

(1985) 02 OHC CK 0027

In the Orissa High Court

Case No : Original Jurisdiction Case No. 482 of 1978

Smt. Pramodini Dash

APPELLANT

Vs

The Chairman, Cuttack Municipality and Others

RESPONDENT

Date of Decision : 05-02-1985

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Orissa Municipal Rules, 1953 — Rule 409

Citation : (1985) 59 CLT 290 : (1985) 1 OLR 413

Hon'ble Judges : G.B. Pattnaik, J;B.N. Misra, J

Bench : Division Bench

Advocate : Bijoy Mohanti and B.C. Sahu, for the Appellant; G.A.R. Dora, B. Rath and A.K. Padhi and Additional Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

G.B. Pattnaik, J.—This is an application by a teacher of a school within the municipal limits of Cuttack invoking the extra ordinary jurisdiction of this Court under Articles 226 and 227 of the Constitution of India. The petitioner has prayed to quash the order of the Municipality dated 28th of March, 1977 (Annexure-5) to the writ petition, where under opposite party No. 4 was given the scale of pay of Rs. 400_620/- with effect from 19.9.1975 and to direct opposite parties 1 to 3 to promote the petitioner to the post of trained graduate teacher. The petitioner has further prayed" that the initial appointment of opposite party No. 4 dated 19.9.1975 should also be quashed, the same being in contravention of Rules 408 and 426 of the Orissa Municipal Rules.

2. According to the petitioner she was a trained graduate on the date she joined the Cuttack Municipality to be posted as a teacher in Busi Bazar Girls, U. P. School on 12. 4. 1971, but she was appointed in a matric C. T. Scale. The appointment letter has been annexed as Annexure-1 to the writ petition. There after she was transferred to another school called Mansinghpattana M. E. School on 30. 6. 1971 under Annexure-2. The said M. E. School became a High School and

the petitioner was promoted to a post carrying I. A. C. T. scale on 5.10.1972 as per Annexure-3. Opposite party No. 4 joined the Cuttack Municipality as a teacher in Choudhury Bazar M. E. School in a post in I. A.C.T. scale on 19.9.1975. Thus admittedly opposite party No. 4 is junior to the petitioner, she having been promoted to the L A. C. T. scale on 5.10.1972. The teachers of all the schools under the Municipality from one cadre and, in fact, in the gradation list which has been prepared by the Municipality under Annexure-4, petitioner has been shown at serial No. 4, whereas opposite party No. 4, has been shown at serial No. 10. Thereafter, under Annexure-5, the opposite party No. 4 was given the scale pay of a trained graduate teacher with effect from 19.9.1975 ignoring petitioner's seniority. The said action of the Municipality. Annexure-5 is, therefore, bad in law. The petitioner further asserts that on 19.9.1975, when opposite party No. 4 was appointed, he had crossed the age limit prescribed under Rule 468 of the Orissa Municipal Rules and, therefore, the initial appointment opposite party No. 4 is void being in contravention of the Rules. Further it was contended that the post of Headmaster was a promotional post and, therefore, could be filled up only by way of promotion from amongst the existings all as contemplated under Rule 425 of the. Orissa Municipal Rules and direct Recruitment to the said post should be held to be contrary to the Rules.

3. Opposite parties 1 and 2 in their return to this Court have averred that for the proposed M. E. School at Choudhury Bazar it was necessary to find out a suitable and experienced man and opposite No. 4 was selected for the said post and was appointed as Headmaster the said school on 19.9.1975 under Annexure-All. But while making the appointment it was clearly indicated that the scale of pay and allowances for the post would be decided later on. Under Annexure B/1 dated 4.11.1975, the Executive Officer, Cuttack Municipality, allowed opposite party No. 4 to draw I. A. C T. scale pending finalisation of the scale of pay. This was by way of an interim arrangement since final decision on the matter could not be taken quickly. Thereafter it was clarified by the Inspector of Schools that the scale of pay of the Headmaster of the school should be that of a trained graduate teacher, and, therefore, finally the scale of pay of the post to which opposite party No. 4 had been appointed was decided to be that of a trained graduate, by order dated 28.3.1977 (Annexure-C/1 to the counter) giving it effect from the date of appointment of opposite party No. 4. In this view of the matter, opposite party No. 4 cannot be said to be Junior to the petitioner. It has been further clarified in the counter affidavit that in Annexure-4, the name of opposite party No. 4 has been shown amongst the teachers getting I. A. C. T. scale since by that date the final decision regarding the scale of pay of the post to which opposite party No. 4 had been appointed had not been taken. But after the final decision, opposite party No. 4 would be shown against the category of trained graduate teacher. It has been averred in the said written statement that the teachers of Girls' School and teachers of Boys School within the Municipality termed two distinct and separate cadres and there is a separate gradation list for the teachers of Girls school. So far as the question of age is concerned, it has been

pleaded that the Municipal Council passed a resolution for relaxation of age which is permitted under the Rules and there has been no violation in recruiting opposite party No 4 even though he was over age It was also pleaded that the Selection Committee went through the service records of all the trained graduate teachers and interviewed six candidates and found opposite party No. 4 suitable.

