

(2011) 04 OHC CK 0043

In the Orissa High Court

Case No : O.J.C. No's. 16429 and 16427 of 1998

Surendra Kumar Patra and Others

APPELLANT

Vs

Abani Kumar Sahoo and Others

RESPONDENT

Date of Decision : 22-04-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 320

Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 — Rule 11, 17, 6, 7, 8

Orissa Public Service Commission (Limitations of Functions) Regulations, 1989 — Regulation 10, 3, 4

Citation : (2012) 113 CLT 53

Hon'ble Judges : S.K. Mishra, J;L. Mohapatra, J

Bench : Division Bench

Final Decision : Allowed

Judgement

S.K. Mishra, J.—In this batch of Writ Petitions common questions of fact & law being involved, the same are being disposed of by this common Judgment. The Petitioners in all these cases assail the combined order passed by the Orissa Administrative Tribunal in O.A. Nos. 123 of 1993, 2153 of 1993 & 2387 of 1997.

2. The facts leading to file all these Writ Petitions are that Orissa Fisheries Service Class-II (Recruitment & Conditions of Service) Rules, 1977 provided for recruitment for the post of Junior Branch of the Fisheries Service as well as promotion to the rank of Junior Branch of Fisheries service. In the year 1979, Government of Orissa in General Administration Department, in exercise of power conferred by the Orissa Civil Service (Classification, Control & Appeal) Rules, 1962 read with Rule 17 of the Orissa Service Code declared that the post of Superintendent of Fisheries is a Specially declared Gazetted post, which was earlier Class-II post & also under the very same notification declared that the Director of Fisheries is the appointing authority in place of the State Government. Classification of posts & services are done by the State Government in pursuance of the Orissa Civil Services (Classification, Control & Appeal) Rules 1962, wherein

specific provision has been made in the shape of Rule 6, 7 & 8. The Petitioners further plead that under Rule 11, the appointing authorities in respect of posts are specified which are to be found in the schedule to the rules & in sub-rule (2) of rule 11 the Government is empowered to declare the appointing authority in respect of specific posts. The State Government in pursuance of its statutory powers converted the said post of Superintendent of Fisheries from Class-II to Specially Gazetted & further in place of the state Government as the appointing authority, conferred the Director of Fisheries with the power to appoint. It is pleaded by the Petitioners that as long as the post of Superintendent of Fisheries continued in the Class-II rank & the State was the appointing authority, the power of appointment was subject to the recruitment procedure of Public Service Commission. It is contended that the same ceased to be operative after the post was brought down to the level of specially Gazetted & the State Government ceased to be the appointing authority. According to the Orissa Public Service Commission, the Limitations & Functions Regulation, 1952, the matter is no more required to be referred to the Orissa Public Service Commission (hereinafter referred as "O.P.S.O") as appointments to be made by the authority other than the State Government is not required to undergo P.S.C. procedure.

3. Since 1979, after issuance of the Notification regarding the rank of Superintendent of Fisheries, no appointment had been made by the State Government through O.P.S.C. It is further submitted that the Petitioners are all Degree holders from the Orissa University of Agriculture & Technology, hereinafter referred as "OUAT", in fishery Science & therefore, they are Bachelor Degree holders in Fishery Science from recognized University. In the year 1992 requisition was placed with the Employment Exchange i.e. the Employment Exchange situated in the OUAT to sponsor candidates for the post of Superintendent of Fishery & categorically requisition was sent to sponsor the candidates having qualification i.e. Bachelor degree in Fishery Science from recognized University, which is the only institution in the State imparting instruction on the same.

