

(2024) 04 OHC CK 0158

In the Orissa High Court

Case No : Writ Petition (C) No. 4865 Of 2015

Swetapadma Bastia

APPELLANT

Vs

Union Of India & Ors

RESPONDENT

Date of Decision : 18-04-2024

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2024) 04 OHC CK 0158

Hon'ble Judges : Dr. B.R.Sarangi, J;G. Satapathy, J

Bench : Division Bench

Advocate : B.B. Swain, G.R. Sethi, B.K. Pattnaik, P.S. Nayak

Final Decision : Allowed

Judgement

Dr. B.R. Sarangi, J

1. The petitioner, by means of this writ petition, seeks to quash the order dated 12.01.2015 passed in O.A. No.260/00502 of 2012 under Annexure-3, by which the Central Administrative Tribunal, Cuttack Bench, Cuttack has set aside the selection of the petitioner as Grama Daka Sevak Branch Post Master (GDSBPM) of Khatkhatia Branch Post Office and directed opposite party no.3 to consider the candidature of opposite party no.4 vis-à-vis others to the post of GDSBPM, and further to quash the consequential order dated 17.08.2015 under Annexure-5, by which opposite party no.3, in compliance of Annexure-3, has quashed the selection of the petitioner as GDSBPM, Khatkhatia Branch Post Office in account with Baghiabahal SO issued vide office letter no.APP/ED/GDS/A-80 dated 27.04.2012.

2. The factual matrix of the case, in brief, is that the post of GDSBPM of Khatkhatia Branch Post Office in account with Baghiabahal Sub-Post Office fell vacant due to retirement of the regular incumbent and in order to fill up the said vacancy, notification was issued on 23.11.2011 to the District Employment Officer, Boudh to sponsor the names of the candidates, besides issuing local open

notification inviting applications from open field candidates fixing the last date of receipt of application as 22.12.2011. In the said notification, it was specifically mentioned that the post was offered to the candidate from the UR community and in case minimum required number of three candidates of the said community are not available the vacancy will go to the other community candidate in the order of OBC, ST and SC.

2.1. The employment exchange did not sponsor any name, but fifteen applications were received in response to the notification, out of which applications of three candidates were received beyond the due date and, accordingly, their cases could not be taken into consideration. Out of the remaining twelve candidates, opposite party no.4 was found to have secured the highest mark in the matriculation examination but discrepancy was found in his application inasmuch he failed to submit the undertaking regarding his other source of income as stipulated in para 4(ii) & 6(6) of the notification. So also in column no.9 of the application, opposite party no.4 had mentioned 'Nil' against the column 'other source of income' and also left column 10(a) to (e) 'blank'. It was further stated that as per para 3.2 of the letter dated 17.09.2003 of the G.I Deptt. of Posts 'As GDS is a part time employee, a candidate applying for any category of GDS will have to supplement his income from other employment sources so as to have adequate means of livelihood to support himself and his family'. As opposite party no.4 applied for the post of GDSBPM, he should have income from other sources to maintain his livelihood. But, since in the accompanying document he mentioned that he had no other source of income, his candidature was not considered. As he did not fill up the columns against 10(a),(b),(d) & (e), as per conditions stipulated in para 8 of the notification, his candidature was rejected.

2.2. The petitioner, being the next highest scorer in matriculation examination and her application form being filled up properly, was selected and was issued with the appointment letter to join in the post of GDSBPM of Khatkhatia Branch Post Office. She was also directed to join the training for the said post, pursuant to which she joined in the post and also undergone theoretical training from 29.05.2012 to 30.05.2012 and practical training from 31.05.2012 to 01.06.2015. After completion of training, the petitioner started working as GDSBPM of Khatkhatia Branch Post Office. While she was working as such, opposite party no.4 approached the Tribunal by filing O.A. No.260/00502 of 2012 challenging rejection of his application for the post in question and selection of the petitioner for the post of GDSBPM of Khatkhatia Branch Post Office and seeking direction to opposite party no.3 to select opposite party no.4 to the said post. In the said O.A., opposite party no.4 had taken a ground that his application was rejected only on the ground that he could not supply/produce the certificate regarding his other source of income and the said certificate was only to be shown or furnished at the time of appointment and not before that and at the time of selection the submission of certificate regarding other source of income was not required and, thereby, at the threshold the rejection of his application is bad in law.

