed with a prayer to quash the said impugned order.

7. Mr. Manas Mohapatra, learned Counsel for the Petitioner vehemently argued that the order dated 10.09.1998 passed in O.J.C. No. 17131 of 1997, on the basis of which the Petitioner has got appointment was neither reopened nor dismissed. The finding of opposite party No. 1 that the order passed in O.J.C. No. 17131 of 1997 is only to implement the earlier order passed in O.J.C. No. 2466 of 1995 is not correct as the said writ petition was filed on fresh cause of action. The Petitioner filed O.J.C. No. 2466 of 1995 for his appointment but this Court vide order dated 10.08.1995 issued a general order that No. general candidate will be appointed till the present selection list is exhausted. In the common judgment passed by the Full Bench the principle has been decided that the select list will be valid for one year as per Rule 6 of the Orissa District & Sub-ordinate Courts" Ministerial Services) Rules, 1969. Therefore, the same would be followed w.e.f. 29.07.2009 from the date of the order as in the said judgment it is not stated that it has retrospective effect. Since no specific order of appointment was issued in favour of the Petitioner or any specific relief has been granted to the Petitioner as was sought for, the dismissal of O.J.C. No. 2466 of 1997 is No. way related to the Petitioner so far his termination is concerned.

8. Further, though 9 persons have been appointed after expiry of the validity of one year of the select list, only the Petitioner has been victimized in this regard. No reasonable opportunity of hearing was granted to the Petitioner before passing of the termination order for which principle of natural justice has been violated. The Petitioner was a government servant and was holding a permanent post. No service rule has been adopted by opposite party No. 1 while terminating him from service. The Petitioner has served for 12 years and at this stage he is over aged and there is no scope to get a job else where. The Petitioner is residing in his service place having family members i.e., his wife, two minor children and aged mother, who depend upon the Petitioner. Opposite party No. 1 has discriminated the Petitioner by issuing termination order and the action of opposite party No. 1 is illegal, arbitrary and violative under Articles 14, 16 and 21 of the Constitution.

9. Per contra, learned Government Advocate appearing on behalf of opposite parties submitted that the Petitioner had been appointed on temporary basis against the regular vacancy. He has not been confirmed in the post he held. In the appointment order dated 25.09.1998 under Anenxure-1 passed by the learned District Judge, Koraput, Jeypore, it has been mentioned that the appointment of the Petitioner was purely temporary and terminable at any time without prior notice and without assigning any reasons therefor. The termination

orders passed against the Petitioner is in accordance with the directions issued by this Court in the common judgment dated 29.07.2009 passed in O.J.C. No. 2466 of 1995. The judgment dated 29.07.2009 passed by this Court in O.J.C. No. 2466 of 1995 is a common judgment in respect of OJC Nos. 2466 of 1995, 1818 of 1997, 13940 and 15502 of 1998, 56/1228/1447/99, 1473 and 17711 of 2001, 1645, 2722 of 2002 and W.P.(C) No. 70 of 2002 under Article 226 of the Constitution. The order passed in O.J.C. No. 17131 of 1997 directing opposite party No. 1 to appoint the Petitioner-Pradeep Kumar Bai being only to implement the earlier order passed in O.J.C. No. 2466 of 1995 and Misc. Case No. 3797 of 1997, the said order is deemed to be an order directly in connection with O.J.C. No. 2466 of 1995. Thus, in view of the above, it was felt necessary to terminate the present Petitioner from Government service with immediate effect. Accordingly, the impugned order dated 07.06.2010 under Annexure-5 has been passed terminating the service of the present Petitioner. Therefore, the order of termination was neither illegal nor in violation of the principles of natural justice.

10. Learned Government Advocate further submitted that out of 8 persons, 5 persons have got appointment by the learned District Judge pursuant to the orders of this Court but their orders in those writ petitions were not set aside. So far as the case of remaining 3 persons are concerned, they have been appointed beyond one year validity of the select list by the order of the District Judge after the order dated 10.08.1995 in O.J.C. No. 2466 of 1995 was passed. The said 3 persons were not parties in O.J.C. No. 2466 of 1995 or in the connected writ petitions. Therefore, services of 8 persons were not terminated though they were given appointment after expiry of one year from the date of publication of the selection list.

