
(2023) 04 OHC CK 0174

In the Orissa High Court

Case No : Writ Petition (C) No.26229, 26393 Of 2020

Pravakar Jayasingh And Others

APPELLANT

Vs

State Of Odisha & Another

RESPONDENT

Date of Decision : 18-04-2023

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2023) 04 OHC CK 0174

Hon'ble Judges : Sashikanta Mishra,J

Bench : Single Bench

Advocate : B. P.Das, Sandeep Parida, P.K.Panda

Final Decision : Dismissed

Judgement

Sashikanta Mishra,J

1. Common questions of law and fact are involved in both the Writ Petitions. Thus, both were heard together and are being disposed of by this common judgment.

2. An advertisement was published by the Director of Secondary Education on 23rd February, 2019 for recruitment to the posts of contractual Trained Graduate Teachers in Government Schools in P.C.M., C.B.Z and Arts disciplines. 1828 number of posts were offered for recruitment. The advertisement contained the particulars of qualification and method of selection etc. The case of the Petitioners is that they appeared in Online Computer based qualifying examination and having qualified, their names were included in the draft common merit list. They were called upon for document verification from 5th September to 12th September, 2019. Their documents were verified and a draft reject list was published and objections were invited from the candidates to submit objections relating to errors if any in the draft common merit list and draft reject list. On 25th October, 2019 a provisional select list of the candidates out of the provisional common merit list was published wherein the names of the

Petitioners did not find place. Feeling aggrieved, some of the Petitioners challenged the selection process before this Court in W.P.(C) No.20604/2019. By order dated 25th February, 2020 passed in W.P.(C) Nos.20604 and 20559 of 2019, this Court directed the authorities to consider the grievance of the Petitioners afresh and if they are within the zone of consideration, to take necessary steps for their appointment. A contempt application was also filed being CONTC No.2558/2020, which was disposed of by order dated 10th September, 2020 directing the Opposite Parties to work out the directions of this Court in order dated 25th February, 2020 within six months. It is the further case of the Petitioners that out of 1848 vacancies only 1548 candidates were selected. Out of the said 1548 candidates, 1235 candidates joined and the rest 593 candidates did not join, for which such number of posts fell vacant. According to the Petitioners, once some of the selected candidates did not join, the remaining candidates ought to be considered for appointment since they were placed in the provisional common merit list. Moreover, there being large number of vacancies available, the Petitioners should be considered for appointment against such vacancies.

3. The case of the Opposite Parties is that undoubtedly common merit list was published, which is the list of all candidates finally found eligible after verification of documents and objections to draft list. In the list all the eligible candidates are arranged in order of marks secured in the Computer based test irrespective of their social/reservation category. Out of the common merit list, the select list of each social reservation category such as SC/ST/SEBC and UR were prepared and published being approved by State Selection Committee. The said lists were prepared taking number of candidates equal to the number of posts advertised for each reservation category. The Petitioners were not included in the draft common merit list as well the final common merit list as they could not come to the range of selection as per their final position in the merit list. It is further stated that publication of select list of 100% of posts advertised has nothing to do with the waiting list. They could not be selected as the select list was limited to number of vacancies advertised and their marks were below the cut-off, i.e. the mark of last candidate of the select list. There is no provision in the advertisement for preparation of second merit list or waiting list so as to consider the case of the Petitioners because of non-joining of some of the finally selected candidates. It has been clarified that there is no cut-off mark for selection but the marks secured by the last candidate in the select list of each category is presumed as the cut-off mark.

4. Heard Mr. B. Routray, learned Senior counsel with Mr. S.D. Routray, learned counsel for the Petitioners, who led arguments on behalf of all the Petitioners, and Mr. Sandeep Parida, learned Senior Standing Counsel appearing for the School and Mass Education Department being assisted by Mr. P.Panda, learned Standing Counsel for the said department.

5. According to Mr. Routray, the Opposite Party-authorities adopted a completely

wrong procedure of selection as a result of which, the Petitioners being eligible to be considered were left out. Mr. Routray contends that Clause-9(h) of the advertisement clearly states that select list for each social reservation category will be prepared for the State Common Merit List taking number of candidates equal to 100% of the number of vacancies for each category in the state as a whole. Therefore, the select list ought to have been prepared for 1828 candidates, but the authorities prepared select list for only 1548 candidates and thereby violated the terms of the advertisement. Mr. Routray, further argues that even out of such 1548 selected candidates, 303 did not join and thus, the actual selected candidates were 1238. The Petitioners ought to have been adjusted against such unfilled vacancies. The advertisement does not prescribe any cut-off mark for selection but the authorities appear to have applied a cut-off mark arbitrarily for which the Petitioners were illegally left out of the selection process.