4. The Petitioners further plead that the Rules provide that the qualification for being appointed as Superintendent of Fisheries was Master degree in Zoology or Marine Biology or Bachelor Degree in Fishery Science from recognized University. In the year 1986 in Rule 8, an amendment was brought in & the same was a conscious amendment made by the Government of Orissa keeping in view of the fact that large number of students with specific qualifications on the subject were coming out successful from the OUAT & as such by the amendment it was decided to insert the proviso to Rule 8 & whereunder preference was directed to be given to the degree holders in Fishery Science. Two persons, who were Petitioners before the Learned Tribunal, viz. Abani Kumar Sahoo & Rajendra Kumar Acharya filed a case before the Tribunal belong to Class-II service known as Subordinate Fishery Service & they do not have degree in Fishery Science & having general degree in M.Sc. in Zoology or in Marine Biology filed the case questioning the selection process. It is pleaded by the Petitioners that they

questioned the selection procedures meant for the rank of Superintendent of Fisheries though they themselves had no right to do so as they belong to the rank of Fishery Extension Officer & in order to come to the rank of Superintendent of Fisheries they have to be promoted to the rank of Deputy Superintendent of Fisheries first, then only question of promotion to the rank of Superintendent of Fisheries would arise. In 1994, the nomenclature of the post of Superintendent of Fisheries was changed to the rank of Junior Fishery Officer & the post of Junior Fishery Officer also remained as Specially declared Gazetted.

5. In this case, the selection procedure started in the year 1992 by issuing requisition to the Employment Exchange against the post of Superintendent of Fisheries. Ultimately, when the appointments were made, they were in respect of the Junior Fishery Officer as by virtue of Annexure 7 & 8 nomenclatures has already been changed. The Petitioners further contended that their appointment as Junior Fisheries Officers based on interview out of the candidates referred by the Employment Exchange at OUAT & that should not have been set aside by the Learned Tribunal & in doing so, it has caused gross miscarriage of justice & illegality.

6. The case of the Opp. Parties which borne out from the Original Application filed before the Tribunal giving directions to the Respondent No.2 not to hold interview on 11.06.1993 for the post of Superintendent as the same is bad in law & in violation of the statutory provision. Direction has also been sought that appointment to the post of Superintendent of Fisheries shall be made by inviting applications through an advertisement in the newspaper & after consulting the O.P.S.C. Specific case of the Opp. Parties is that the post of Superintendent of fisheries is governed by statutory rules namely, the Orissa Fisheries Service, Class (Recruitment & Conditions of Service) Rules, 1977, hereinafter referred as the "Rules 1977". Rule 4 of the Rules 1977 provides that Orissa Fisheries Service, Class consists of the posts of Assistant Director of Fisheries in- the Senior Branch & 27 posts of Superintendent of Fisheries in the Junior Branch including one post of Co-ordination Officer & one post of Statistical Officer. It is further pleaded that the rules also provide that candidates for appointment to the Junior Branch of the Service must hold a Second Class Master's Degree either in Zoology or in Marine Biology; or (b) a Bachelor's Degree in Fishery Science from a recognized University in India. According to the amendment of the 1986 Rules, 5 (1) Clause (b) provides that the posts of Junior Branch will be filled up by direct recruitment & by promotion. Among others, it was also provided in the amended rules that the percentage of posts to be filled up by direct recruitment would be 50% of the total vacancies & the remainder would be filled up by promotion from the Orissa Fisheries Subordinate Service. The qualification for appointment to Junior Branch was modified by providing that it would be Second Class Master Degree either in Zoology or in Marine Biology or a Bachelor's Degree in Fishery Science from a recognized University.

The Petitioners before the Tribunal have put up their grievance that despite these

legal provisions, the Respondent No.2 invited names from the Employment Officer, University Employment Information Guidance Bureau, OUAT, Bhubaneswar & went ahead with the appointment to the post of Superintendent of Fisheries in September, 1992.

