

(2018) 01 OHC CK 0013

In the Orissa High Court

Case No : 4008 of 2011, W P (C) No 19415 of 2017

Shri Susanta Kumar Sethi & Ors

APPELLANT

Vs

State of Orissa & Others

RESPONDENT

Date of Decision : 16-01-2018

Acts Referred:

[Orissa Reservation of Vacancies in Posts and Services \(For Scheduled Castes and Scheduled Tribes\) Act, 1975](#), [Section 3](#), [Section 6](#)

Citation : (2018) 01 OHC CK 0013

Hon'ble Judges : Biswanath Rath

Bench : Single Bench

Advocate : Sameer Kumar Das, S.K. Mishra, D. Mohapatra, Pami Rath, J. Mohanty, J.P. Behera, T.K. Mishra, U.C. Mishra, A. Mishra, A. Bal, J.K. Mohapatra, B.P. Sasmal, S.Ch. Mishra, R.C. Praharaj, Asim Amitabh Dash, B.K. Parida, A.N. Pattanayak, S.A. Pattanik, Bidyadh

Final Decision : Dismissed

Judgement

1. W.P.(C) No.4008 of 2011 is filed at the instance of the petitioners who are the unsuccessful candidates in the matter of appointment for the

posts of Sikshya Sahayak pursuant to the advertisement vide Annexure-1.

2. In filing the writ petition W.P.(C) No.4008 of 2011 the petitioners therein sought for quashing of the selection of the opposite party nos.6 to 25

vide Annexure-3 as well as the order of the Collector under Annexure-14 and further sought for a direction to the Collector, Puri to appoint the

petitioners as Sikshya Sahayak in the S.T. backlog vacancies against which the opposite party nos.6 to 25 have been appointed and also for grant

of all consequential service benefits. The petitioners further also sought for quashing of the orders under Annexures-10 & 11 passed by the

opposite party no.1 in order to facilitate appointment of the S.C. candidates in the vacancies caused due to non-availability of the S.T. candidates

in exercise of power U/s.6 of the ORV Act.

3. Factual background involved in the W.P.(C) No.4008 of 2011 is that the petitioners and the opposite party nos.6 to 25 were all the candidates

for the post of Sikshya Sahayak pursuant to an advertisement issued vide Annexure-1. It is averred that following the scheme of the Government

and the inputs in the advertisement, the provisions of the O.R.V. Act are also applicable to the selection of Sikshya Sahayak. It is, therefore, a

proportionate number of posts were kept reserved for the S.C., S.T. and other reserved category candidates in the process of selection of Sikshya

Sahayaks. The advertisement claimed to be further stipulating that untrained S.C. & S.T. candidates can also be exchanged in the event of non-

availability of trained S.C. and S.T. candidates. Petitioners involved in the first writ petition are all scheduled caste candidates belonging to Delanga

Block having "+2" qualification to their credit. On completion of the selection process in all categories except 238 number of vacancies for want of

S.T. candidates, the petitioners claimed that the S.T. vacancies should have been filled up by the S.C. candidates following the provisions

contained in Section 6 of the O.R.V. Act. It is alleged that the Collector instead of moving to the Government to de-reserve 238 numbers of

reserved posts of S.T. candidates in order to enable them to fill up the vacancies by taking the candidates from other category, somehow for some

communication at Government level, the panel list for 2006 stood invalid on 22.12.2007 and as a consequence, 237 number of posts as against

S.T. vacancies remain unfilled. The request of the petitioners to fill up the said vacancies by enhancing the number of candidates belonging to S.C.

category was turned down at appropriate level. In the meantime, in another development a communication was made to the effect that in the event,

there are no S.C. & S.T. candidates available, the Collector may be advised to fill up those vacancies on temporary basis. In a subsequent

development, it was also decided to fill up the S.T. vacancies by taking the candidates from the panel/select list of 2006 in order of merit from the

unreserved category at Annexure-10, resulting some candidates of the Puri District approached this Court in filing W.P.(C) No.12248 of 2008.

