
(2010) 08 OHC CK 0034

In the Orissa High Court

Case No : Writ Petition (C) No. 2349 of 2009

Sri Batakrushna Palai

APPELLANT

Vs

State of Orissa and others

RESPONDENT

Date of Decision : 05-08-2010

Acts Referred:

Citation : (2010) 08 OHC CK 0034

Hon'ble Judges : S.K. Mishra, J; Pradip Mohanty, J

Bench : Division Bench

Final Decision : Allowed

Judgement

S.K. MISHRA, J.—The petitioner prays to direct the opposite parties to regularize his services from the date of initial appointment with other service and financial benefits and also for quashing the advertisement under Annexure-3.

2. The petitioner claims that he was selected and appointed on contractual basis as the Technician (A/C) in the Bhubaneswar Orissa School of Engineering Cuttack hereinafter referred to as the B.O.S.E. for brevity. It is the further case of the petitioner that in order to run and operate the newly created Cinematography Department under the B.O.S.E. the State Government vide Industries Department Letter No. 11493 dated 3.6.1996 created and sanctioned two posts of Studio Technician for the Light and A/C wing of B.O.S.E. Cuttack and intimated the Director, Technician Education and Training Orissa, Cuttack.

3. Before initiating any action pursuance of the aforesaid letter for filling up of the post of Studio Technician (A/C) and Studio (Light) Technician, the Cinematography Department of B.O.S.E., Cuttack was reconstituted as Film and Television Institute of Orissa, (B.O.S.E. Campus), Cuttack. It is registered as a Society under the Societies Registration Act, 1860 wherein the Principal Secretary to State Government in the Industries Department is the Co-Chairman and Vice-Chancellor of Ravenshaw Autonomous University is the Chairman. The Director, Technical Education and Training Orissa, Cuttack is the Vice-Chairman

and administrative head in respect of Class-III & Class IV staff of the said Film and Television Institute of Orissa. (B.O.S.E. Campus), Cuttack.

As per first Meeting of said Film and Television Institute of Orissa, (hereinafter referred to as "F.T.I.O." for brevity), the process relating to selection and appointment for the aforesaid two posts of Studio Technician was initiated by the Vice-Chairman-cum-D.T.E.T. for filling up of the aforesaid two posts of Studio Technician on regular basis Vacancies were notified to Employment Exchange under the provisions of Compulsory Notification of Vacancies Act and Rules framed there under in compliance of the said requisition made by the opposite party No. 3 twenty eight names including the name of the petitioner were sponsored by the Employment Exchange. Upon receipt of 28 aspirants, they were called for written test out of whom 7 candidates including the petitioner were qualified and selected to appear for the practical and viva-voce test for the post of Studio Technician (A/C.). Pursuance of the written test result, 7 candidates including the petitioner appeared in the practical and viva-voce test. In such process, the petitioner stood first for the post of Studio Technician (A/C) by securing 64.50 marks out of 100.

4. After selection, select list was prepared, but before the appointment could be made, the then opposite party No. 3 was transferred. By considering the urgent need of manpower to take over air conditioning plant and other electrical installation etc., the then Director F.T.I.O. vide order dated 18.2.1999 wrongly observed that in absence of Government approval regular appointment cannot be made and directed to take separate action to obtain Government approval. The petitioner further pleads that as a result of such misconception of fact the then Director, F.T.I.O. vide Order No. 16/FTI dated 18.2.1999 appointed the petitioner on contractual basis on a consolidated pay. The petitioner joined duty as Studio Technician (A/C) by submitting his joining report on 19.2.1999. Thereafter, his services have been extended from time to time and the petitioner is still continuing today. In the meantime, the Film and Television Institute of Orissa was re-named as Biju Pattnaik Film and Television Institute of Orissa (hereinafter referred to as the "B.P.F.T.I.O." for brevity).

The petitioner further pleads that in spite of the Director noting that separate steps are being taken to obtain Government approval for regular appointment of the petitioner till today neither any action is taken nor any request is communicated to the Government. In view of such inaction of the opposite parties, even though the petitioner was properly selected against a regular vacancy but he is continuing till today on contractual basis on a consolidated pay since last ten years.