2.3. The Tribunal, taking into consideration the letter dated 17.09.2003 of the Government of India in Department of Posts as well as the conditions stipulated in para 4(ii) of the notification, allowed O.A. No.260/00502 of 2012, vide order dated 12.01.2016, by quashing the appointment of the petitioner. Hence, this writ petition.

3. Ms. B.K. Pattanaik, learned counsel appearing for the petitioner contended that even though notice was issued to the petitioner in O.A. No.260/00502 of 2012, she had not received the same and was also not aware of such litigation. Moreover, she has been performing her duty in the post of GDSBPM of Khatkhatia Branch Post Office. But, the Tribunal quashed her appointment relying upon the letter dated 17.09.2003 of the Government of India in Department of Posts, wherein it has been stated that the certificate regarding the other source of income is to be submitted before appointment. It is contended that the application of opposite party no.4 was incomplete and was not properly filled up and, thereby, the authority had rightly rejected the application of opposite party no.4 as per Clause-8 of the notification dated 23.11.2011 under Annexure-1, which stipulates "Applications received after the prescribed date, applications not accompanied by the required documents and applications which are incomplete will be rejected." It is further contended that neither the advertisement nor any requisition was made to the employment exchange indicating that the certificate regarding other source of income is to be submitted before appointment. Therefore, the Tribunal has committed gross error apparent on the face of the record relying upon the notification which was neither circulated nor referred to in the advertisement nor requisition made to the employment exchange. It is further contended that reliance placed on any notification that should be formed part of the advertisement or requisition made to the employment exchange. It is further contended that the Tribunal, while passing the order impugned dated 12.01.2015, has not considered the experience of 3 ½ years gained by the petitioner and also not issued direction to the authority to give her alternative appointment in any nearby Post Office as per GDS Rules. Thereby, the impugned order passed by the Tribunal cannot be sustained in the eye of law. It is further contended that in compliance of the order dated 12.01.2015 passed by the Tribunal in O.A.No.260/00502 of 2012, opposite party no.3, vide order dated 17.08.2015, terminated the services of the petitioner, who had completed 3 ½ years of service, without giving alternative appointment in view of DGP&T letter no.295-4/53 dated 08.08.1953, wherein it has been decided that the ED Agents, whose services are to be dispensed with on departmentalization of their offices, may be provided for in other available Extra-Departmental posts if they are suitable and willing. Thereby, termination of the petitioner from service by order dated 17.08.2015 under Annexure-5 passed by opposite party no.3 cannot be sustained in the eye of law and the same is liable to be quashed. To substantiate his contentions, learned counsel for the petitioner has relied upon the judgment of the apex Court in *Dhananjay Malik & Ors. v. State of Uttaranchal & Ors.*, (2008) 2 ATT (SC) 183.

4. Mr. P.S. Nayak, learned Senior Panel Counsel, Govt. of India appearing for opposite parties no.1 to 3 contended that admittedly opposite party no.4 has secured higher marks in matriculation than the petitioner, but his application was rejected as he had not fulfilled the criteria as per the advertisement. Consequentially, the petitioner, having secured second highest mark, was selected. Opposite party no.4 challenged the selection of the petitioner before the Tribunal and relying upon the letter dated 17.09.2003 of the Government of India in the Department of Posts requiring to submit the certificate of other source of income before appointment, the Tribunal, vide order dated 12.01.2025, quashed the selection of the petitioner and directed opposite party no.3 to consider the candidature of opposite party no.4. Thereby, to implement the order of the Tribunal, opposite party no.3 passed order on 17.08.2015 terminating the petitioner from service. Accordingly, opposite party no.3 has not committed any illegality or irregularity in passing the order dated 17.08.2015 terminating the services of the petitioner, so as to warrant interference of this Court.