6. Mr. Sandeep Parida, learned Sr. Standing counsel, submits that out of 1828 posts, 280 posts belonging to SC and ST candidates were not available for selection and therefore, the total number of posts available for selection came down to 1548. Mr. Parida, further argues that the procedure laid down in the advertisement under Clause-9 thereof was strictly followed inasmuch as category wise lists equal to 100% of the posts available under each category were published. The Petitioners were placed below the last candidates of each of the categories. There is no provision in the advertisement for having a waiting list and therefore, all unfilled vacancies have to be carried forward to the next recruitment process. Mr. Parida emphatically argued that no cut-off mark was applied in the selection process, rather the Petitioners were placed below the last person selected in each category on merit. Therefore, according to Mr. Parida there was no necessity to consider the case of the Petitioners.

7. The facts and contentions being as narrated above, the question that falls for consideration before this Court is, whether the procedure of selection prescribed in the advertisement was followed.

8. Reference to the advertisement (copy enclosed as Annexure-1 in W.P.(C) No.26229 of 2020) reveals that 1828 vacancies, which included unfilled vacancies of previous recruitments were notified for being filled up. The process of selection is described under Paragraph-9, which is quoted herein below;

“9.Method of Selection:

(a) The selection will be made on the basis of result of online (Computer based) Competitive Examination. The Scheme and Syllabus of examination is placed at Appendix-B.

(b) A candidate has to secure minimum 35% (30% in case of candidates of SC/ ST category) marks in each paper to qualify in the examination.

(c) The provisional rank list shall be prepared taking the qualifying candidates only. Names of candidates in the provisional rank list shall be arranged in order

of marks secured by the candidates in the examination. In case of two or more candidates secure the same marks the candidate older in age will be placed above in the rank.

(d) Out of the list prepared as per para 9(c) candidates equal to 120% of the vacancies of each social reservation category shall be called to get their documents verified at District level. The district mentioned in the permanent address in the application form shall be taken as the district in which the documents of a candidate are to be verified.

(e) The eligibility of candidates included in the rank list prepared as mentioned in para 9(c) shall be determined through verification of all relevant documents in support of age, qualification and other eligibility conditions laid in the advertisement.

(f) Place and dates of verification of documents of candidates shall be published in the website after finalization of results of the online examination.

(g) The provisional common merit list for the state finalized after determination of eligibility as in para 9 (d) shall be treated as Draft merit list and this along with the list of in-eligible candidates shall be published for inviting objections. After necessary corrections the merit lists will be finalized.

(h) Select list for each social reservation category will be prepared from the State common merit list taking number of candidates equal to 100% of the number of vacancies for each of the category in the state as a whole.

(i) Inclusion of the name of a candidate in the Merit List/Select List confers no right on the candidate to engagement unless Govt. or the State Selection Committee or the Appointing Authority are satisfied after such inquiry or re-verification of documents, as may be considered necessary, that a candidate is suitable in all respects for engagement to the service."

From the relevant provisions of the advertisement quoted above, the following facts emerge-

All candidates are to appear in the Online (Computer based) Competitive Examination and those who secure 35% (30% in case of SC/ST candidates) marks in each paper shall qualify. A provisional rank list of such qualifying candidates shall be prepared being arranged in the order of marks secured by them. Thereafter candidates equal to 120% of the vacancies of each social reservation category from out of the provisional rank list shall be called for document verification. After document verification, a provisional common merit list along with list of ineligible candidates shall be published for inviting objections. After necessary corrections, if any, the merit list will be finalized. Most importantly, select list for each social reservation category will be prepared from the State Common Merit List taking number of candidates equal to 100% of the number of vacancies in each of the categories in the state as a whole. Be it noted that the advertisement does not provide either for fixation of cut-off marks

or for preparation of any waiting list.

9. Coming to the facts of the case at hand, it is seen that the following was the vacancy of different posts advertised;

Regular vacancies

Unfilled Vacancies Previous

recruitments

Post

SEBC

TOTAL

SEBC

TOTAL

GRAND

SI

UR

SC

ST

UR

SC

ST

TOTAL

1

2

3

4

5

6

7

8

9

10

11

12

13 (7+12)

1

TGT PCM

34

11

15

8

68

94

31

42

21

188

256

2

TGT CBZ

33

10

15

7

65

105

34

47

24

210

275

3

TGT Arts

186

60

83

42

371

463

150

209

104

926

1297

Total

253

81

113

57

504

662

215

298

149

1324

1828

10. It has been stated in the counter affidavit that 280 posts belonging to SC and ST were not available for selection though the reason thereof has not been specified. Be that as it may, if such number of posts are taken away from the total number of posts notified (1828-280), then 1548 posts were available belonging to different categories. It has further not been specified as to of which discipline namely, PCM, CBZ or Arts, the 280 vacancies of SC and ST are applicable. As regards the selection made for TGT (Arts), it is seen that the category wise posts would be as follows;

TGT (Arts)

