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IN THE HIGH COURT OF ORISSA AT CUTTACK

WRIT PETITION (CIVIL) No.6658 of 2014

State of Odisha and Others *Petitioners*

-versus-

Prasanta Kumar Swain *Opposite Party*

Advocates appeared in this case:

For Petitioners : Mr. P.K. Muduli
Addl. Govt. Advocate

For Opposite Party : Mr. Jaganath Patnaik
Senior Advocate
Mr. Bibudhendra Dash, Advocate

**CORAM:
THE CHIEF JUSTICE
JUSTICE K.R. MOHAPATRA**

**JUDGMENT
08.07.2022**

Dr. S. Muralidhar, CJ.

1. This writ petition by the State of Odisha through the Forest and Environment Department challenges an order dated 14th November, 2012 passed by the State Administrative Tribunal, Bhubaneswar ('Tribunal') in O.A. No.163 of 2008 whereby a direction was issued to the Petitioners to regularize the services of the Opposite Party by relaxing Rule 3(1) of the Orissa Ministerial Services (Method of Recruitment to the Post of Junior Clerk to the District Offices) Rules, 1985 ('OMS Rules, 1985') by issuing a

notification and giving him all consequential service and financial benefits with effect from 24th November, 1984.

2. The background facts are that the Opposite Party was initially appointed as a Junior Clerk on *ad hoc* basis for a period of 89 days by an order dated 27th September, 1984 issued by the Working Plan Officer, Koraput Circle for the period from 10th September, 1984 to 7th December, 1984 on the pay scale of Rs.255-390/-with D.A. and A.D.A as admissible from time to time. It was stated that “the appointment is purely temporary and terminable at any time without any notice assigning any reason thereof.” By a subsequent order dated 24th November, 1984 the Opposite Party was again appointed as Junior Clerk and allowed to continue as such until further orders. It was reiterated that the appointment was ‘purely temporary and terminable at any time without any notice assigning any reason thereof’. The admitted position is that Opposite Party continued as such.

3. In the meanwhile, on 17th April, 1987 the Chief Secretary to the Government wrote to the Secretaries of all the Departments of the Government stating that they should immediately terminate the services of adhoc/temporary employees and to fill up the vacancies by the candidates from the list drawn up by the Collectors. Despite this, the Opposite Party continued as Junior Clerk.

4. On 6th May, 1991 the Principal Chief Conservator of Forests circulated to all the Offices the letter received from the General

Administration Department ('GA Department') regarding 'regularization of the irregular recruitments against the Post of Junior Clerks in the District Offices and Sub-ordinate Offices.

Inter alia, in para 4 of this letter, it was stated as under:

“4. After carefully considering the problems relating to regularization of such irregular appointments in the district and sub-ordinate Offices, Govt. have approved the following principles. You are, therefore, requested to take necessary follow up action accordingly to solve the problems faced by such irregular recruitments.

(1) Such recruitments should have put in at least one-year continuous service in one or more spells in the same office. Adhoc appointees of this category whose services have been terminated may be allowed to join and work in such offices provisionally subject to availability of vacancies.

(2) Two chances should be given to them to appear in the next two consecutive recruitment examinations.

(3) Condonation of age may be done by the Collector, both for appearing in the examination and for appointment.

(4) Details of such appointments should be furnished to the Collector/Head of Deptt/and to the concerned administrative department.”

5. Despite the above instructions, the services of the Opposite Party were not regularized. He then filed OA No.2143 of 1993 in the Tribunal praying that his services should be regularized. The Tribunal passed an interim order on 26th November, 1993 that his services should not be discontinued. This continued till the final

order dated 9th February, 1999 of the Tribunal in which, after extracting para 4 of the above circular, the Tribunal noted the contention of counsel for the Opposite Party that since he is appointed prior to the coming into force of the OMS Rules, 1985 he should not be subjected to the conditions laid down in para 4 of the letter. The Tribunal rejected the contention as not being sound. A direction was issued to the Petitioners to consider the case of the Opposite Party in terms of the aforesaid instructions, it was further directed as under:

“If no chance has so far been given to him to appear at the recruitment examination, the applicant shall be given two chances to appear at the next two consecutive examinations. If he becomes over aged by then, his age should be relaxed so as to allow him to compete with other candidates in the recruitment examination. Until regular appointments are made through a recruitment examination the applicant shall continue in the post. In case he is found suitable for appointment on the basis of the result of the recruitment tests, his services as adhoc employee shall be counted for the purpose of giving all service benefits.”

