

(2021) 10 OHC CK 0067

In the Orissa High Court

Case No : Writ Petition (Civil) No. 13119 Of 2014

Rashmirekha Das And Others

APPELLANT

Vs

Orissa Public Service Commission, Cuttack, State of Odisha
And Others

RESPONDENT

Date of Decision : 26-10-2021

Acts Referred:

Orissa Finance Service Rules, 1979 — Rule 19(1)
Constitution of India, 1950 — Article 14, 16, 309

Citation : (2021) 10 OHC CK 0067

Hon'ble Judges : Dr. S. Muralidhar, CJ;B.P. Routray, J

Bench : Division Bench

Advocate : M. S. Sahoo, Suravi Mohanty

Final Decision : Allowed

Judgement

Dr. S. Muralidhar, CJ.

1. All these writ petitions arise from a common set of facts and involve the same issues and are accordingly disposed of by this common judgment.

2. The lead petition viz., W.P.(C) No.13119 of 2014 is by the State of Odisha through the General Administration Department (GAD) and is directed against an order dated 23rd April, 2014 passed by the Odisha Administrative Tribunal, Cuttack Bench, Cuttack (OAT) in O.A. No.1731 (C) of 2010 filed by Opposite Party No.1 (Ms. Suravi Mohanty). By the said impugned order, the OAT disposed of the aforementioned O.A. along with 28 other O.As. and quashed the select list published on 22nd May, 2010 of the successful candidates, who appeared in the examination held by the Odisha Public Service Commission (OPSC) for filling up vacancies of different posts under the Odisha Civil Services (OCS) (Categories-I and II).

3. It may be noted at the outset that the impugned order of the OAT was common to several other O.As and in respect of the said O.As., the

corresponding writ petitions had been filed, which have been tagged with the main petition in this batch of matters.

4. The background facts are that on 11th August, 2006, an advertisement No.8 of 2006-07 was issued for recruitment to the posts and services coming under the OCS (Categories-I and II). The scales of pay of Category-I was Rs.6,500-200-10,500/- and for Category-II, it was Rs.5,500-175-9,000/-. The number of vacancies was 289.

5. On 6th September, 2006, a corrigendum was issued enhancing the number of vacancies to 401. The last date for submission of applications was 3rd October, 2006. On 16th November, 2006, a second corrigendum was issued altering the number of vacancies to 380.

6. A total number of 32936 candidates appeared in the preliminary examination held on 11th May, 2007. Of this, only 3729 candidates qualified for appearing in the main examination. Ultimately, 2931 candidates appeared in the main examination and 750 from different categories were selected to appear in the personality test. Of the 750 candidates, 744 appeared in the personality test.

7. Meanwhile, by a resolution dated 28th February, 2009 of the GAD, the Orissa Administrative Service (OAS) cadre was restructured. The OAS-II cadre, which was restructured as OAS-I (JB) in the scale of pay of Rs.15,600/-39,100/- with Grade Pay Rs.5,400/-. Likewise, by a separate resolution of the same date of the Finance Department, the Orissa Finance Service (OFS) was restructured and the Orissa Taxation & Accounts Service (OTAS) was constituted.

8. On 20th August, 2009, the Revenue & Disaster Management Department (R&DM Department) passed a resolution constituting a new cadre of the Orissa Revenue Service (ORS). Inter alia, it was decided that the cadre strength of OAS-I (JB) would be 984 and that the officers of the aforesaid OAS-I (JB) holding different posts in the ORS on the date of its constitution shall be allowed to continue against such posts as a temporary measure until the posts are filled up by officers from ORS.

9. On 24th December, 2009, the result of the main examination conducted by the OPSC was published. Between 15th and 26th February, 2010, the viva-voce test was conducted.

10. Meanwhile, an interim order was passed by the OAT, which was challenged in this Court by some of the candidates as well as the OPSC in separate writ petitions. This Court allowed both writ petitions by a common order and quashed the interim order passed by the OAT and directed that the interviews/viva voce would continue. Thereafter the interviews were conducted between 16th April to 21st May, 2010 and the final select list was published on 22nd May, 2010 by the OPSC. The final list comprising 378 candidates was submitted to the GAD on 11th June, 2010 by the OPSC.

11. On 11th August, 2010, the GAD called upon the selected candidates to

exercise their option afresh keeping in view the changed scenario whereby all the posts of OAS and OFS had been upgraded to the Junior Class-I posts from Class-II.