UR

186+463=649

SC

60+150

=210

ST

83+ 209 =292

SEBC

42+104

=146

11. This Court would now ascertain as to if the select list of candidates was equal to 100% of the posts available under each category. In the resolution dated 25th October, 2019, the provisional select list for each of the categories were published. It is indicated that one post under SEBC category was reserved as per order dated 4th October, 2019 passed in W.P.(C) No.19056/2019; one post in SC category (Ganjam) was kept reserved in view of the order dated 31st July, 2019 of the OAT in O.A. No.930/2019 and one post of SC (Ganjam) was kept reserved as per order dated 31st July, 2019 of the OAT in O.A. No.931/2019. It is further seen that the provisional select list was published for 649 candidates in UR category, 208 in SC category, 133 in ST category and 145 in SEBC category. The short fall of two candidates in respect of SC and one candidate in SEBC was obviously because of the aforementioned interim order of this Court/OAT. In so far as the shortfall in ST is concerned, it would obviously relate to the non-availability of candidates. This Court therefore, finds that the provisional select list was published entirely as per the advertisement. This Court has also perused the provisional select list of candidates under different categories for TGT (PCM) and TGT (CBZ) and finds that the same is equal to 100% of the posts notified and shortfall wherever found, is because of non-availability of SC and ST candidates and interim order passed by this Court. Therefore, this Court finds nothing wrong in the procedure adopted by the authorities in preparation of the provisional select list. It is not the case of the Petitioners that they were placed higher than the last man selected under each of the categories. Had such been the case, the matter would have been entirely different.

12. This Court has already noticed that the advertisement does not provide for publication of waiting list. Much argument has been made from the stand taken by the Opposite Parties in paragraph-21 of their counter filed in W.P. (C)No.20604/2019, which is quoted herein below for immediate reference;

"That the Petitioners have submitted an additional affidavit in the instant case wherein they have alleged that the Opposite Parties have published the select list without publishing the waiting list in consideration of their representation as directed by the Hon'ble High Court in the final order dated 26.9.2019 passed in W.P.(C) No.18006/2019. In response to this, it is submitted that the Hon'ble Court had given 3 months time for disposal of the representation and the matter is under examination by the Opposite Party No.1. Further, publication of select list for 100% of the posts advertised has nothing to do with the waiting list. Question of waiting list may come when posts finally taken up for selection remain unfilled due to non-joining of candidates or candidates not attending verification of documents or agreement before engagement."

Referring to such stand, Mr. Routray has argued that when the authorities themselves admit that the question of waiting list would arise when posts remained unfilled due to non-joining of the candidates, they cannot turn around and take the plea that there is no provision in the advertisement for waiting list. Responding to such argument, Mr. Parida submits that in the Writ Petitions the Petitioners had alleged that the Opposite Parties violated the order passed by this Court in publishing the provisional select list dated 25th October, 2020. It is in such context and to highlight the stage at which the question of waiting list generally comes that the above statement was made in the counter affidavit. Nevertheless the terms of the advertisement would reign supreme.

13. From the arguments advanced on behalf of the Petitioners, it observed that what they essentially claim is, several vacancies, 593 to be precise, being still available to be filled up for non-joining of selected candidates, a second merit list or a sort of waiting list should have been prepared and appointments offered to the Petitioners. Whether such recourse can be taken by the authorities in the absence of any rule or provision in the advertisement came for consideration before the Apex Court in the case of Vallampati Sathish Babu vs. State of Andhra Pradesh and others; reported in 2022 SCC Online SC 470. After referring to the facts and contentions raised, the Apex Court held as follows;

"29. The appellant could have claimed the appointment to the post which remained unfilled provided there is a provision for waiting list as per the statutory provision. In absence of any specific provision for waiting list and on the contrary, there being a specific provision that there shall not be any waiting list and that the post remaining unfilled on any ground shall have to be carried forward for the next recruitment. The appellant herein, thus, had no right to claim any appointment to the post which remained unfilled."

Of course, in the said case the relevant rule had a provision which specifically provided that there shall not be any waiting list. Nonetheless, the same principle would apply to the present case in the absence of a provision for waiting list. The principle reiterated by the Apex Court in the same decision is as under;

"32. An identical question came to be considered by this Court in the case of

Suresh Prasad (supra). In the said decision, it is specifically observed and held that even in case candidates selected for appointment have not joined, in the absence of any statutory rules to the contrary, the employer is not bound to offer the unfilled vacancy to the candidates next below the said candidates in the merit list. It is also further held that in the absence of any provision, the employer is not bound to prepare a waiting list in addition to the panel of selected candidates and to appoint the candidates from the waiting list in case the candidates from the panel do not join. The aforesaid decision of this Court has been subsequently followed by the Andhra Pradesh High Court in the case of Samiula Shareef (supra)."

14. In view of the position of law as above, there is no way by which the Petitioners can claim to be considered for appointment against the unfilled vacancies. This Court cannot issue any direction de hors the terms of the advertisement as the decision to provide for waiting list or not has to be left to the sound discretion of the employer.

15. Thus, on a conspectus of the analysis of facts and contentions narrated hereinbefore, this Court finds nothing wrong in the process of selection adopted by the opposite party-authorities so as to be persuaded to interfere. Resultantly, the Writ Petitions being devoid of merit and therefore, dismissed. There shall be no order as to costs.

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