6. Despite the above order, no steps were taken for regularization of the Opposite Party. A representation was made by him on 20th September, 2006 to the Conservator of Forests, Bhubaneswar Circle pointing out that he had been transferred to various forest divisions within the State of Odisha as any other regular employee and by that date he had rendered 22 years of service without adverse remarks against him. Although he had received increments from time to time, he had not received any from 1999 onwards. Specifically, he stated as under:

“That, neither the Revenue Divisional Commissioner nor the Collector nor any other Competent Authority who are conducting recruitment examination for the Junior Clerk given me a chance to appear till date nor any action have been taken by my authority to appear recruitment test.”

He also pointed out as under:

“That, I came to know from a reliable source that, One Sri Sarbeswar Pradhan, Jr. Clerk, O/o the Conservator of Forests, Bhubaneswar Circle, Bhubaneswar who has been appointed in similar manner & the Hon’ble Tribunal has delivered equal judgment in both the cases is getting all financial benefit regularly.”

7. No response to the above letter was forthcoming from the Petitioners herein. The Opposite Party made another representation on 2nd January, 2008. With no response to this either, the Opposite Party second time approached the Tribunal in O.A. No.163 of 2008 which he filed on 5th February, 2008. In this application, he *inter alia* pointed out that he had been permitted to appear at the Departmental Examination of 1985 for the first efficiency bar (EB) held on 19th April, 1987. By an order dated 13th May, 1987 to the Chief Conservator of Forests he was informed of having qualified in the said exam. He had also been granted increments and pay fixation thereafter till 17th May, 1999. However, thereafter the Petitioners stopped paying increments. He pointed out that other similarly situated persons were getting annual increments without interruption.

8. The Petitioners herein filed a reply to the said OA No.163 of 2008 on 27th June, 2008 *inter alia* contending that in view of the

judgment of the Supreme Court in *Secretary, State of Karnataka v. Umadevi (2006) 4 SCC 1*, an *ad hoc* employee cannot claim the benefit of regularisation as a matter of right.

9. On 12th November, 2008 the Tribunal passed an order in which it was *inter alia* observed as under:

“4. While the submission of the learned counsel for the States are perfectly placed in reference to the facts of the case it is also to be considered that the time of the applicant is running as he has already spent 24 years and is already 46 years old. If no steps are taken to fill up the post on regular basis and the applicant is not given any opportunity to compete along with others then a time would come when he would retire without having been regularized. That prospect was not contemplated in the orders of the Tribunal while disposing the O.A. No.2143/93. It hoped that the Govt. would give two opportunities to the applicant for consideration of regularization to the post and therefore merely continuing the applicant in the post in the initial stage of the scale without increment and without pensionary benefits would not construe a full compliance of the order. Indeed if the applicant's service are required for 24 years I do not see why the Respondents are not in a position to fill up the post on regular basis. As there is a direction of the Tribunal to the effect that the applicant should be given two chances for consideration of regularization, the Respondents may examine it if continuance of the post can be sufficient basis for treating the post regular and take appropriate steps for filling up the post regular basis. If such steps are taken it is needless to say that the order of the Tribunal in O.A.No.2143/93 are still in operation is as much as the applicant would be given two chances to appear in Examination and it succeeds for appointment on the basis of the result of the recruitment his past service would be counted towards regular service.

That the learned counsel for the state seeks some time to take instructions in regard to the prospect of regularization and as to why no regular selection has been made to fill up the post.”