5. While entertaining this writ petition, this Court, vide order dated 30.03.2015, directed for issuance of notice to opposite parties nos.4 & 5 by Registered Post with A.D. making it returnable within a period of three weeks, and also passed interim order in Misc. Case No.4804 of 2015 that disengagement/ termination of the petitioner, if made pursuant to Annexure-3, the same shall be subject to result of the writ petition. It is evident from office note dated 08.04.2015 that notice was issued on admission/stay matter to opposite parties no.4 & 5 fixing 29.04.2015 for appearance and show-cause. Vide memo no.14603 dated 10.04.2015, the said interim order was also communicated to the Dy. Registrar, Central Administrative Tribunal, Cuttack Bench, Cuttack for information and necessary action and vide memo no.14602 dated 10.04.2015, LCR was called for in O.A. No.260/00502 of 2012 from the Tribunal. Office note dated 12.07.2018 indicates that LCR was not received and A.D. (SR) not back from opposite parties no.4 & 5. Pursuant to order dated 25.03.2012, Mr. P.K. Parhi, learned DSGI entered appearance for opposite parties no.1 to 3 by filing memo of appearance. When the matter was listed on 22.04.2021, Mr. P.K. Parhi, DSGI submitted that Ms. Bijay Laxmi Tripathy, learned Central Government Counsel is in charge of the file and requested for an adjournment to obtain instructions.

6. In response to the order dated 22.04.2021, opposite parties no.1 to 3 filed their counter affidavit. So far as opposite party no.4 is concerned, office note indicates that A.D. has not back. As it reveals, whatever address was furnished before the Tribunal, same has been mentioned in the description of opposite party no.4 in the cause title of the writ petition. Therefore, notice was issued to opposite party no.4 on the same address. Furthermore, Mr. N.R. Routray, learned counsel was appearing for opposite party no.4 before the Tribunal, wherein the very same address was furnished by opposite party no.4. Since notice was issued to opposite party no.4 at his correct address and A.D. has not back from him, notice shall be treated as sufficient in view of provisions contained in proviso to sub-rule (5) of Rule-9 of Order-5, which reads as follows:

"9(5) When an acknowledgment or any other receipt purporting to be signed by the defendant or his agent is received by the Court or postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee or by any person authorized by the courier service to the effect that the defendant or his agent had refused to take delivery of the postal articles containing the summons or had refused to accept the summons by any other means specified in Sub-rule (3) when tendered or transmitted to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant:

Provided that where the summons was properly addressed, prepaid and duly sent by registered post acknowledgment due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgment having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of issue of summons."

7. In *Basant Singh v. Roman Catholic Mission*, AIR 2002 SC 3557, the apex Court held that summons proved to have been sent by Registered Post to a correct and given address, it can be presumed that notice is duly served.

8. In *Hemanta Kumar Tripathy v. Malati Dibya* (since dead), represented through her legal heirs, 2009 (I) CLR 83, this Court held that the order passed by the learned Civil Judge (Sr. Division) that issuance of notice to defendant no.3 by Registered Post with A.D. after expiry of 30 days from the date of issue of such notice held sufficient and that the order of the lower court cannot be termed as illegal.

9. Taking into consideration the aforementioned provisions of law as well as the case laws decided by the apex Court and this Court, since notice was issued to opposite party no.4 by Registered Post with A.D. with correct address, as prescribed in the cause title of the O.A. before the Tribunal as well as in the writ petition before this Court, there is presumption of due service of notice, even though A.D. has not back, after 30 days of expiry. Since this writ petition is of the year 2015 and, more so, this is a certiorari proceeding, this Court is not inclined to grant adjournment and rather proceeded to decide the matter on the basis of pleadings available on record.

10. This Court heard Ms. B.K. Pattanaik, learned counsel appearing for the petitioner and Mr. P.S. Nayak, learned Senior Standing Counsel, Government of India appearing for opposite parties no.1 to 3 in hybrid mode. Since notice was issued to opposite party no.4 and he did not choose to appear and this writ petition is of the year 2015, with the consent of learned counsel appearing for the parties, the writ petition is being disposed of finally at the stage of admission.

