

(2024) 10 OHC CK 0009

In the Orissa High Court

Case No : Writ Petition Civil (OAC) No. 642 Of 2016

Smt. Kabita Giri

APPELLANT

Vs

State Of Orissa And Others

RESPONDENT

Date of Decision : 03-10-2024

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2024) 10 OHC CK 0009

Hon'ble Judges : B.P. Routray, J

Bench : Single Bench

Advocate : S.K. Das, S.P. Panda

Final Decision : Disposed Of

Judgement

B.P. Routray, J

1. Heard Mr. S.K. Das, learned counsel for the Petitioner as well as Mr. S.P. Panda, learned Additional Government Advocate for the State-Opposite Parties.

2. The Petitioner was an applicant for the post of Pharmacist as per the advertisement dated 20.7.2015 (Annexure-1) issued by the office of the Chief District Medical Officer, Sundargarh. The Petitioner took part in the selection process and secured 1566 marks as per the selection list prepared under Annexure-5. Opposite Parties 4, 5 & 6, the private Opposite Parties, who also participated in the selection process, secured 1545, 1361 and 1526 marks respectively in the same selection process under Annexure-5. The Petitioner as well as Opposite Parties 4, 5 & 6 all belong to UR(W) category. The private Opposite Parties though secured less marks in the selection process, but given appointment except the Petitioner. The candidature of the said Opposite Parties were preferred over the candidature of the Petitioner for the reason that, those Opposite Parties belong to Sundargarh district whereas the Petitioner belong to Balasore district.

3. It needs to mention here that, as per the advertisement under Annexure-1,

the condition prescribed as per clause-2 of the selection procedure that, the candidate of Sundargarh district will be given preference, and in case of non-availability of required numbers of candidates of Sundargarh district, the cases of candidates belonging to other districts will be considered.

4. The State authorities have filed their counter reiterating their stand that, Opposite Parties 4, 5 & 6, who belong to UR(W) category, have been given appointment on the basis of preference given over the Petitioner as they all belong to Sundargarh district and the Petitioner is a non-resident of Sundargarh district. This is the main subject matter of issue concerned in present writ petition.

5. Mr. S.K. Das, learned counsel for the Petitioner submits that, the Petitioner is an ordinary resident of Sundargarh district though her native belongs to Balasore district as per the Residential Certificate submitted by her in the application form. The Opposite Parties never disputed the Residential Certificate of the Petitioner regarding her ordinary residence in Sundargarh district where her husband was serving. Bereft of this, it is also submitted by Mr. Das that, the preference comes next to the merit and the candidates having less merit in the selection process cannot be preferred over the candidate having higher merit.

6. Mr. S.P. Panda, learned A.G.A. on the other hand submits that, the authorities have clearly mentioned in the advertisement regarding choice of preference which is neither challenged nor disputed by the Petitioner and so, by implementing said preferential clause mentioned in the advertisement, which remain unchallenged, the private Opposite Parties have been preferred for selection and appointment over the Petitioner since she is not a resident of Sundargarh district. He further submits that, the posts advertised meant for the Office of CDMO in Sundargarh district and therefore keeping such preferential clause cannot be said illegal.

7. The selection list as per Annexure-5 where the Petitioner had got more marks than Opposite Parties 4, 5 & 6 is not disputed. The Residential Certificate of the Petitioner stating she is an ordinary resident in the district of Sundargarh was also not questioned by the appointing authority. Thus it is found admitted that, the Petitioner, who is an ordinary resident of Sundargarh district, has secured much more marks in merit than those private Opposite Parties. Now it is to be seen whether by playing preferential clause, can the private Opposite Parties be preferred over a candidate securing more merit in the selection process.

8. Law is well settled that preference cannot take place the merit. In State of U.P. & Ors v. Om Prakash & Ors., (2006) 6 SCC 474, the Hon'ble Supreme Court has observed that, preference cannot be en-bloc over the merit. The observations of the Supreme Court, relevant to be reproduced here, are that, "this Court has consistently held that when selection is made on the basis of merit assessed through the competitive examination and interview, preference to additional qualification would mean other things being qualitatively and quantitatively

equal, those having additional qualification would be preferred. It does not mean en bloc preference irrespective of inter se merit and suitability.”

9. In the instant case, as per the procedure of selection mentioned in the advertisement, merit also comes first. It needs to be mentioned that, the selection of merit has been provided in clause-1 and the preference has been mentioned in clause-2. So it is not the case that preference will be exercised at the first instance over the merit in terms of the conditions of advertisement. As stated earlier, the law has been settled that, the merit should always be counted first and then the consideration of preference would operate. When it is admitted that, the Petitioner has secured more marks than Opposite Parties 4, 5 & 6 and she is an ordinary resident of Sundargarh district, Opposite Parties 4, 5 & 6 having less marks than the Petitioner cannot be preferred for appointment ignoring the case of the Petitioner. As such, the Petitioner is found entitled for appointment as Pharmacist in terms of the advertisement under Annexure-1 in the category UR(W) being more meritorious than the candidates appointed for the same.

10. However it is seen that in the meantime, eight years have already been elapsed pending the writ petition. So the availability of vacancy is definitely a pertinent question to be considered here. Neither the private Opposite Parties have entered their appearance to contest the case nor the State have stated anything in their counter affidavit regarding availability of vacancy. Further in the meantime, as those private Opposite Parties 4, 5 & 6 are already in service for a considerable period, this Court is not inclined to set aside their appointment in order to accommodate the Petitioner. At the same time, it is also found true that when the Petitioner has been illegally deprived of appointment and the candidates having less merit than the petitioner are given appointment ignoring Petitioner’s case, in such circumstances, this Court directs for appointment of the Petitioner as Pharmacist in any available vacant post in the district and in case of non-availability of vacancy in the district as on date, she shall be extended the benefit of appointment in the next available vacancy of the post in the district. The Opposite Parties are directed to comply with the order of this Court within a period of one month in case of availability of vacancy and in case of future availability of vacancy, within fifteen days thereafter.

11. The writ petition is disposed of as allowed.

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