10. In the rejoinder filed by the Opposite Party thereafter before the Tribunal on 17th October, 2012 it was pointed out that despite the above order of the Tribunal, the Petitioners herein had not obtained any instructions as directed. Along with the rejoinder, the Opposite Party enclosed a letter dated 4th September, 2012 received from the Public Information Officer (PIO), Khurda Forest Division, Khurda working in the office of the DFO, Khurda Division pursuant to an application made under the Right to Information Act (RTI Act) confirming that the Opposite Party was working as a Junior Clerk in the office of the DFO, Khurda Forest Division “in an existing vacancy of a Junior Clerk”. Through another application under the RTI Act, the Opposite Party obtained under letter dated 11th October, 2012 the combined seniority list of Junior Clerks in which the Opposite Party’s name figured at Sl.No.32. He pointed out that the person junior to him figuring at Sl.No.60 in the list had been regularized. It was also pointed out that in the Agriculture Department the provisions of Rule 3(1) of the OMS Rules, 1985 had been relaxed and the services of 49 irregular recruitees against the post of Junior Clerk/Junior Clerk-cum-Typist had been regularized. The relevant orders dated 19th November, 2010 and 30th November, 2010 of the Directorate of Agriculture and Food Production were enclosed with the rejoinder affidavit.

11. In light of the above pleadings, and after hearing learned counsel for the Opposite Party as well as the learned Additional Government Advocate (AGA) for the Department the Tribunal passed the impugned order on 14th November, 2012 in which *inter alia* it was noticed that despite 28 continuous long years of service, the services of the Opposite Party had not been regularized. The order passed by the Agriculture Department regularizing the services of 49 Junior Clerks in relaxation of Rule 3(1) of the OMS Rules, 1985 was also taken note of by the Tribunal and it was held “there is therefore, no reason as to why the same benefit should not be extended to the applicant, who has continuously served under the Government for 28 years.” The Tribunal further noted “though the Applicant has not been formally regularized, he has been treated as a regular government employee for all practical purposes and his name has also been included in the gradation list of Junior Clerks.”

12. During pendency of the present petition, on 16th April, 2014 this Court passed an order requiring the Petitioners to file an additional affidavit enclosing the order dated 19th November, 2010 of the Directorate of Agriculture and Food Production, regularizing the services of 49 irregular recruitees against the post of Junior Clerk/Junior Clerk-cum-Typist. In response thereto, an affidavit was filed by the Petitioners on 22nd July, 2014 *inter alia* stating that “the Opposite Party cannot claim negative equality in the matter of regularization”. It was claimed that those working in the Agriculture Department had been doing so continuously without any break in service for more than 20 years whereas the

Opposite Party had been continuing after 27th November, 1993 pursuant to the interim order of the Tribunal.

13. On 14th October, 2016 this Court passed an order noting the averments made in page 7 of the writ petition of the State that “the Opposite Party did not appear in the recruitment examination.” The Court directed the learned AGA “to file a further affidavit along with documents, if any, indicating the dates of such recruitment held by the appropriate authority for regularization.” Pursuant to the above order another affidavit was filed by the Petitioners on 2nd December, 2016 where in paras 3 and 4 it was stated as under:

“3. That, it is submitted that in reply, the Collector & District Magistrate, Puri vide letter No.3462 dtd. 07.11.2016 informed that the recruitment *examination for the post of Jr. Clerk has conducted in the year 2012, 2013 & 2014 respectively.* But now the Govt. have pleased to delegate the power to the Odisha Sub-ordinate Staff Selection Commission, Bhubaneswar for conducting the recruitment Examination for Jr. Clerk. Copy of the letter No.3426 dtd. 7.11.2016 is enclosed herewith and marked as Annexure-3 for kind perusal of the Hon’ble Court.

Similarly the Collector, Khordha informed that, the recruitment examination for the post of Jr. Clerk was held 2011 and 2012. From the year 2015 the Odisha Sub-Ordinate Staff Selection Commission, Bhubaneswar is conducting the said examination.

4. That, it is humbly submitted that Dy. Collector, Establishment, Collectorate, Khordha vide letter No.18310 dt. 29.11.2016 to Divisional Forest

Officer, Khordha Division, Khordha that *there is no such reference in the Collectorate, Khordha to sponsor the name of irregular/illegal appointee to allow for appearing consecutive recruitment examination.* Copy of the letter No.18310 dtd. 29.11.2016 of Collector, Khordha is enclosed herewith and marked as Annexure-4 for kind perusal of the Hon'ble Court."