5. For smooth and effective administration and in order to give full autonomy to the newly created B.P.F.T.I.O., the State Government in Industries Department vide Notification No. 20943 dated 14th/15th November, 2002 abolished 21 posts from B.O.S.E., Cuttack including the posts created vide order under Annexure-1 and vide Notification No. 20937 dated 14th/15th November, 2002 the said pots

were developed under B.P.F.T.I.O. to run the diploma course in Cinematography. Film, Video Editing, Sound and T.V. independently, which was initially created under B.O.S.E., Cuttack. The petitioner claims that so far as the letter under reference relating to post of Technician (A/C) under B.P.F.T.I.O. is concerned, it is the outcome of non-communication of his selection and appointment against a regular vacant post for which the proper selection was adhered to including notification of vacancies under the provisions of Compulsory Notification of Vacancies Act.

6. Thereafter, the petitioner learnt that the opposite parties were proposing to issue advertisement for filling up of the post, as aforesaid. He made a representation to the opposite parties for regularization of his service. But the same did not yield any result. Without considering his representation the opposite parties issued advertisement in Oriya Daily "The Samaj" on 14.2.2009 inviting application for filling up of the various posts under B.P.F.T.I.O. Including the post of Technician (A/ C) as per the advertisement as at Annexure-13. Thereafter, the petitioner has filed this writ application claiming the relief as described above.

7. The opposite parties filed their counter affidavit, inter alia pleading that the petitioner has submitted an application in pursuance of the advertisement as at Annexure-13 and the writ application is not maintainable. The opposite parties further pleaded that the petitioner was initially engaged as Studio Technician (A/ C) in the Film and Television Institute of Orissa on contract basis with a consolidated amount of Rs. 3,000/ - per month for a period of six months or till the post is filled up on regular basis, whichever is earlier, vide Annexure-6 to the writ petition. It is further pleaded that though the petitioner was engaged on contractual basis with effect from 18.2.99 but he is continuing on extension basis from time to-time or till the said post is filled up on regular basis, whichever is earlier. While continuing as such in the said post, the State Government in it's Department of Industries, vide order dated 30.6.2008 on the proposal of the B.P.F.T.I.O., Cuttack, approved the filling up of the vacancies and requested the Principal to fill up the vacant post on certain terms and conditions as mentioned in Annexure-A.

After receipt of the Government order the opposite party No. 4 issued advertisement which was published in Oriya Daily "The Sambad" on 14.2.2009 for filling up of certain vacancies as mentioned in the said advertisement. So far as the post of Studio Technician (A/C) is concerned pursuant to the advertisement applications have been received and the petitioner has applied for the said post within the time. It is" further pleaded that while the process of recruitment is on motion and notwithstanding the fact that the petitioner is an applicant to the said advertisement and the selection process is postponed in view of the code of conduct of the ensuing General Election, the petitioner has filed the present writ petition without any basis.

The opposite parties further plead that the petitioner was initially engaged on

contractual basis after facing an interview. The same does not confer any right on the petitioner to be excluded from facing interview pursuant to the present advertisement made for the regular vacancy to be filled up on selection basis. Since the petitioner was engaged on contractual basis, he has no right to claim regularization in the absence of any regular vacancy in the said post. In the meantime, steps have been taken to fill up the said vacancy. Thus, the opposite parties claim that the claim of the petitioner is without any merit and is liable to be dismissed.

8. The petitioner filed a rejoinder to the counter affidavit in which it is pleaded that the 5th Governing Body meeting of B.P.F.T.I.O. held on 7.1.2003 categorically observed that the petitioner was appointed through interview duly sponsored by the Employment Exchange against the sanctioned post of Studio Technician (A/C). The petitioner was appointed on contractual basis due to non-transfer of post of Studio Technician (A/C) from B.O.S.E. Cuttack. The copy of the resolution of the 5th Governing Body meeting has been annexed as Annexure-15. The petitioner pleads that subsequently the Governing Body illegally and arbitrarily decided to fill up the said post and after exploiting him for more than ten years advertisement as per Annexure-13 was issued.

The petitioner claimed that the State being a model employer should regularize his employment.