This writ petition was disposed of with a direction that the vacancies with regard to the post of Sikshya Sahayak shall not be filled up from the select list of the year 2006 and the authorities to take expeditious steps for initiation of a fresh recruitment process and engage the candidates from the select list. It is alleged that despite the above direction of this Court, the Government vide its letter dated 14.11.2008 directed the Collector to fill up the balance vacancies involving 81 number of posts by taking candidates from the general category after obtaining undertaking from the selected candidates to the extent that engagement will be on purely temporary basis till the S.C. & S.T. candidates are available for induction. It appears, in the meantime, the Principal Secretary to Government of Odisha in School and Mass Education Department directed to replace the general candidates by S.C. candidates, those who have been appointed as Sikshya Sahayak against the S.T. vacancies. In the meantime, the petitioners have approached the Collector-cum-C.E.O., Zilla Parishad, Puri for their appointment but the Collector-cum-C.E.O. rejected their claim, resulting the W.P.(C) No.4008 of 2011. It further appears, this writ petition was disposed of earlier by the judgment of the Hon"ble Single Judge of this Court dated 31.8.2012. In the meantime, a review petition was filed which was also dismissed on 10.5.2013. The order of the Hon"ble Single Judge was challenged in W.A. No.237 of 2014 in the Hon"ble Division Bench and the W.A. No.237 of 2014 was allowed by setting aside the order of the Hon"ble Single Judge, the Hon"ble Division Bench directing therein that the writ petition shall be heard after making the persons likely to be affected, as parties to the writ petition. Consequent upon amendment of the cause title by bringing the opposite party nos.6 to 25 to the fold of consideration of the writ petition, the writ petition required re-adjudication.

4. Shri S.K. Das, learned counsel for the petitioner apart from taking this Court to the pleadings in the writ petition, taking this Court to the several documents filed involving the writ petition, contended that for a clear condition contained in clause 6 of the advertisement involved for application of the O.R.V. Act, the entire selection process pursuant to the advertisement under Annexure-1 becomes illegal. Further, taking to the provisions contained in Rule 6 of the O.R.V. Act, learned counsel for the petitioners also contended that for the provisions contained in the O.R.V. Act for

merger of the vacancies involving the S.T. candidates in the S.C. candidates, all the posts meant for S.T. candidates should have been considered

involving the S.C. candidates only. Shri Das, learned counsel for the petitioners further contended that for clear violation of the provisions

contained in the O.R.V. Act, the impugned orders becomes illegal. Further, referring to the decision of this Court in W.P.(C) No.12248 of 2008,

learned counsel for the petitioners contended that for the direction contained therein, the only option available with the authority was to fill up the

vacancies by initiating a fresh recruitment process. While referring to the order of this Court dated 11.11.2008 involving W.P.(C) No.12248 of

2008 and further referring to a decision of the Hon''ble Apex Court in the case of State of U.P. and another versus Synthetics and Chemical Ltd.

and another as reported in (1991) 4 SCC 139 learned counsel for the petitioners submitted that for the support of the decision to the case of the

petitioners, the impugned order also otherwise not legally sustainable and hence, requiring interference of this Court in the same.

5. In their opposition, the contesting opposite party nos.6 to 25 representing through Mrs. Rath, while referring to their counter averments justifying

the impugned orders, raised the question of locus standi of the present petitioners in filing the writ petition on the premises that once the candidates

like the petitioners faced an interview accepting a set of conditions in the advertisement, it is not open to them to challenge the condition stipulated

therein after remaining unsuccessful in the selection process. It is submitted by Mrs. Rath, that in the event, the petitioners had any grievance,

nothing prevented them to challenge the selection process involving the advertisement at the threshold itself. It is claimed that for the completion of

the selection process long back and for long lapse of time in the meantime, not only there is no scope for interfering in such matters but in the event,

such matter is entertained after long gap of almost 11 years, then looking to the age of the opposite parties 6 to 25 almost all having crossed the

age bar to appear in any other interview, will also be put to serious prejudice that too for their no fault. Referring to two decisions of the Hon''ble