11. On the rival contention of the parties, the only question falls for consideration by this Court is as to whether in the facts and circumstances of the case, opposite party No. 1-District Judge, Koraput, Jeypore is justified in terminating the service of the present Petitioner under (Annexure-5)?

12. To deal with the above question, it is necessary to note here some facts, which are not in dispute. Opposite party No. 1 vide advertisement dated 14.08.1992 invited application for filling up the posts of Junior Clerks, Junior Typists and Junior Stenographers. The Petitioner applied for the post of Junior Clerk. He appeared in the written-examination as well as viva-voice Test. As per the selection list published on 13.10.1993, there were 119 candidates, wherein the Petitioner's name finds place at serial No. 25. Nineteen (19) candidates were appointed from the said merit list vide order dated 02.11.1993. The Petitioner approached this Court in O.J.C. No. 2466 of 1995 for his appointment to the post of Junior Clerk on the ground that his juniors have got appointment. This Court vide order dated 10.08.1995 disposed of the said writ petition with a direction that no fresh general candidates will be appointed in the post of Junior Clerk till the present list of October, 1993 is exhausted. This Court further directed that the order given in the list will be followed while issuing appointment orders.

Pursuant to the said order, appointments were given to the candidates. Since the selectee against serial No. 24 got appointment on 08.10.1996 and no appointment order was issued to the Petitioner, the Petitioner filed a Misc. Case No. 3767 of 1997 arising out of O.J.C. No. 2466 of 1995 for his appointment. This Court vide order dated 16.07.1997 disposed of the said Misc. Case observing that since the candidate occupying 24th position has got appointment, the next vacancy would obviously go to the Petitioner. When the Petitioner noticed that opposite parties are not issuing any appointment order to him though regular vacancy for the post of Junior Clerk was available, he again approached this Court in O.J.C. No. 17131 of 1997 for his appointment. This Court vide order dated 10.09.1998 directed opposite party No. 1 to issue appointment order in favour of the Petitioner, who stands at serial No. 25 as the candidate at serial No. 24 has already got appointment. Pursuant to the said order, opposite party No. 1 issued appointment order on 25.09.1998 in favour of the Petitioner on temporary basis against the regular vacancy of the post of Junior Clerk.

13. While the matter stood thus, opposite party No. 1 filed Civil Review No. 40 of 1999 to modify the order dated 10.08.1995 passed in O.J.C. No. 2466 of 1995 as there was specific order that no fresh general candidates will be appointed to the post of Junior Clerk till the list of October, 1993 is exhausted. As there were 119 candidates in the merit list, opposite party No. 1 found it difficult to give appointment to all the candidates as in the meantime some candidates are over aged and some are otherwise not suitable for government job. Further case of opposite party No. 1 is that as per Rule 6(5) of the Recruitment Rules, 1969 when a vacancy occurs after the list of successful candidate is exhausted and before the announcement of the result of the next examination, such vacancy may be filled up by the successful candidate of the previous years provided that the age does not exceed the maximum limit laid down under Rule 6(3) of the said Rules. According to opposite party No. 1, under the said Rule the learned District Judge shall prepare a list of successful candidate in order of merit and appoint candidates during the period of one year from the date of publication of the result of the examination. The Civil Review No. 40 of 1999 was allowed vide order dated 18.09.2002 setting aside the order dated 10.08.1995 passed in O.J.C. No. 2466 of 1995. On the basis of the order passed in Review, O.J.C. No. 2466 of 1995 was referred to the Full Bench along with other similar 11 pending writ petitions filed by other candidates of the select list of the year 1993 who have not got their appointment. The Full Bench of this Court by a common judgment dated 29.07.2009 held that the select list cannot remain in force on the expiry of one year. The life of the select list is one year from the date of its publication. Though O.J.C. No. 2466 of 1995 was dismissed, the order dated 10.09.1998 passed in O.J.C. No. 17131 of 1997 pursuant to which appointment was given to the Petitioner on 25.09.1998 was neither recalled nor set aside.