7. Keeping in view the submissions made by the Learned Counsel as well as taking into the different notification & annexures, the Learned Tribunal noted that the moot point to be decided is regarding change of designation of Superintendent of Fisheries to that of Junior Fisheries Officer & declaring such posts as Specially Declared Gazetted & whether such procedure is correct or otherwise. Further taking into consideration that according to Rules, 1977, 27 posts of Superintendent of Fisheries belong to the Junior Branch of the Orissa Fisheries Service Class-II. The same designation remained unchanged at the time of amendment of the Rules, 1977 in 1986. The Tribunal further held that it was not an amendment of the Rules, 1977 but only a Resolution of the Government dated 4.04.1994. This Resolution is not purported to be a Notification for amendment to the Rules, 1977. The Tribunal further held that statutory provisions cannot be changed or amended or replaced by issuing a Resolution of the Government. Since no statutory amendment was brought for effecting change in the designation of Superintendent of Fisheries as the Junior Fisheries Officer. The Resolution being ultra vires to Rules 1977 has no binding effect. Learned Tribunal further held that since the post of Superintendent of Fisheries are Class II of the Junior Branch of Service, those have to be filled up in pursuance of the statutory provisions of Rules 1977 through the O.P.S.C. by issuing open advertisement in the newspaper. The Tribunal further held that the applicants shall also be allowed to participate in the recruitment process even if they are age barred in the meantime.

8. In assailing this finding, the Learned Counsel appearing for the Petitioner submitted that the Learned Tribunal contended that the applicant before the Learned Tribunal have not prayed for setting aside the recruitment for the post of Superintendent of Fisheries without inviting applications through an advertisement. In drawing attention to the Regulation 3 of the Orissa Public Service Commission (Limitations of Functions) Regulations, 1989, it is pointed out by the Learned Counsel that it is not necessary to consult the commission on any of the matter specified in Sub-clauses (a), (b) & (c) of Clause (3) of Article 320 of the Constitution in respect of the posts & services to which appointment is made by an authority other than the State Government. It is further contended that Regulation 4 provides that in regard to services & posts to which appointments are made directly by the State Government, it shall not be necessary to consult the Commission on any of the following matters, i.e. the classification of services & posts & no other things. It is further submitted that Clause 6 provides for classification of services & the services of State shall be classified as State Civil Service Class-I & Specialty Declared Gazetted & other Civil Services Class-II, State Civil Service Class-III. Regulation 10 further provides that the appointment to the services & posts other than the State Civil

Services Class I & General State Service shall be made by the authorities specified in this behalf in the schedule & in the schedule, it is provided that the specially declared Gazetted service/posts for the appointing authority, the Head of the Department. Learned Counsel therefore, submitted that the reasoning resorted to is completely erroneous & requires interference.

9. On the other hand, the Learned Counsel for the Opp. Parties contended that the appointment to the post of Junior Fishery Officer/ Superintending Officers is made without an open advertisement.

10. Learned Counsel for the Petitioner has relied upon the reported case of Ashok Kumar Shrivastava and Others Vs. Ram Lal and Others, ; wherein the Supreme Court has held that withdrawal of certain posts from the purview of Public Service Commission is permissible in view of exigencies. However, at paragraph 28, the Hon''ble Supreme Court held that the posts can be taken out of the purview of the Public Service Commission & the State Government was free to fill up those posts after laying down norms consistent with the constitutional provisions & other related laws. Thus, the material question in these Writ Petitions is whether the appointing authority has followed the procedure laid down for selection & appointment of Civil Servants or there has been a breach of the same. In this regard, the Learned Counsel for the Opp. Party has placed reliance on recently reported case i.e. State of Orissa & anr. v. Mamata Mohanty, AIR 2011 SCW 1332.

11. It is not disputed in this case that the appointments were made by the appointing authority by calling for names from the Employment Exchange situated within OUAT campus. It is also not the case of the Petitioners that all these Employment Exchanges were notified to sent the names of the persons who have the qualification & eligibility to appear the examination there is no dispute that no open advertisement was made in this case for recruitment of the Junior Fishery Officers. The Hon''ble Supreme Court in the aforesaid case (Mamata Mohanty supra) after taking into consideration a number of decisions has come to the conclusion that some appropriate method consistent with the requirement of Article. 16 should be followed in matters of public employment & to avoid nepotism & corruption. In other words, there must be a notice published in appropriate manner calling for applications of those who applied in response thereof should be considered fairly. Even if the names of candidates are requisitioned from employment exchange in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from the open market by publishing advertisement in the local newspapers having wide circulation or by announcement in Radio & Television. Merely calling names from the Employment Exchange does not meet the requirement in the said Article of the Constitution. The Hon''ble Supreme Court further proceeded to hold that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made merely by inviting names from the Employment Exchanges or putting a note on

the Notice Board that will not meet requirement of Articles 14 & 16 of the Constitution of India. Such course violates the mandates of Articles 14 & 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. Thus, for a valid & legal appointment mandatory compliance of the said Constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit. Thus, on this score alone, the recruitment process wherein the Petitioners were selected is bad in law & is liable to be struck down.