Apex Court in the case of Pradeep Kumar Rai and others versus Dinesh Kumar Pandey and others as reported in 2015(II) SCC 493 and in the

case of Vijendra Kumar Verma versus Public Service Commission, Uttarkhand and others as reported in 2011 (I) SCC 150 Mrs. Pami Rath,

learned counsel for the private opposite party contended that for the support of the decisions referred to hereinabove to the case at hand, there is no scope for this Court to interfere with the impugned orders. Further referring to the provisions contained in the O.R.V. Act since applicable to the civil posts and for the nature of appointment being temporary involving the impugned order, Mrs. Rath, also contended that even though the advertisement refers to the application of O.R.V Act but in fact, there could not have been any application of the O.R.V. Act involving the advertisement under Annexure-1. Learned counsel for the other contesting opposite parties also challenged the maintainability of the writ petition on the ground of delay for being filed after one and half years of the cause of action and after almost five years of introduction of the advertisement and further, the petitioners are also estopped to challenge the conditions in the advertisement after being appeared and remain unsuccessful in the interview involved.

6. Shri Mohapatra, learned Standing Counsel for the School and Mass Education Department while supporting the stand taken by Mrs. P. Rath and referring to the stand of the School and Mass Education Department in their counters submitted that the selection involving the vacant posts not only included the general candidates but 9 numbers of S.C. candidates were also taken into consideration. Taking reference of the judgment of the Hon''ble Apex Court in the case of M. Nagaraj & Ors versus Union of India, learned counsel for the School and Mass Education Department submitted that for the decision involved herein, there was no scope for exchange of the vacancies earmarked for the S.T. candidates with the S.C. candidates. Shri Mohapatra, learned counsel for the School and Mass Education Department further contended that since the select list was found invalid after lapse of one year, there is no otherwise scope for reopening of the selection list or the selection process and also brought to the notice of this Court that since following a direction of the competent authority, the case of such appointees have been considered for their regularization and all these private opposite parties have been regularized in their services in the meantime, there is no scope for interfering in such matter at this point of time.

7. Shri Mohapatra, learned Standing Counsel for the School and Mass Education

Department also relied upon the judgment of this Court in the case of Sri Susanta Kumar Sethi and others versus State of Orissa and others as reported in 2012 (II) OLR-791 by particularly referring to the observations in paragraph no.4 therein.

It is under these circumstances, Shri Mohapatra prayed this Court for dismissal of the writ petition for having no merit.

8. Shri Das, learned counsel for the petitioners in his counter to the submissions of the counsels named hereinabove, while reiterating his

submissions already recorded hereinabove, referring to the rejoinder to the counter affidavit of opposite party nos.11, 13, 15, 16, 21, 22, 23 & 25

and also additional counter affidavit of opposite party no.5, while refuting each of the submission made by both the sets of counsels indicated

hereinabove, submitted that once an advertisement indicates application of O.R.V. Act & Rules, the application of O.R.V. Act & Rules becomes

compulsory. This apart, referring to the provisions contained in the O.C.S. (C.C.A) Rules, 1962, learned counsel for the petitioners contended that

the State Government consciously made the application of the O.R.V. Act to the selection of Sikshya Sahayak. For non-observance of the

provisions of O.R.V. Act & Rules submitted that all actions involving the recruitment process become illegal and unless the impugned actions are

interfered with and set aside, the same will end with a bad law.

9. Considering the rival contentions of the parties, this Court finds, there is no dispute that the petitioners as well as the opposite party nos.6 to 25

were all the candidates involving an advertisement dated 14.10.2006 for filling up of the posts of Sikshya Sahayak. Clause-6 of the advertisement

reads as follows:

6. Reservation structure/ratio: The reserve rules of the government will be applied for the candidates coming under O.R.V. Act as well as other

candidates such as ex-military service men, the differentially able and eminent sports personnel. Female candidates will enjoy 33.33% of

reservation meant for them and

Scheduled Castes:16.25%

Scheduled Tribes :22.5%

S.E.B.C. :27.00%

General caste :34.25%

10. Facts, as narrated by both the parties, discloses that while the petitioners remain unsuccessful in the selection process, the private opposite

parties 6 to 25 were all appointed pursuant to the decision of the competent authority taken vide orders dated 28.7.2008 & 31.7.2008 as find

place at Annexures-G/11 & H/11. Entire reading of the pleadings involving the writ petition, this Court finds, though the petitioners have challenged

the decision of the Government involving the selection of the opposite party nos.6 to 25 and though these opposite parties are made party may be

after long lapse of time but for the direction in the Writ Appeal No.237 of 2014 disposed of on 13.9.2016 unfortunately the petitioners have

nowhere made any averments challenging the selection of the opposite party nos.6 to 25 except imploding them only in the cause title involving the

writ petition.