14. One of the grounds of challenge of the Petitioner that shocks our judicial conscience is that 9 persons have been appointed as Junior Clerks beyond expiry

of one year of the select list including the Petitioner but the Petitioner has been picked up on the basis of the order of the Full Bench, which amounts to sheer discrimination and is hit by Article 14 of the Constitution. In reply learned Government Advocate submitted that out of 8 persons, 5 persons namely, Bipin Bihari Nayak, Bijaya Kumar Mohapatra (since dead), Nimain Charan Biswal, Bibhuti Bhusan Panda and M. Srinivas Rao (Orthopedically handicapped) have got appointment by the learned District Judge pursuant to the orders of this Court and those orders have not been set aside in any subsequent writ or in the common judgment dated 29.07.2009. Those persons were not parties to O.J.C. No. 2466 of 1995 or other connected writ petitions. The judgment in that writ petition is not binding on them. Therefore, their appointments have not been declared invalid by the higher competent authority or in any legal proceedings. So far as the case of remaining 3 persons, namely, Kanhu Charan Nayak, Lingaraj Padhy and A. Ramesh Kumar is concerned, they have been appointed beyond one year validity of the select list by the order of the District Judge after the order dated 10.08.1998 was passed in O.J.C. No. 2466 of 1995 in which this Court issued directions not to appoint any general fresh candidate for the post of Junior Clerk till the list of October, 1993 is exhausted. The said 3 persons were not parties in O.J.C. No. 2466 of 1995 or in the connected writ petition. Thus, it was argued that the opposite parties are justified in not terminating the services of other 8 persons, who were given appointment after expiry of one year of the select list.

15. There is no quarrel over the legal proposition that according to the Rule the select list cannot remain in force after expiry of one year, for the life of the select list is one year from the date of publication. There is also no dispute that the Petitioner was given appointment pursuant to the order of this Court and he had served for 12 years continuously at the time his service was terminated. On the date of termination of his service he was over aged and there is no scope for him to get any government job elsewhere to maintain his family.

16. It needs to be noted that the State Government moved for review only in case of Petitioner but they did not choose to do so in case of others who had been given appointment after expiry of one year from the publication of the select list pursuant to the order of this Court. No reason has been assigned as to why the State did not do so. It is interesting to note that in case of some employees, who had been given appointment like the Petitioner in this case, no action has been taken against them pursuant to the common judgment dated 29.07.2009 passed by this Court. Certainly in their case the appointment would not be on the basis of any order passed by this Court. The State cannot be permitted to take advantage of its own lapse. Though there is no concept of negative equality yet State cannot adopt "pick and choose" method without indicating any valid basis therefor and terminate the service of the Petitioner.

17. In the peculiar facts and circumstances of the case and taking note of undisputed position that the Petitioner has already served for more than a

decade on the basis of earlier order of this Court and that State is not taking any action against other similarly situated persons (whose appointment were made after expiry of one year from the publication of the Select list), we quash the impugned order of termination dated 07.06.2010 under Annexure-5. We, therefore, direct the opposite party No. 1-District Judge, Koraput at Jeypore to allow the Petitioner to work in the post he last held before termination with immediate effect. Since the Petitioner was appointed against the clear vacancy and discharged his duties as such, the stand taken by the opposite party No. 1 that his appointment was on temporary basis and not confirmed in the post is wholly untenable in law. Therefore, we further direct opposite party No. 1 to see that his appointment in the post shall be confirmed after expiry of probationary period to be stipulated in the appointment order as per the Probationary Rules applicable to the post at the time it was issued to him and assign his ranking Number in the seniority list of the cadre and give all the consequential benefits of promotion and fix his salary in accordance with law within eight weeks from the date of his reinstatement in the post. We make it clear that the Petitioner is entitled for financial benefits, such as salary and other consequential benefits for the period he has not been permitted to work after his termination as this Court at the time of issuing notice has observed that any termination made shall be subject to the result of the writ petition.

18. In the result, the writ petition is allowed.

19. No order as to costs.