12. Learned Counsel for the Petitioners further pointed out that on filing application before the Learned Tribunal they were not eligible for being appointed as they were already served in the Fisheries Department, but Learned Counsel failed to substantiate his contentions by showing any provision of law, which precludes a person who has qualification but is employed at the time from appearing in an open examination.

It is trite law that a person having requisite qualification can apply for the said post even if he is gainfully employed, unless there is a bar for such persons in appearing in the recruitment test. In other words, even persons who are gainfully employed can apply, but that application shall generally be routed through the department in which they serves.

13. The only other question that requires determination in this case is whether appointment shall be made by the Director of Fisheries or the State Government in consultation with the O.P.S.C. This question assumes importance in the sense that the Learned Tribunal has come to the conclusion that the Resolution, by which the Superintendent of Fisheries have been declared as Specially Declared Gazetted Officers does not have effect of an amendment of an Act.

14. Rule 6 of the Orissa Civil Services (Classification, Control & Appeal) Rules, 1962, as it stood before the amendment of the year 2000, provides for the classification of the services. It lays down that the Civil Services of the State shall be classified as follows:

- (1) State Civil Services, Class I,
- (2) State Civil Services, Class II,
- (2-A) State Civil Services, (Specially Declared Gazetted),
- (3) State Civil Services, Class III.

At present the classification of Services is as under:

- (i) State Civil Services, Group-A;
- (ii) State Civil Services, Group-B;
- (iii) State Civil Services, Group-C

At present the State Civil Services (Specially Declared Gazetted) has been gone away with. However, when the cause of action arises in the present case, the earlier classification i.e. prior to the Amendment, 2000 was in application, hence relevant for the purpose of this case. Rule 17 of the Orissa Service Code provides for Gazetted Government Servant. It includes :

(i) a member of any State "Civil Service, Class I or Class" or General State Service, Class I or Class within the meaning of the Orissa Civil Service (Classification, Control & Appeal) Rules, 1962,

(ii) any other Government servant who may be specially declared by the State Government to be a Gazetted Government servant.

In pursuance of the powers conferred under the Rule 17, the State Government has declared on 16.08.1979 the Superintendent of Fisheries (Junior) to be Specially Declared Gazetted Officer under Clause (ii) of Rule 17 of the Orissa Service Code. Thereafter, as per Resolution dated 04.04.1994, the nomenclature of the Superintendent of Fisheries (Specially Declared Gazetted) was changed to that of Junior Fisheries Officer (Specially Declared Gazetted). In the Notification of the year 1979 i.e. Annexure 3, it is seen (hat the Superintendent of Fisheries now designated as Junior Fisheries Officer, were not only declared to be specially declared Gazetted Officer but it was also stipulated that the authority competent to make appointment to such officers is the Director of Fisheries. In such situation, it is not necessary to consult the O.P.S.C. & the. Director of Fisheries can conduct the recruitment test & appoint the Specially Gazetted Officers. To that extent, the order passed by the Learned Tribunal is erroneous &, therefore, it requires modification.

15. In the result, the writ application is allowed in part. We do not interfere with the directions given by the Learned Tribunal to the effect that the recruitment made by the Opp. Party No.5 is illegal. However, we modify operative portion of the order to the extent that the Opp. Party No.5 shall make a fresh recruitment by making an open advertisement. Since both the Petitioners & private Opp. Parties have; in the meantime, become over age & were pursuing the litigation, we direct that if any of them applies in response to such open advertisement, their applications shall be considered notwithstanding the fact that they have become over age in the meantime. Opp. Party No.5 is directed to complete the entire selection procedure within six months.

L. Mohapatra, J.

16. I agree.