
(2009) 12 OHC CK 0017
In the Orissa High Court

Sadhu Charan Pradhan and Others

APPELLANT

Vs

State Administrative Tribunal and Others

RESPONDENT

Date of Decision : 23-12-2009

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (2010) 109 CLT 325 : (2010) 1 OLR 999 Supp

Hon'ble Judges : S.K. Mishra, J;Indrajit Mahanty, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

S.K. Mishra, J.—In this batch of Writ Petitions, the Petitioners seek to challenge the order of the Orissa Administrative Tribunal, Bhubaneswar in O.A. Nos. 880 of 2000, 732(C) of 1999, 361 (C) of 2000, 362(C) of 2000, 1113(C) of 1999, 998 of 2000, 0 & 1476 of 2001, wherein prayer of the Petitioners to issue direction to the Government to absorb them as "Firemen" was refused.

2. The Petitioners had applied for recruitment to the post of Fireman in pursuance of the advertisement dated 15.05.1997 issued by the Fire Officer, Orissa, Cuttack. In total, 176 posts were advertised for recruitment test. The test was to be conducted by a Selection Board consisting of senior officers of the Department. They prepared a list of 176 candidates which contained the names of the Petitioners. The grievance of the applicants-Petitioners is that they were not appointed even though vacancies were available. It is their case that out of 176 candidates only 130 were appointed. The Petitioners further claimed that Opposite Party No. 3 issued letter dated 24.03.1.989 indicating that the select list/merit list is to be valid for a period of one year from the date of application or till another recruitment of Firemen is held, whichever is earlier. The Petitioners further claimed that though advertisement was for 176 posts, the select list/merit list was published for 238 posts, Petitioners further submit that Opp. Party No. 3 issued appointment letters to the 132 selected candidates from the select list/merit list vide order No. 1320/RO dated 01.04.1998, indicating that the

appointment will be given to the select candidates after verification of character & antecedent records & subject to medical fitness for such appointment. Petitioners further submit that letter No. E-2/96 issued in the month of July, 1998 reflects that the Government in Home (DCD) Department accorded approval to the decision of the High Power Committee, to fill up post of Fireman & 16 posts of Station Officer.

Accordingly, 8 eligible candidates were selected by the Selection Board to be appointed as "Firemen" in the existing vacancies. Therefore, the Petitioners prayed that they be appointed against the existing vacancies.

3. Opp. Parties 2 to 5, in their counter, inter alia, have averred that the advertisement was made for holding recruitment test on ten different centers across the State for selection of 176 candidates for temporary appointment as Firemen in the Orissa Fire Service. It was clearly indicated in the advertisement itself that the actual posts to be filled up may vary. Taking vacancy position into consideration, the final select list of 130 candidates (122+8) was published & given appointment as Firemen in two phases in accordance with the provisions of the Orissa Reservation of Vacancies Act & Rules. The Opp. Parties further averred that 122 candidates were appointed as Firemen in the first phase as intimated in the letter dated 1.4.1998 & 8 in the second phase vide F.O. letter No. 4131/RO dated 25.08, 1998 as per the available vacancy position. The vacancy is to be calculated either at the time of issue of advertisement or even at the time of issue of Annexure-2 did not eventually turned out to be justified as no Government order creating the posts for five new Fire Stations was received by the time the appointments were considered, Thus, the appointment orders of 130 candidates were issued by the Fire Officer in two phases limiting to the actual vacancies. The Opp. Parties further averred that the Director, Fire Services, Orissa had requested the Government in Home Department to accord sanction of Government towards creation of 35 new Fire Stations, which have already become operational & lifted the ban for filling up of the base level vacancies in the range of Fire Officer & S.O. However, required sanction of Govt. towards creation of post for 35 new Fire Stations & orders in lifting the ban to create the base level vacancy has not been received.

4. Considering the fact of this case, Orissa Administrative Tribunal, Bhubaneswar refused to issue a direction to appoint all the applicants. However, the Tribunal recommended that whenever next selection is held & if the applicants want to participate in the selection, they may be allowed to do so by relaxing the upper age limit having regard to the fact that they had been selected & have been pursuing the case & could not be appointed due to reduction in the number of vacancies. Such order of the Tribunal is assailed in this writ application under Article 227 of the Constitution of India.

5. During the pendency of this Writ Petition, this Court in Order Dated 18.09.2008 passed in Misc. Case No. 10273 of 2008 ordered that 12 posts shall be kept vacant & the rest of the posts may be filled up. Further on 20.08.2009,

this Court issued further directions to the Counsel for the State to obtain instruction, whether the Petitioners can be absorbed against the vacant posts on a fresh physical test being conducted. This observation was made considering the fact that at one point of time, they had been selected for appointment to the post & only because of the "ban order", they could not be given appointment. Accordingly, the Opposite Parties submitted an affidavit on 08.09.2009. In the said affidavit, the Opposite Parties, inter alia, stated that, they have no hesitation to absorb the Petitioners in the aforesaid vacancy on physical test, but it may be appreciated that all the Petitioners have crossed their upper age limit, which is; fixed by Rule 5.1 (d) of the Orissa Fire Service (Method of Recruitment of Firemen) Order, 2006, where the upper age limit for candidates of general category is 25 years, for SEBC category is 28 years and for SC/ST category 30 years. In course of hearing of the writ application. Learned Counsel for the Petitioners mostly argued on the additional affidavit filed on 08.09.2009 & submitted that though the Petitioners are over aged, their case can be considered in view of the item No. 3 of the table of the Government instructions for amendment of the O.G.F.R. It is provided that in item No. 3 corresponding to Rule 52, power to relax in special cases, the maximum age limit for appointment in the Government pensionable services is with the Authority to which delegation is made. The extract is given below:

----- Item No. of				
Nature of power Authority to which Extent of power No. rule delegation is made				
delegated -----				
(1)	(2)	(3)	(4)	(5)
----- 3 52 Power				
to relax Appointment Authority Full power subject special cases, to the condition				
that maximum age limit the reason such appointment Govt. relaxation shall				
pensionable service. recorded in the order appointment. xxx xxx xxx				

6. A Constitutional Bench consisting of seven Hon"ble Judges of the Apex Court in I, L. Chandra Kumar Vs. Union of India and others, held that all decisions of the Tribunals, whether created pursuant to Article 323-A or Article 323-B of the Constitution, will be subject to the High Court's writ jurisdiction under Articles 226/227 of the Constitution, before a Division Bench of the High Court within whose territorial jurisdiction the particular Tribunal falls. This will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Articles 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter. The Apex Court further held that the Tribunals will, nevertheless, continue to act like Courts of first instance in respect of the areas of law for which they have been constituted.

7. In view of the aforesaid observation of the Apex Court, the responsibility, duty

& obligation of the High Court is to consider, whether the decision rendered by the Tribunal is correct in keeping in view the facts that were presented before the Tribunal. In other words, later communications or pleadings should not be, in our considered opinion, be taken into consideration, while deciding whether the Administrative Tribunal acted properly or otherwise. It is undisputed in this case that, originally an advertisement was issued for 176 posts of Firemen. However, such advertisement clearly indicated that the number of posts to be filled up may vary. In the instant case, the Opp. Parties state that the number of vacancies available to be filled up was reduced because of posts were not created for some Fire Stations, which have been previously sanctioned & the posts meant for those Fire Stations were taken as anticipated vacancies while issuing the advertisement. But, at a later point of time, the Finance Department did not give concurrence to the said creation of post & therefore the Opp. Party could not absorb the Petitioners in the said recruitment process.

8. A Constitutional Bench of the Supreme Court in *Shankarsan Dash Vs. Union of India*, , examined the question & ruled that it is not correct to see that if a number of vacancies are notified for appointment & adequate number of candidates are found fit, the successful candidates do not acquire any indefeasible right to be appointed against the existing vacancies. The Apex Court further ruled that ordinarily, the notification merely amounts to an invitation to qualified candidates to apply for recruitment & on their selection, they do not acquire any right to the post, unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. The Apex Court further observed that however, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons & if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, & no discrimination can be permitted. Thus, the correct position of law in the words of the Supreme Court has been consistently followed by it. This view of the Constitutional Bench was followed by the Supreme Court in *Union of India (UOI) and Others Vs. Kali Dass Batish and Another*, .

9. Applying the settled principle of service law that the selected candidates do not have an indefeasible right to be appointed in this case, it is to be examined if the Tribunal committed any grave error of law while deciding the case of the applicant. It is seen that the Learned Tribunal has taken pains to discuss the factual aspect as well as the legal aspect & has come to the conclusion that in view of the plea of the State Government that, the actual vacancies that arisen at the time of recruitment was reduced because of non-receipt of clearance from the Finance Department. It is thus held that the Learned Tribunal has not in any way acted in an illegal manner. Moreover, it is pertinent to note that, as per the decision of the Supreme Court in *Shankarsan Dash (supra)*, the action/decision of the State cannot be held to be arbitrary or capricious. There appears to be a bona fide reason in not appointing the Petitioners.

10. The Supreme Court in Union of Public Service Commission Vs. Gaurav Dwivedi and Others, ; has also indicated that there is no rule which prohibits change in number of vacancies, which are once notified. Indeed, it is not necessary or incumbent upon the Government to fill up all the vacancies, which are notified even if the candidates have been selected, The Supreme Court in Vijay Kumar Sharma and Others Vs. Chairman, School Service Commission and Others, ; after discussing the various decisions of the Supreme Court including the afore cited Constitutional Bench case, held that it is evident that the selected persons have no legal right & the Supreme Court in exercise of its power of judicial review would not ordinarily direct issuance of any writ in absence of any pleading & proof of mala fide or arbitrariness on the part of the employer. Each case, therefore, must be considered on its own merit. In applying this principle to the present case, it is seen that there is no allegation of any mala fide on the part of the employer. It is not the case of the Petitioners that candidates, who are placed below them in the merit list, have been given appointment. There is also no case of arbitrariness in this case as It is crystal clear from the materials on record that at that time, because of absence of concurrence of the Finance Department, the Government did not appoint these Petitioners.

11. Learned Counsel for the Petitioners have also relied upon an unreported decision of this Court i.e. Pravat Ranjan Mohanty and Anr. v. State of Orissa and Ors. W.P.(C) No. 13379 of 2005 (decided on 29.05.2007). However, in the said order, the Division Bench has made it clear that order cannot be cited as a precedent.

12. In the result, we find no merit in the writ applications requiring interference by this Court nor for setting aside the order passed by the Orissa Administrative Tribunal & to issue instruction to the Government to appoint the Petitioners. The Writ Petitions are accordingly dismissed.

Indrajit Mahanty , J.

13. I agree.