11. It is the admitted fact that pursuant to notification issued on 23.11.2011 to the District Employment Officer, Boudh as well as local open notification inviting applications in the prescribed proforma from intending candidates for the post of Gramin Dak Sevak Branch Postmaster, Khatkhatia Branch Post Office fixing

22.12.2011 as the last date of receipt of applications, the employment exchange did not sponsor any name. However, in response to the local open notification, fifteen candidates including the petitioner and opposite party no.4 offered their candidatures. Out of them, the candidatures of three candidates were rejected due to receipt of their applications beyond the due date and five candidates, out of remaining 12, were in order in the merit list on the basis of marks secured in the matriculation examination. On scrutiny of the certificates, it was found that opposite party no.4 secured 68.04% of marks and stood first in the merit list and the petitioner stood second in the merit list having secured 67.86% marks. Para-3.2 of letter no.22-12/2001-GDS dated 17.09.2003 of the Government of India, Department of Posts under Annexure-R/2 provides "As GDS is a part-time employee, a candidate applying for the post of any category of GDS will have to supplement his income from other employment sources so as to have adequate means of livelihood to support himself and his family. Accordingly, opposite party no.4, who had applied for the post of GDSBPM, Khatkhatia Branch Post Office, should have income from other sources to maintain his livelihood. The above condition of the Directorate was appraised to the candidates (including opposite party no.4) vide Para-4(ii) of Annexure-1.

12. In the application form (Annexure-R/1) for the post of GDSBPM, Khatkhatia Branch Post Office, opposite party no.4 at serial no.9 had mentioned "NIL", as against whether the applicant has other sources of income. Thereby, opposite party no.4 had failed to fulfill the above condition. Furthermore, he failed to furnish the required data/information against the points 10(a)(b)(d) & (e) of the application form. Thereby, his application was rejected for the aforesaid reasons. The petitioner, who was next to opposite party no.4 in the merit list, had fulfilled all the conditions mentioned in the notification under Annexure-1 to the writ petition. Therefore, she was selected to the post of GDSBPM, Khatkhatia Branch Post Office and accordingly, the petitioner worked in the said post for the period from 06.06.2012 to 17.08.2015.

13. Opposite party no.4 knowing the terms and conditions mentioned in the application form with eyes wide open had filled up the same. When on scrutiny it was found that his application was defective, the same was rejected, therefore, no fault can be attributed to the authority concerned. Rather, opposite party no.4 having participated in the process of selection by way of filing defective application was become unsuccessful. Under such circumstance, the Tribunal should not have entertained the Original Application filed by opposite party no.4.

14. In *Om Prakash Shukla v. Akhilesh Kumar Shukla and Ors.*, AIR 1986 SC 1043, it has been clearly laid down by a Bench of three learned Judges of the apex Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.

15. In *Madan Lal v. State of Jammu and Kashmir*, AIR 1995 SC 1088, the apex

Court held as follows:-

".....If a candidate takes a calculated chance and appears at the interview then, only because the result of the interview is not palatable to him he cannot turn round and subsequently contend that the process of interview was unfair or Selection Committee was not properly constituted."

16. In *Vijendra Kumar Verma v. Public Service Commission, Uttarakhand and others*, (2011) 1 SCC 150, the apex Court in paragraph-27 ruled as follows:-

"In *Union of India v. S. Vinodh Kumar*, (2007) 8 SCC 100 in para 18, it was held that:

"18..... It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same."

17. In *Marripati Nagaraja v. Government of A.P.*, (2007) 11 SCC 522, the apex Court observed as follows:-

"The other contention of Mr. Rao that the candidates had given only seven days time for making preparation to appear in the second screening test, cannot, in our considered view, give rise to a ground for setting aside the entire selection process. The Tribunal did not make any discrimination. One screening test had already been held. The number of candidates appeared in the first screening test was 510. The Commission obtained the permission of the Tribunal for holding the second screening test. It issued a notification on 12.12.2000 stating that such a test would be conducted on 7.1.2001. All the candidates were given the same time for preparation. Only because the appellants herein were employees at the relevant time, the same by itself could not confer on them any special privilege to ask for an extended time. They had no legal right in relation thereto. Appellants had appeared at the examination without any demur. They did not question the validity of the said question of fixing of the said date before the appropriate authority. They are, therefore, estopped and precluded from questioning the selection process."

Similar view has also been taken by this Court in *Sevati Patra* (supra); *Pradeep Kumar Jena v. State of Odisha*, 2017 (II) OLR 274; *Pravati Nayak v. State of Odisha*, 2018 (Supp-II) OLR 946; and also judgment dated 02.04.2019 rendered in W.P.(C) No. 14047 of 2012 (*Keshari Sahoo v. State of Odisha*).