4. In the rejoinder filed by the petitioner, the assertion that teachers of Boys' school and teachers of Girls' school within the Municipality formed two different cadres was denied and some instances were given showing transfer of teachers from Boys' schools to Girls' school and vice-versa.

5. Mr. Mohanti, the learned counsel for the petitioner, at the hearing of the case reiterated the stand taken in the writ petition and raised three contentions:

(i) The cadre being one, the petitioner must be deemed to be senior to opposite party No. 4 and, therefore, opposite party No. 4 could not have been appointed as a Headmaster in trained graduate scale superseding the claim of the petitioner.

(ii) The appointment of opposite party No. 4 was Void being in contravention of Rules 408 and 426 of the Orissa Municipal Rules.

(iii) In any view of the matter petitioner's case not having been considered while giving opposite party No. 4 the trained graduate scale, the order should be struck down.

Mr. Dora appearing for the Municipal Council combated each of the aforesaid contentions and submitted that there has been no violation of the Rules while appointing opposite party No. 4 to the post of Headmaster in a trained graduate scale and also the question of inter se seniority between the petitioner and opposite party No. 4 did not arise as they were in two different cadres. It was also submitted by Mr. Dora that petitioner's was considered while appointing opposite party No. 4 to a post in trained graduate scale and, therefore, petitioner cannot make any grievance on that score.

Mrs. Padhi appearing for opposite party No. 4 reiterated the stand taken by the Municipal Council and further submitted that Opposite party No. 4 was an experienced teacher who was found most suitable in the interview that was conducted by the Municipal Council and was appointed to the post, of Headmaster. His appointment could not, therefore, be challenged at this length of time when he is almost due to retire in a short time.

We will examine the correctness of each of the contentions raised on behalf of the petitioner.

6. There is no definition of "cadre" in the Orissa Municipal Act or the Rules framed thereunder. But "cadre" has been defined in the Orissa Service Code to mean, "the strength of a service or part of a service sanctioned as a separate unit". Though in the counter affidavit of the Municipal Council a stand was taken

that teachers of Boys' school and teachers of Girls' school formed two different cadres, but no document was produced in support of that stand. A file was produced before us by the counsel appearing for the Municipal Council, but that file does not throw any light on the point. There has been no decision of the Municipal Council treating the teachers of Boys' school and the teachers of Girls' school serving under the Municipality as two different units. Mr. Dora then contended that the fact that two gradation lists were prepared would indicate that there were two different cadres. The gradation list was prepared for the first time in the year 1976 and the nothings in the file that was produced before us indicate that two gradation lists were prepared to support the stand taken by the Municipality in some writ petitions pending in the High Court. In our opinion, the stand taken by the Municipality in some writ petitions cannot be the basis for declaring the teachers of Boys' school and teachers of Girls' school to belong to two different cadres. In the absence of any resolution of the Municipal Council to that effect, we are constrained to hold that the teachers of all the schools under the Municipality form only one cadre and the stand of the Municipal Council on that score cannot be accepted.

7. We would now examine the question of inter se seniority between the petitioner and opposite party No. 4. No doubt, petitioner was appointed in April, 1971, but to a post in matric C. T. scale. The appointment of opposite party No. 4 on 19.9.1975 was to a post in trained graduate scale, by which time the petitioner was serving, on being promoted, in a trained I. A. C. T. scale with effect from 5.10.1972. As would appear from the documents appended to the counter affidavit of opposite parties Nos 1 and 2, the appointment of opposite party No. 4 was to the post of Headmaster in the proposed M. E. School, but there was no determination of scale of pay and allowances on the date of appointment. Subsequently, under Annexure-B/1 he had been permitted to draw I. A. C. T. scale pending finalisation of his scale of pay and ultimately the Municipal Council resolved to allow the said opposite party No. 4 to draw the scale of pay in trained graduate scale with effect from the date of his appointment and it was so done on the basis of some clarifications obtained from the Inspector of Schools. In that view of the matter, in the eye of law it must be held that opposite party No. 4 was appointed to the post of Headmaster in trained graduate scale on 19.9.1975 on which date the petitioner was continuing as a teacher in a trained I. A. C. T. scale. Thus, opposite party No. 4 must be declared to be senior to petitioner and petitioner's grievance is wholly unfounded.

