

(2008) 08 OHC CK 0006

In the Orissa High Court

Case No : W.A. No's. 75 of 2007 and 139 of 2008

Rita Swain

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 21-08-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 16(1)

Citation : (2008) 08 OHC CK 0006

Hon'ble Judges : B.S. Chauhan, C.J;B.N. Mahapatra, J

Bench : Division Bench

Advocate : Mahendra Ku. Sahoo and M.K. Das, for the Appellant; Sachidananda Sahoo, P.R. Bhuyan and M.K. Khuntia, for the Respondent

Final Decision : Dismissed

Judgement

B.S. Chauhan, C.J.—These two writ appeals have been filed against the judgment order of the learned Single Judge dated 20th August, 2007 in W.P.(C) No. 15075 of 2005 by which the appointment of the Appellant in the first case has been set aside being in contravention of law and a further direction has been issued that in district Puri, wherever the appointment had been made in contravention of law, the appointee be removed after observing the principles of natural justice.

2. The facts and circumstances giving rise to these appeals are that the selection process for appointment of Anganwadi worker was initiated in 2000 and after preparing the inter-se merit list of the applicants, one Smt. Sailabala Dei was appointed In 2001. She joined as Anganwadi worker at Salanga Anganwadi Center. Subsequently she was offered a better employment and thus she submitted her resignation on 6th January, 2003, after serving for a period of about two years. The District Collector, Puri appointed the Appellant Smt. Rita Swain as she had been at Sl. No. 2 in the merit list prepared in the year 2001, while considering her application, in view of the judgment and order of the learned Single Judge in W.P.(C) No. 6150 of 2005 filed by her. It appears that during the pendency of the said writ petition, the said post was advertised afresh

and selection process started. But abandoning the same, the Appellant had been offered the appointment. It was challenged by filing W.P.(C) No. 15075 of 2005, which has been allowed by the learned Single Judge observing that once the appointment had been made on the post, the selection process stood exhausted and in case the appointee had submitted resignation, a fresh process was to be initiated. When it came to the notice of the Court that such an illegality had been committed in respect of several other centres of the district of Puri, the District Collector was directed to reconsider all such cases and remove such appointees after observing the principles of natural justice, Hence these appeals. First appeal is being filed by the appointee in place of Smt. Sailabala Dei and second appeal has been filed by similarly appointed persons who may face removal process in pursuance of the direction of the Court.

3. Learned Counsel for the Appellant in Smt. Rita Swain has submitted that once the selection process had started, selected list was prepared, appointment had been made and after that the appointee had tendered the resignation, the Appellant being No. 2 in the merit list had rightly been offered the appointment. Law does not require initiation of fresh selection process and therefore, the judgment and order of the learned Single Judge is liable to be set aside.

4. Learned Counsel for the Appellant, in Writ Appeal No. 139 of 2008 filed by Chandrika Das & Anr., has submitted that none of such appointee had been a party before the Court, therefore, the direction for reconsidering their appointment should not have been issued as it is the violation of the principles of natural justice and the said direction issued by the learned Single Judge requires to be set aside.

5. On the contrary, learned Addl. Standing Counsel has vehemently opposed both the appeals contending that if the select list is prepared, it remains valid only till the vacancy is not filled up. Once the appointment is made against the vacancy advertised, the selection process stands exhausted. The process adopted by the Collector in this case amounts to filling the future vacancies. So far as the question of second appeal is concerned, the learned Single Judge has not quashed the appointment, rather direction has been made to reconsider and pass appropriate order after observing the principles of natural justice. Therefore, both the appeals are liable to be dismissed.

6. We have considered the rival submissions made by the learned Counsel for the parties and perused the record.

So far as the appeal filed by Chandrika Das and Anr. is concerned, learned Single judge has not passed any terminating their appointment rather issued a direction to the District Collector to re-examine the case and pass appropriate order only after giving opportunity of hearing to each of them. Therefore, no grievance can be raised by them, in case the law laid down by the learned Single Judge is found to be correct in the appeal, filed by Smt. Rita Swain.