9. In an additional counter affidavit to the rejoinder, the opposite parties averred that before creation of B.P.F.T.I.O., the three courses, namely, Cinematography, Sound & T.V. Engineering and Film and Video Editing were imparted at Bhubanananda, Orissa School of Engineering, Cuttack. Twenty-one posts including the posts of Technician (A/C) and Electrician were created by the Government under the Bhubananda Orissa School of Engineering, Cuttack for operation and maintenance of the Studio proposed to be created for the above 3 courses vide Industries Department G.O. No. 11493 dated 3.6.1996.

However, after creation of B.P.F.T.I.O. on 23.2.1998 the above 21 posts were not transferred from B.O.S.E., although permission was granted for imparting education in the above 3 diploma courses by the newly created institute. After creation of the post vide industries Department letter dated 3.6.1996, requisition was placed by the Director of Technical Education and Training, Orissa before the Employment Exchange vide letter No. 2347 (2) dated 1.5.1998 seeking sponsoring of eligible candidates to be considered for appointment against one post of Technician (A/C) and Technician (Light) in anticipation of transfer of the posts from B.O.S.E. to Film Institute.

In the meantime, the Employment Exchange sponsored the names and the petitioner was called to appear in the interview. But the result of the interview was not given effect to as the post in question was not transferred from B.O.S.E. to B.P.F.T.I.O.

However, in order to man the Air Conditioning facilities in the newly created

institute, it was felt essential, as a stop gear (sic) measure to appoint him on contractual basis. Hence, the Director of F.T.I.O., subsequently re-designated as Principal, instead of writing for creation of the post issued contractual appointment letter for a period of six months in favour of the petitioner vide Letter No. 16/FTI dated 18.2.1999.

The opposite parties, therefore, plead that the claim of the petitioner that he should have been appointed on regular basis is neither sustainable in law nor in fact. There being no post, the selection made in anticipation of creation of post can not create any right in favour of the petitioner that too after having accepted and worked on contract basis. The opposite parties further plead that the petitioner accepted contractual appointment and chose not to challenge the same in any Court of law, as he was aware that no regular post was existing on the date of his appointment.

The opposite parties further plead that the 5th Governing Body did not resolve for regularization of the services of the petitioner.

10. An examination of the documents filed reveals that as per Letter No. 11439/IV TTI-11/96 Bhubaneswar dt.3.6.1996 the post of Studio Technician (A/C) in the scale of pay of Rs. 1400-2600 was created. Such letter also indicates that it had been cleared by the Principal Secretary, Finance Department and has been concurred by F.A.-cum-Joint Secretary to Government in Industries Department. Such non-gazetted post was created under B.O.S.E., Cuttack. However, in 1997-98 the institute was registered as a Society in the name and style "Film and T.V. Institute of Orissa. (B.O.S.E. Campus), Cuttack. As per annexure-3 series, the Director of Technical Education & Training, Orissa requested the Employment Officer, District Employment Exchange, Cuttack for sponsoring of candidates for Studio Technician (Light and A/C) as per enclosure to Annexure-3. It has been clearly mentioned that the post had been created for the Film & T.V. Institute of Orissa located in the Bhubanananda Orissa School of Engineering Campus, Cuttack. Such posts were stated to be regular posts. As per the letter dated 1.5.1998, the District Employment Officer, Cuttack recommended the names of 28 candidates including the petitioner. Then the petitioner was called for written test as per Annexure-4 and for practical and viva-voice test as per Annexure-5. Annexure-6 is the appointment letter issued in favour of the petitioner on contract basis with a consolidated pay of Rs. 3,000/- per month for a period of six months. Thereafter the services have been extended from time to time. Such process is not disputed in this case.

It is evident from the Letter No. 20937/I/II TTI-36/02, dated 14th/ 15th November, 2002 issued by the Under Secretary to Government to the Accountant General (A&E) Orissa vide Annexure-8 that the Government of Orissa Industries Department created 21 posts for B.P.F.T.I.O., Cuttack out of which Studio Technician (A/C) in the pay scale of Rs. 5,000-8,000/- is one. As per Notification No. 20943 dated 14th/15th November, 2002, 2 posts of B.O.S.E., Cuttack were abolished after obtaining the concurrence of the Governor.