11. Considering that the advertisement contains the application of O.R.V. Act and further, taking into consideration the opposition to the claim of

the petitioners by the opposite party nos.6 to 25 that once the candidates have accepted the conditions in the advertisement, it is not open to such

candidates to challenge any conditions therein any further, this Court finds, the petitioners' grievance since involves non-application of the

provisions contained in the O.R.V. Act by the competent authority, the submission regarding non-maintainability of the writ petition has no force.

12. Now coming to decide as to whether the provisions of O.R.V. Act had any application to fill up the posts under the advertisement or not and if

applicable, then to what extent?, this Court on reading of the provisions contained in the O.R.V. Act, 1975 and the Rules, 1976 made thereunder,

finds, the Act is created only to provide for adequate representation of Scheduled Caste and Scheduled Tribes in the posts and services under the

State. Section 3 deals with applicability of the Act and Sub-section (c) & (d) excludes the application of the Act to the tenure posts and those filled

up on the basis of any contract. Definition of "Tenure" as per different Dictionaries as follows:

(1) In Webster's New Dictionary the meaning of "Tenure" is as follows:

Tenure n. Habitation, holding, incumbency, occupancy, occupation, possession, proprietorship, residence, tenancy, term, time

(1) In Black Law's Dictionary the meaning of "Tenure" is as follows:

Tenure, n. 1. A right, term, or more of holding lands or tenements in subordination to a superior. In feudal times, real property was held predominalty as part of a tenure system. 2. A particular feudal mode of holding lands, such as socage, gavelkind, villeinage, and frankalmoign.

In Judicial Dictionary the meaning of "Tenure" is as follows: Post. A "tenure post" is defined in Fundamental Rule 9(30A) as follows: "A "tenure

post" means a permanent post which an individual government servant may not hold for more than a limited period. Neither the post of wireless

licence inspector not that of town inspector answers this definition. [P G Joshi v Director General, Posts and Telegraphs (1975) 4 SCC 584 at

587, AIR 1975 SC 1].

It is thus, this Court here observes that "Tenure" means a term during which an office is held. It is a condition of holding the office. Once a person

is appointed to a tenure post, his appointment to the said office begins when he joins and it comes to an end on the completion of the tenure, unless

curtailed on justifiable grounds. Such a person does not superannuate, he only goes out of the office on completion of his tenure. The question of

prematurely retiring him does not arise. [L P Agarwal v Union of India (1992) 3 SCC 526 at 534, AIR 1992 SC 1872]

Tenure cannot be equated with "terms and conditions of service" or payment of gravity or pension. "Tenure" when followed by words of office,

means "term of office". [Punjab University v. Khalsa College, Amritsar 1971 Cur LJ 334, AIR 1971 P&H 479].

13. Now coming to examine the advertisement as at Annexure-1, this Court finds, though the advertisement is made for recruitment of required

numbers of Sikshya Sahayak but the clause "4" therein provides the followings:

4. Engagement: Shiksha Sahayaks will, on a yearly contract, be engaged in primary and upper primary classes of primary/Upper primary and high

schools. 4.1 For the selection of block unit level Shiksha Sahayaks, there will be a selection committee under the Chief executive officer of Zillah

Parishad and the district collector. As its members, there will remain the concerned DEO, DI of schools, District Welfare Officer, District

Employment Officer and the DPC (Sarva Shiksha Aviyan). The DPC (Sarva Shiksha Aviyan) of the concerned district will function as the

convener of the committee. 4.2. Besides an appointment letter, there will be an agreement signed on a stamp paper between the Shiksha Sahayak

on one hand and the chief executive officer, ZP and the district collector, on the other, on behalf of the Zillah Parishad. 4.3. Attempt will be made

to engage the Shiksha Sahayaks in their respective gram Panchayats or in the nearby gram Panchayats.