7. The select list was prepared after assessing the inter-se merit of the

candidates for the purpose that appointment has to be offered according to their merit. The select list loses its life once all advertised vacancies are filled up. The waiting list etc. is prepared for a purpose that in case the candidate who has been offered the appointment does not join, the post may be offered to the person next to him in the merit list. Select list is not immortal nor it can be used as a reservoir that whenever the vacancy occurs in future the candidate may be offered the appointment from the said select list.

8. It is settled legal proposition that no relief can be granted to the candidate after expiry of the Select List. (Vide *J. Ashok Kumar v. State of Andhra Pradesh and Ors.* (1996) 3 SCC 225; *State of Bihar and others Vs. Md. Kalimuddin and others*, ; *State of U. P. and others Vs. Harish Chandra and others*, ; *Sushma Suri Vs. Govt. of National Capital Territory of Delhi and Another*, ; & *State of U.P. Vs. Ram Sawrup Saroj*, . It has been held therein that if the select list expires as per the rules applicable, as its life is over, no appointment can be made from the said list.

9. In *State of Punjab Vs. Raghubir Chand Sharma and Another*, , the Apex Court examined the case where only one post was advertised and the candidate whose name appeared at Serial No. 1 in the select list joined the post, but subsequently resigned. The Court rejected the contention that post can be filled up offering the appointment to the next candidate in the select list observing as under:

With the appointment of the first candidate for the only post in respect of which the consideration came to be made and select list prepared, the panel ceased to exist and has outlived its utility and at any rate, no one else in the panel can legitimately contend that he should have been offered appointment either in the vacancy arising on account of the subsequent resignation of the person appointed from the panel or any other vacancies arising subsequently.

10. The Court was of the view that it would amount to filling up the future vacancy. Any appointment made beyond the number of vacancies advertised, is without jurisdiction, therefore a nullity, inexecutable and un-enforceable in law.

11. In *Ashok Kumar and Others Vs. Chairman, Banking Service Recruitment Board and Others*, , the Supreme Court held as under:

5 Article 14 read with Article 16 (1) of the Constitution enshrines fundamental right to every citizen to claim consideration for appointment to a post under the State. Therefore, vacant posts arising or expected should be notified inviting application from all eligible candidates to be considered for their selection in accordance with their merit. The recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16 (1) of the Constitution. Boards should notify the existing and expected vacancies and the Recruitment Board should get advertisement published and recruitment should strictly be made by the respective Boards in accordance with the procedure to the notified vacancies but not to any vacancies that may arise during the process of selection.

(Emphasis added).

12. In *Gujarat State Deputy Executive Engineers' Association v. State of Gujarat and Ors.* 1994 Supl. (2) see 591, the Hon'ble Supreme Court quashed the appointments made over and above the vacancies advertised holding that such an action was neither permissible nor desirable for the reason that it would amount to "improper exercise of power" and only in a rare and exceptional circumstance and in emergent situation, this rule can be deviated from and it can be done only after adopting policy decision based on some rational as the authority cannot fill up more posts than advertised as a matter of course, 13. In *Prem Singh and Others Vs. Haryana State Electricity Board and Others*, , the Apex court observed as under

....The selection process by way of requisition and advertisement can be started for clear vacancies and also for anticipated vacancies but not for future vacancies. If the requisition and advertisement are for a certain number of posts only, the State cannot make more appointments than the number of posts advertised,.....State can deviate from the advertisement and make appointment on the posts falling vacant thereafter in exceptional circumstances only or in emergent situation and that too by taking a policy decision in that behalf.

(Emphasis added).

14. The said judgment in *Prem Singh* was followed with approval by the Hon'ble Supreme Court in *Virender S. Hooda and Others Vs. State of Haryana and Another*, .