12. On 28th September, 2010, a Notification was issued by the Finance Department appointing 207 candidates to Class-I (Junior Branch) of the OFS in Pay Band-3. They were to be in probation for a period of two years in terms of Rule 19 (1) of the Orissa Finance Service Rules, 1979 (OFS Rules). The appointments were made subject to the final outcome of the O.A. Nos.159 (C), 218(C) and 358(C) of 2010 pending before the OAT.

13. On 30th September, 2010, the R&DM Department issued an office order placing 73 candidates for posts in the OAS-I (JB) and asking them to report for undergoing Institutional and Field level training at Gopabandhu Academy of Administration in Bhubaneswar.

14. On 6th June, 2011, the Government of Odisha in exercise of powers conferred by the proviso to Article 309 of the Constitution of India framed the OFS Rules, 2011 with retrospective effect from 28th February, 2009. Likewise, on 25th June, 2011, the OAS Rules, 2011 were framed whereby the resolution dated 28th February, 2009 was saved.

15. One of the contentions raised before the OAT was that the advertisement issued on 11th August, 2006 was for Class-II posts with Rs.6,500/- basic and specially declared Gazetted posts with Rs.5,500/- basic and not for Class-I posts of scale of pay of Rs.15,600/- and Class-II with scale of pay Rs.9,300/-. It was further contended that the ORS and OTFS were newly created services but candidates from the select list were appointed in Class-II with higher scale of pay of Rs.9,300/- in the ORS, which were neither advertised nor any selection was made against the said posts. Accordingly, it was contended that the select list of the Class-II posts in the ORS was illegal and void. Further, it was contended that since the posts of Class-II and specially declared Gazetted as advertised with less scale of pay were abolished on

28 th February, 2009, the selection and recommendation made in terms of the advertisement had become null and void. In short, it was contended that the appointments made of candidates to posts that had not been advertised and for which no selection was held and, therefore, such appointments were nullity in the eye of law.

16. It was further contended that in case a fresh advertisement would have been issued inviting applications for Class-I and Class-II posts, several more brilliant and eligible candidates would have got an opportunity to apply for the post and participated in the test. Only because the advertisement invited applications against Class-II posts, they perhaps did not chose to apply for such posts. Thus, brilliant candidates would be debarred from participating in the selection test, which is therefore arbitrary, illegal and unconstitutional. Reliance was placed on the decision of the Supreme Court in *State of Orissa v. Mamata Mohanty*, 2011

(3) SCC 436.

17. It was held by the OAT in the impugned order that the selected candidates were appointed against the upgraded posts without inviting applications through a fresh advertisement and making a fresh selection to fill up the upgraded Class-I posts. It was accordingly held that "the selected candidates cannot be treated to have been continuing in Class-II Service to be brought over to Class-I (Junior Branch) as on 25.5.2009/28.2.2009 since they participated in the selection process for appointment in Class-II/Specially declared Gazetted service/posts and no appointment order had been issued in their favour as against those Class-II Service/posts before the cut-off date." It was further held that since all eligible persons were not given a chance to participate in the selection since no advertisement was issued for filling up the upgraded Class-I posts "the orders of appointment issued in favour of respondent Nos.3 to 380 as against those upgraded posts/services, on the basis of the select list under Annexure-6, are completely unjust, illegal and violative of the mandates of Constitution of India, more particularly Articles 14 and 16 and hence are liable to be quashed." The authorities were nevertheless given the liberty to issue a fresh advertisement for the newly created posts inviting applications from all candidates, who were eligible at the time of the advertisement No.8 of 2006-07 and thereafter conducted fresh selection through the OPSC and issued appointment orders in favour of the selected candidates. Further, the authorities, who were "at liberty to issue appointment order in favour of the selected candidates, as against the posts, which were in existence, as per the advertisement and for which they were selected."

18. This Court has heard the submissions of Mr. M. S. Sahoo, learned Additional Government Advocate appearing for the State of Orissa, Ms. Suravi Mohanty, who appeared in person, Mr. B. Pradhan, Mr. B. Mohanty and Mr. J. Katikia, learned counsel appeared for the other Petitioners.

19. At the outset, it requires to be noticed that while the select list was quashed, no actual substantial relief was given to the applicants who were challenging the select list including Ms. Suravi Mohanty, who appears in person as Opposite Party No.1 in W.P.(C) No.13119 of 2014.