(Underlining is of this Court)

14. The above goes to show that the engagement under recruitment is a contractual engagement and that too the appointment is on a yearly

contract. Clause "6" indicates the application of the O.R.V. Act reflected hereinabove, which makes it clear that for the nature of the posts, the

same is firstly a tenure posts and secondly filled up on the basis of contract following the conditions of the clause "4" of the advertisement, for

which, this Court is of the view that the application of the O.R.V. Act has no role at all involving the advertisement under Annexure-1.

15. Considering the submission of Shri Das, learned counsel for the petitioner that the engagement subsequently having been regularized the

O.R.V. Act has an application otherwise, this Court observes, the writ petition since involves a challenge to the initial engagement of the opposite

parties under the terms of the advertisement under Annexure-1, the contentions raised by the learned counsel for the petitioners in the above

regard, has no scope for consideration at this level. In the event of any subsequent event involving the tenure appointment particularly regularizing

such appointees, nothing prevented the petitioners to challenge the regularization of the opposite parties at appropriate time. This Court has a

doubt as to whether question involving regularization of such candidates can be raised at this point of time particularly after long lapse of time in the

meantime. It is at this stage, this Court also takes into consideration the submission of Mrs. P. Rath that the petitioners having applied and

appeared pursuant to the advertisement under Annexure-1 accepting the particular set of terms and conditions therein, are estopped from taking

such issues particularly after remaining unsuccessful in the recruitment process. This Court following the decision of the Hon"ble Apex Court in the

case of Vijendra Kumar Verma versus Public Service Commission, Uttarakhand and others as reported in 2011(I) SCC 150 and the subsequent

decision of the Hon"ble Apex Court in the case of Pradeep Kumar Rai and others versus Dinesh Kumar Pandey and others as reported in

2015(II) SCC 493, observes that the petitioners having participated in the process of interview with a particular set up conditions more particularly

allowing the authority to proceed in the selection process and not challenged the condition in the advertisement or the process followed in the

interview till results were declared and considering that there is long lapse of time stretching to more than decades, the petitioners are estopped to

raise such grounds at this point of time. Entertaining such matters at this point of time will be landing the successful candidates i.e. the opposite

parties 6 to 25 in a disastrous future for their crossing the age limit for appearing in any future interviews.

16. Following the decisions vide 1981 (4) SCC 159, this Court again observes that it is not open for a Writ Court to re-determine the appropriate

methods of selection unless the motives are proved in a given case. The observation made in paragraph no.24 of the judgment vide 2011(I) SCC

150 are as follows:

24. When the list of successful candidates in the written examination was published in such notification itself, it was also made clear that the

knowledge of the candidates with regard to basic knowledge of computer operation would be tested at the time of interview for which knowledge

of Microsoft Operating System and Microsoft Office operation would be essential. In the call letter also which was sent to the appellant at the time

of calling him for interview, the aforesaid criteria was reiterated and spelt out. Therefore, no minimum benchmark or a new procedure was ever

introduced during the midstream of the selection process and were also fully aware that they must possess the basic knowledge of computer

operation meaning thereby Microsoft Operating System and Microsoft Office operation. Knowing the said criteria, the appellant also appeared in

the interview, faced the questions from the expert of computer application and has taken a chance and opportunity therein without any protest at

any stage and now cannot turn back to state that the aforesaid procedure adopted was wrong and without jurisdiction.

The observation made in paragraph nos.17 & 21 of the judgment vide 2015(II) SCC 493 are as follows:

17. Moreover, we would concur with the Division Bench on one more point that the appellants had participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the appellants did not challenge it at that time. Thus, it appears that only when the appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time. Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted.

21. Further, it is a settled law that in cases like the present one, where an executive action of the State is challenged, the court must treat with caution and not overstep its limits. The interference by the court is warranted only when there are oblique motives or there is miscarriage of justice. In the present case, there is no oblique motive or any miscarriage of justice warranting interference by this Court. Hence, the appeals and the writ petition are dismissed.

17. For the observations made hereinabove and support of the decisions referred to hereinabove to the case of the opposite party nos.6 to 25, this Court finds, the writ petition must fail which is accordingly, dismissed.

18. As a consequence of dismissal of the writ petition vide W.P.(C) No.4008 of 2011, the W.P.(C) No.19415 of 2017 since requires no further consideration for being covered by the decision involving W.P.(C) No.4008 of 2011, the same also stands dismissed. However, there is no order as to cost.