8. So far as the question of contravention of the Rules is concerned, Mr. Mohanti for the petitioner placed reliance on Rules 408 and 426 of the Orissa Municipal Rules. According to the learned counsel, Rule 408 prohibits recruitment of a person whose age exceeds 28 years and the second proviso to Sub-rule (3) of Rule 408 authorises the Municipal Council to relax the age limit for entry in Municipal service by resolution with prior approval of the State Government. No such resolution having been passed in this case, the appointment of opposite party No. 4 in 1975 must be held to be void as admittedly he had exceeded the

age of 23 years. As has been averred in the counter affidavit, opposite party No. 4 had twelve years" teaching experience prior to his appointment in 1975. He was interviewed along with several others and the service records of the trained graduate teachers were also considered by the Selection Committee. He was adjudged suitable man to the post of Headmaster of the proposed M. E. School. His appointment at this length of time after he has served the "Municipality for more than nine years cannot be declared invalid on the ground of contravention of Rule 408. True, the Municipal Council has not been able to produce a resolution relaxing the age limit, but we find that under Annexure-D/1 when the Executive Officer requested the Director of Employment Exchange to sponsor names for the post of teacher, he indicated that names be sent of experienced persons even though they may be more than 28 years of age and pursuant to the said letter of request, opposite party No. 4 had been sponsored by the Employment Exchange along with several others. The Inspector of Schools was in the Selection Committee which selected opposite party No. 4 for the post of Headmaster of the proposed M. E. School. Opposite party No. 4 has rendered service for more than nine years and the Municipality and the students have derived benefits out of his teaching. In this view of the matter, we cannot hold this initial appointment to be bad in law and accordingly we reject the said submission of Mr. Mohanti for the petitioner.

9. So far as violation of Rule 426 of the Orissa Municipal Rules is concerned, Mr. Mohanti's contention is based on the ground that the post of Headmaster is a selection post and, therefore, must be filled up by way of promotion alone and there could not have been a direct recruitment to the said post. Rule 426 is quoted herein below in extenso:

"(1) Posts of Manager, Head Clerk, Accountant, Upper Division Clerks or posts carrying upper division pay and posts of Headmasters of secondary schools shall be selection posts and all the ministerial posts other than those specified above shall be nonselection posts.

(2) Promotions to selection posts shall be made on grounds of qualification and merit, seniority being considered only where qualifications and merits are approximately equal.

(3) Promotions to non-selection posts shall be made in accordance with strict seniority except:

(a) Where a senior does not possess the qualifications prescribed for holding the higher post and definitely proved to be incompetent to hold such post ; or

(b) Where on account of his proved serious misconduct it is considered undesirable to promote him.

(4) Non-promotion to a non-selection post shall be deemed to be withholding of promotion, within the meaning of the rules relating to appointment and punishment of officers and servants of the council.

(5) The Government or any authority appointed by them in this behalf may, if they deem fit, call for records relating to appointments and promotions to selection posts for review and the orders passed by the Government or the authority shall be carried out by the Council."

Mr. Mohanti's aforesaid contention is based on the provision of sub-rule (2) of Rule 426. The said Rule prescribes that the promotion to selection post shall be made on grounds of qualification and merit, seniority being considered only when qualifications and merit are approximately equal. In our opinion, the said provision merely prescribes the criteria for selection when it is decided to give promotion and it does not put an embargo on the power of the Municipal Council to make direct recruitment to the post of Headmaster. On the other hand Rule 409 indicates the possibility of direct recruitment to all posts in classes I, II and III subject: to probation for a period of two years. The classification of services under a Municipal Council has been enumerated in Appendix-A to the Rules and the Headmaster comes within Class-II. A fair and harmonious reading of Rule 409 and Rule 426 would establish that direct recruitment to a post in any of the classes I, II and III of the service is permissible and also promotion to the said post is permissible. But when the municipal council decides to fill up the post by way of promotion, then the criteria for promotion have been indicated in Sub-rules (2) and (3) of Rule 426 depending upon the fact whether the post is a selection post or a non-selection post. In that view of the matter, we do not find any infirmity in the appointment of opposite party No. 4. to the post of Headmaster in the proposed M. E. School.

10. The only other submission survives for our consideration is whether the case of the petitioner was considered while appointing opposite party No. 4. In view of conclusion that direct recruitment is possible under law, it was not necessary to consider the case of the petitioner while making the appointment to the post of Headmaster. But we also find from the counter affidavit filed by the Municipal Council that the service records of all the trained graduate teachers were considered by the Selection Committee. Since the petitioner was a trained graduate her service records must have been looked into by the Selection Committee. But as we have said earlier, she did not have the right of consideration since it was a case of direct recruitment which was permitted under the Rules and, therefore, no grievance can be made on that score.

11. In the result, therefore, all the submissions of the learned counsel for the petitioner fail and the writ application is dismissed, but there would be no order for costs.

B.N. Misra, J.

12. I agree.