(emphasis supplied)

14. Enclosed with this affidavit were copies of the aforementioned documents which made it plain that the Opposite Party's name was never sponsored for appearance in the recruitment examinations held in 2011 and 2012, long after the initial order of the Tribunal passed on 9th February, 1999. Therefore, there was no question of the Opposite Party failing to appear in the recruitment exam.

15. Thereafter, when the petition was listed for hearing in this Court on 14th February, 2019 it was dismissed by a short order on the ground that since "the opposite party is working for a period of three decades, it will not be appropriate for us to disturb the findings of the Tribunal." The said order was set aside by the Supreme Court of India by its order dated 5th January, 2022 allowing the Petitioner's Civil Appeal No.154 of 2022. The proceedings were remitted to this Court for a fresh decision "preferably within a period of three months from the date of receipt of a certified copy of the order."

16. This Court has heard the submissions of Mr. P.K. Muduli, learned AGA appearing for the Petitioners and Mr. Jaganath Patnaik, learned Senior Advocate for the Opposite Party (Applicant).

17. Mr. Muduli, submitted that the Petitioners were aggrieved by the impugned order essentially on the following grounds:

(i) O.A. No.163 of 2008 in which the impugned order had been passed was the second petition filed by the Opposite Party for the same relief of regularization and therefore, was barred by principles of *res judicata*;

(ii) In the earlier petition filed by the Petitioner being O.A. No.2143 of 1993 the Tribunal had passed an order on 9th February, 1999 directing the Petitioners to consider the case of the Opposite Party for regularisation, by giving him an opportunity of appearing in the next two consecutive recruitment examinations in terms of para 4 of the circular dated 30th March, 1991 of the GA Department. However, the Opposite Party had failed to appear in the two consecutive recruitment exams and therefore, could not be considered for regularization. Having failed to avail of that opportunity, it was not open to the Opposite Party to file a second petition for the same relief;

(iii) Unless the Opposite Party satisfied the requirements of the OMS Rules, 1985 and merely because he had served for a long number of years, he would not be entitled to regularization as a

matter of right. He could not claim parity with 49 others who have been regularized in accordance with the 1991 circular.

18. Mr. J. Patnaik, learned Senior Advocate for the Opposite Party, on the other hand submitted that on their own showing the Petitioners had not conducted any recruitment exam between 1999 and 2011. Further, on their own showing, for the recruitment exams held in 2011 and 2012, the name of the Opposite Party was admittedly not sponsored and therefore, there was no opportunity provided to him to appear in such exams. It was pointed out further that after 2015 it was the Odisha Sub-ordinate Staff Selection Commission that was conducting such examination and the Opposite Party was given no opportunity to appear in the exams if any held thereafter. Therefore, the failure to appear in the regularization exam was not attributable to the Opposite Party. He placed reliance on the decisions in *State of Karnataka v. M.L. Kesari (2010) 9 SCC 247*; *Amarkant Rai v. State of Bihar (2015) 8 SCC 265* and *Prem Ram v. Managing Director, Uttarakhand Pey Jal and Nirman Nigam, Dheradun (2015) 11 SCC 255*. According to Mr. Patnaik, the impugned order of the Tribunal called for no interference.

19. The above submissions have been considered. It is seen from the impugned order that in the second application being O.A.No.163 of 2008, the Opposite Party did disclose at the outset the fact that he had earlier filed O.A. No.2143 of 1993 in the Tribunal seeking the relief of regularization and that the Tribunal had passed an order on 9th February, 1999 in the said application

issuing the directions as aforementioned. He was constrained to again approach the Tribunal precisely for the reason that despite the lapse of over a decade thereafter the Petitioners had not implemented the directions of the Tribunal. In particular, the Opposite Party averred in the body of O.A. No.163 of 2008 that no examination had been held for recruitment despite repeated representations of the Opposite Party.