15. In *Union of India and Ors. v. Ishwar Singh Khatri & Ors* 1992 Supl. (3) SCC 84, the Court held that selected candidate have right to appointment only against "vacancies notified" and that too during the life of the select list as the panel of selected candidate cannot be valid of indefinite period. Moreover, impanelled candidates "In any event cannot have a right against further vacancies." In *State of Bihar and others Vs. The Secretariat Assistant Successful Examinees Union 1986 and others*, , the Apex court held that " a person who is selected does not, on account of being empaneled alone, acquire any indefeasible right of appointment. Empanelment is at the best a condition of eligibility for purposes of appointment, and by itself does not amount to selection or create a vested right to be appointed unless relevant service rules say to the contrary." In the said case as the selection process was completed in five years after the publication of the advertisement, the contention was raised that the empanelled candidates deserved to be appointed over and above the vacancies notified. The Hon'ble Supreme Court rejected the contention observing that keeping the selection process pending for long and not issuing any fresh advertisement in between, may not be justified but offering the posts in such a manner would adversely prejudice the cause of those candidates who achieved eligibility in the meantime

16. In *Surinder Singh and Ors. v. State of Punjab and Ors.* AIR 1998 SC 18, the

Apex Court held as under:

A waiting list, prepared in an examination conducted by the Commission does not furnish a source of recruitment. It is operative only for the contingency that if any of the selected candidates does not join then the persons from the waiting list may be pushed up and be appointed in the vacancy so caused or if there is some extreme exigency the Government may as a matter of policy decision pick up persons in order of merit from the waiting list. But the view taken by the High Court that since the vacancies have not been worked out properly, therefore, the candidates from the waiting list were liable to be appointed does not appear to be sound. This practice, may result in depriving those candidates who became eligible for competing for the vacancies available in future, If the waiting list in one examination was to operate as infinite stock for appointment, there is danger that the State may resort to the device of not holding the examination for years together and pick up candidates from the waiting list as and when required. The Constitutional discipline requires that this Court should not permit such improper exercise of power which may result in creating a vested interest and perpetuating the waiting list for the candidates of one examination at the cost of entire set of fresh candidates either from the open or even from service. Exercise of such power has to be tested on the touch-stone of reasonableness. It is not a matter of course that the authority can fill up more posts than advertised.

(Emphasis added).

17. In *Kamlesh Kumar Sharma Vs. Yogesh Kumar Gupta and others*, , the Apex Court similarly observed as under:

As per the scheme of the Act and the aforesaid provisions, for each academic year in question, the management has to intimate the existing vacancies and vacancies likely to be caused by the end of the ensuing academic year in question. Thereafter, the Director shall notify the same to the Commission and the Commission, in turn, will invite application by giving wide publicity in the State of such vacancies. The vacancies cannot be filled except by following the procedure as contained therein. Sub-section (1) of Section 12 has incorporated in strong words that any appointment made in contravention of the provisions of the Act shall be void. This was to ensure to back-door entry but selection only as provided under the said sections.

(Emphasis added).

18. Similar view has been reiterated by the Supreme Court in *Shri Kant Tripathi Vs. State of U.P. and Ors.* (2001) 10 SCC 237; and *State of Jammu & Kashmir and Others Vs. Sanjeev Kumar and Others*, .

19. In view of the above, it is evident that select list has a life and when all the appointments to the vacancies advertised are made and candidates who are offered the appointment joins the service, the selection process stands exhausted and the select list/waiting list does not survive. In case a candidate

who is above in the merit list is offered the appointment and he joins the post, the post stands filled up and in case he resigns or dies that vacancy cannot be filled up from the merit list/ waiting list and the proceeding for fresh selection has to be initiated.

20. In the instant case, if the appeals are examined in the light of the aforesaid law, we reach in inescapable conclusion that the judgment and order of the learned Single Judge does not require any interference whatsoever Appeals lack merit and the same are dismissed.

21. In the facts and circumstance of the case, we request the learned District Collector, Puri that in case fresh selection proceeding has not been initiated, it should be initiated and concluded at the earliest.

B.N. Mahapatra, J.

22. I agree.