11. It is further evident from Annexure-15 i.e., the Minutes of the Proceedings of 5th Governing Body Meeting of B.P.F.T.I.O. held on 7.1.2003 that the post of Technician (A/C) was considered. It is further observed by the Governing Body that the person holding the post was appointed through interview duly sponsored by the Employment Exchange against the post on contract basis in absence of creation/ transfer of the post. He is continuing since 19.2.1999. It was resolved in remarks column that since the post has been created for B.P.F.T.I.O., his service may be regularized against the post. These facts are not controverted by the opposite parties, though a feeble attempt has been made in the additional affidavit filed after filing of the rejoinder by the petitioner.

12. The plea raised by the opposite parties that the petitioner having applied in pursuance of Annexure-13 is precluded from challenging the same, is not tenable. Such a plea may be available to the opposite parties in case the petitioner participates in the selection process and later on being unsuccessful challenges the advertisement. In this case, though he has applied pursuant to the advertisement, it is not the case of the opposite parties that the selection process has been completed and he has failed in his attempt. Thus, the first contention of the opposite parties is unacceptable.

13. There is no dispute that the petitioner was selected through due process of selection and secured first position in the test for being appointed as Technician (A/C). The only difficulty that was faced by the authorities at the time of appointing him in the aforesaid post on regular basis is that the B.O.S.E. was converted and re-named as Film & T.V. Institute inside B.O.S.E. Campus. It is undisputed that the B.O.S.E. had approved posts for such Technician (A/C). It is also not disputed that the said institute was re-named as F.T.I. Thus, the reasonable and legitimate expectation of all concerned is that whatever obligations were there, it would be taken over by the Film & T.V. Institute. In view of technical difficulties arising out of non-transfer of the posts, the then Director, F.T.I. issued appointment order in favour of the petitioner on contractual basis. It is further undisputed that such 21 posts, including the Technician (A/C) in B.O.S.E. Institute were abolished by the order of the Governor and 21 posts have been created in the F.T.I., which has been re-named later on as B.P.F.T.I.O. Thus, any person, who has been appointed against the vacant post under the B.O.S.E. Institute, has reasonable and legitimate expectation to be appointed or absorbed in the 21 posts created under B.P.F.T.I.O. The State being benevolent and model employer shall consider the case of the petitioner for regularization.

14. Alternatively, it is seen that the petitioner has been working on contractual basis for a period of 10 years and his selection and appointment was made against a sanctioned vacancy. The Hon'ble Supreme Court in Secretary, State of Karnataka and Others Vs. Umadevi and Others, has observed that in cases of duly qualified persons, who have been appointed though irregularly, in duly sanctioned vacant post and employees have continued to work for ten years or more but without intervention of orders of Courts of tribunals, their services may

be considered for regularization and the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointees, who have worked for more than ten years or more in duly sanctioned posts but not under cover of orders of Courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant-sanctioned posts that require to be filled up, in case, where temporary employees or daily wagers are being now employed. The Supreme Court further clarified that the regularization, if any, already made, but not subjudice, need not be reopened based on the judgment. But there should have no further by-passing of the constitutional requirement and regularizing or making permanent those not duly appointed as per the constitutional scheme.

15. In this case, though there was a vacant post in the B.O.S.E. Institute, the same was not created for the F.T.I. at the time of appointment of petitioner on contractual basis. Therefore, at best there is some irregularity in the same as B.O.S.E. Institute was to be re-named as F.T.I. and later on B.P.F.T.I.O. Thus, this is a fit case for considering the case of the petitioner for appointment on regular basis.

16. The claim of the petitioner for back wages from the date of appointment is not admissible, as he did not approach the Court and remained silent till the issuance of advertisement.

17. In the aforesaid view of the matter, the writ petition is allowed. Annexure-13, so far as it relates to the selection of a Technician (A/ C), is hereby quashed and the opposite parties are directed to reconsider the case of the petitioner in the light of the observation made in the judgment and give effect to their own resolution of the 5th Governing Body and take appropriate steps for regularizing his service within a period of two months from the date of submission of certified copy of this judgment before the appropriate, authority.

No costs.

Pradip Mohanty, J.

18. I agree.