20. The Court further notes that in the impugned order, the Tribunal has taken note of the fact that was an earlier petition in which an order had been passed by the Tribunal on 9th February, 1999 which had not been implemented by the Petitioners. In the circumstances, it is incorrect on the part of the Petitioners to contend that they have implemented the order dated 9th February, 1999. On their own showing as stated in the affidavit dated 2nd December, 2016 no recruitment exam was in fact held for the post of Junior Clerk till 2011. Further, there was “no such reference in the Collectorate, Khordha to sponsor the name of irregular and illegal appointees to allow for appearing in consecutive recruitment examinations”. The Opposite Party was working as Junior Clerk in the DFO, Khurda Forest Division, and therefore, could not have possibly appeared in 2011 and 2012 without such sponsorship. Since there was no exam held prior thereto, after 1999 there was no occasion for the Opposite Party to have appeared in the exam. Therefore, the contentions of the Petitioners, that in page 7 of the writ petition that “the Opposite Party did not appear in the recruitment examination” is incorrect. The fact of the matter is that there was no recruitment

examination held till 2011 and even in the exams held in 2011 and 2012 his name was not sponsored and therefore, he could not have appeared.

21. With the Petitioner not having implemented the earlier directions issued by the Tribunal on 9th February, 1999; the question of the subsequent petition by the Petitioners being barred by *res judicata* does not arise. The failure to implement the earlier directions gave rise to a fresh and continuing cause of action since 9th February 1999 till the date of filing of the second petition.

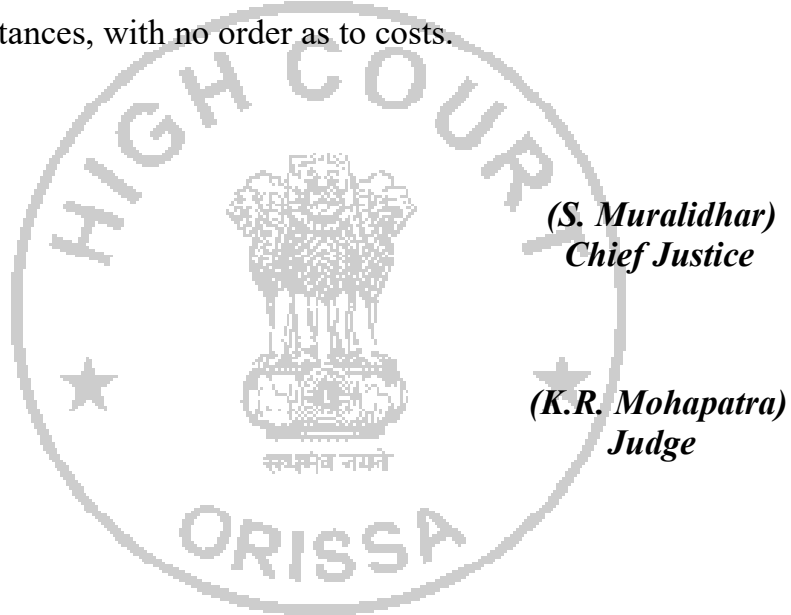
22. The Petitioners also do not have any satisfactory explanation why Opposite Party has been discriminated against vis-à-vis 49 other persons in the Agriculture Department, who are similarly placed as the Opposite Party, whose services were regularized. In this context, it must be noted that the Supreme Court in ***State of Karnataka v. M.L. Kesari*** (*supra*) explained the purport of the decision in the ***State of Karnataka v. Umadevi*** (*supra*) and held that the exception contained in para 53 of ***Umadevi*** (*supra*) for regularization of irregular appointments as a ‘one time measure’ meant that such process would not be complete “till all eligible persons who have a right to be considered in terms of para 53 of ***Umadevi*** (*supra*) case are considered”. In ***M.L. Kesari*** (*supra*), specific directions were issued to that effect.

23. In ***Amarkanta Rai*** (*supra*) it was similarly held that once the service of regularization is put in place there could be no discrimination amongst similar employees for being considered

for regularization. To the same effect, is the decision in ***Prem Ram*** (*supra*). These three decisions support the case of the Opposite Party.

24. For all of the aforementioned reasons, the Court finds that no grounds have been made out by the Petitioners for interfering with the impugned order of the Tribunal.

25. The writ petition is accordingly dismissed, but in the circumstances, with no order as to costs.



S.K.Jena/Secy.