20. The short question that arises for consideration is whether the OAT was justified in quashing the select list on the ground that candidates were appointed to posts that were not advertised?

21. At the outset, it must be noted that Ms. Mohanty having participated in the selection process cannot turn down to challenge the procedure after being unsuccessful. In *Vijendra Kumar Verma v. Public Service Commission, Uttarakhand* (2011) 1 SCC 150 the Supreme Court notes as under:

"...we may refer to the decision of the Supreme Court in *Dr. G. Sarana Vs. University of Lucknow & Ors.* reported in (1976) 3 SCC 585 wherein also a similar stand was taken by a candidate and in that context the Supreme Court

had declared that the candidate who participated in the selection process cannot challenge the validity of the said selection process after appearing in the said selection process and taking opportunity of being selected. Para 15 inter alia reads thus:

"15.... He seems to have voluntarily appeared before the Committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the Committee."

27. In P.S. Gopinathan Vs. State of Kerala and Others reported in (2008) 7 SCC 70, this Court relying on the above principle held thus:

"44.Apart from the fact that the appellant accepted his posting orders without any demur in that capacity, his subsequent order of appointment dated 15-7-1992 issued by the Governor had not been challenged by the appellant. Once he chose to join the mainstream on the basis of option given to him, he cannot turn back and challenge the conditions. He could have opted not to join at all but he did not do so. Now it does not lie in his mouth to clamour regarding the cut-off date or for that matter any other condition. The High Court, therefore, in our opinion, rightly held that the appellant is estopped and precluded from questioning the said order dated 14-1-1992. The application of principles of estoppel, waiver and acquiescence has been considered by us in many cases, one of them being G. Sarana (Dr.) v. University of Lucknow....."

28. In Union of India and Others vs. S. Vinodh Kumar and Others reported in (2007) 8 SCC 100 at paragraph 18 it was held that it is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same. Besides, in K.H. Siraj vs. High Court of Kerala and Others reported in (2006) 6 SCC 395 in paragraph 72 and 74 it was held that candidates who participated in the interview with knowledge that for selection they had to secure prescribed minimum marks on being unsuccessful in interview could not turn around and challenge that the said provision of minimum marks was improper, said challenge is liable to be dismissed on the ground of estoppel."

22. It was contended by Mr. M. S. Sahoo that once the cadre was restructured, it was open to the State Government to have issued appointment orders to the selected candidates in the restructured cadre. He submitted that the eligibility criteria in the erstwhile cadre as well as restructured cadre remained the same. The cadre level was re-designated as Civil Service Class-I instead of Civil Service Class-II. Therefore, it was not a case where all the eligible persons had not applied.

23. The Court's attention was drawn to the judgment dated 19th October, 2012 passed by the Division Bench of this Court in W.P.(C) No.11211 of 2011. That was a writ petition filed as a Public Interest Litigation by one Sarada Prasad Mahanti in this Court. He inter alia sought quashing of the appointment made by the very same advertisement of reserve candidates against unreserved posts

beyond 50% and of appointment to the candidates to Class-I posts whereas they were selected for Class-II with the far lesser basic pay. In its judgment dated 19th October, 2012, it was noted by this Court that the question whether selection could take place to Class-I from Class-II whereas the advertisement was issued for only Class-II posts was already the subject matter of O.As pending before the OAT. Accordingly, the High Court declined to entertain the writ petition. Also, there were two parallel proceedings-one before the OAT and the other before this Court which could not be allowed to continue. For the aforementioned reasons, the writ petition was dismissed on the ground of maintainability.

24. In the present case, Ms. Mohanty did not qualify in the examination and has not been granted any relief as such by the OAT. None of the other applicants before the OAT have likewise qualified and have not been granted any relief. The net result is only that the selected candidates have been seriously prejudiced since the select list was quashed. The Court finds that the OAT erred in failing to notice that the process of the selection and the eligibility criteria was no different in the restructured posts. It is purely hypothetical that some other candidates may have applied had the advertisement been issued for the Class-I posts. No one has come forward to make any such grievance. It is strange that the OAT proceeded to quash the select list when no substantive relief was going to be granted to any of the applicants before the OAT except causing serious prejudice to those already selected. The Court finds no legal basis for the OAT to have interfered with the select list in the aforementioned facts and circumstances.

25. For all of the aforesaid reasons, the impugned order of the OAT dated 23rd April, 2014 is hereby set aside. All the writ petitions are allowed in the aforementioned terms, but in the circumstances with no order as to costs.