18. The aforesaid judgments have been referred to in *Dhananjay Malik* (supra). In view of law laid down by the apex Court, the inevitable conclusion is that opposite party no.4, having unsuccessfully participated in the process of selection without any demur, is estopped from challenging the selection criterion inter alia that the advertisement and selection with regard to non-furnishing of other source of income against clause-9 and other information required as per clause-10(a), (b) (d) & (e) cannot be sustained in the eye of law.

19. The Tribunal has committed error relying upon the notification/letter dated 17.09.2003 issued by the Government of India, Ministry of Communications, Department of Posts while passing the impugned order. Clause-3.2 of the said letter reads as follows:-

"3.2 As GDS is a part-time employee, a candidate applying for the post of any category of GDS will have to supplement his income from other employment sources so as to have adequate means of livelihood to support himself and his family. A certificate to this effect will have to be obtained from the candidate before he/she is given an appointment letter."

On perusal of the aforesaid provision, it is made clear that GDS is a part-time employee and a candidate applying for the post of any category of GDS will have to supplement his income from other employment sources so as to have adequate means of livelihood to support himself and his family. A certificate to this effect will have to be obtained from the candidate before he/she is given an appointment letter. Therefore, the certificate, which a candidate has to furnish, shall have to be formed part of the application itself. Opposite party no.4 was duty bound to furnish the same at the time of submission of application, because this was to be done only prior to issuing appointment order and that being formed part of the condition of the application that cannot and should not have been waived out by the Tribunal. Thereby, the Tribunal has committed gross error apparent on the face of the record holding that opposite party no.4 could have supplied certificate/ information with regard to other source of income before issuance of appointment order. Therefore, the Tribunal has ignored clause-9 of the application form where the requirement was to furnish the certificate and this requirement cannot be interfered with by the Court in any manner. If the terms and conditions, as specifically mentioned in the application form, are to be adhered to, the same cannot be ignored or brushed aside in the name of notification. Consequentially, the finding of the Tribunal cannot be sustained in the eye of law.

20. In compliance of the order dated 12.01.2015 passed by the Tribunal in O.A. No.260/00502 of 2012, opposite party no.3, vide order dated 17.08.2018 under Annexure-5, has quashed the order of selection of the petitioner, which is also the subject matter of challenge before this Court and this Court has passed interim order on 30.03.2015 in Misc. Case No.4804 of 2015 directing that disengagement/termination of the petitioner, if made pursuant to Annexure-3, the same shall be subject to result of the writ petition. But opposite party no.3, taking into consideration the service of 3½ years rendered by the petitioner, could have provided her an alternative engagement in the interest of justice, equity and fairplay in view of D.G. P & T letter no.295-4/53 dated 08.08.1953, wherein it has been provided that the ED Agents, whose services are to be dispensed with on departmentalization of their offices, may be provided for in other available Extra-Departmental posts if they are suitable and willing. Therefore, the order of the Tribunal cannot be allowed to stand, for the detailed

reasons mentioned above.

21. In view of facts and law, as discussed above, the order dated 12.01.2015 passed by the Tribunal in O.A. No.260/00502 of 2012 under Annexure-3 and the consequential order dated 17.08.2015 under Annexure-5 passed by opposite party no.3 quashing the selection of the petitioner as GDSBPM, Khatkhatia Branch Post Office, in the name of implementing the order of the Tribunal, cannot be sustained in the eye of law. Accordingly, the same are liable to be quashed and are hereby quashed. Thereby, this Court directs opposite parties no.1 to 3 to take immediate steps for giving appointment to the petitioner as expeditiously as possible, preferably within a period of three weeks from the date of receipt of this judgment and grant all consequential benefits as due and admissible to her taking into consideration her past service. However, she will not be entitled to get any salary/remuneration for the period from 17.08.2015 till her reinstatement in service, but the benefit of continuity in service and consequential benefit shall be extended to her in accordance with law. Needless to say, taking into consideration the principle of equity, since opposite party no.4 has also rendered service in the meantime, he should be accommodated by giving an alternative employment in conformity with the provisions contained in D.G. P & T letter no.295-4/53 dated 08.08.1953.

22. In the result, therefore, the writ petition is allowed. But, however, in the facts and circumstances of the case, there shall be no order as to costs.

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