

THE HIGH COURT OF ORISSA AT CUTTACK

W.P. (C) No.7080 of 2014

*(An application under Articles 226 & 227 of the Constitution of India and Orissa
Ministerial Services Rules, 1994)*

Prakash Samantaray

.....

Petitioner

-versus-

State of Orissa and Others

.....

Opposite Parties

Appearing in the case :-

For the Petitioner : Mr. U.C. Mohanty, Advocate

For the Opp. Parties : Mr. A.P. Das, Addl. Standing Counsel
(for Opposite Parties 1 and 2)

CORAM:

THE CHIEF JUSTICE

JUSTICE A. K. MOHAPATRA

JUDGMENT

4th January, 2022

Dr. S.Muralidhar, CJ.

1. The challenge in the present writ petition is to the order dated 19th March, 2014 passed by the Odisha Administrative Tribunal (OAT), Bhubaneswar in O.A. Nos.86 of 2013 and 739 of 2011. By the said impugned judgment the OAT rejected the prayer of the Petitioner for quashing the directions issued by the Government of Odisha in the office of the Engineer-in-Chief (EIC), Water Resources Department (WRD) dated 7th July, 2009 and 20th June, 2011 refusing to grant post-facto approval regarding absorption of the

Petitioner as Junior Assistant in the office of the EIC, WRD. The OAT also negated the challenge of the Petitioner to the final gradation list of Junior Assistants issued by the EIC, WRD on 2nd January, 2013 from which the name of the Petitioner stood deleted.

Background facts

2. The background facts are that a Memorandum of Settlement was reached between the Balimela Project Workers & Employees Joint Council, Chitrakonda and the Government of Orissa, EIC, WRD on 3rd May, 1974. Based on the settlement the Government of Orissa, Irrigation & Power Department (IPD) decided to maintain a common seniority list cadre ('CSL Cadre') of regular employees working in all the major projects under execution (for e.g., the Hirakud, Balimela, Rengali projects) and to be executed in future. The CSL included the post of Junior Assistant/Junior Clerk/Junior Project Clerk having a equal scale of pay, i.e.Rs.780/- 1160/-. The EIC, WRD was the Cadre Controlling Authority who acted as (i) Coordinator; (ii) Authorised for inter-project transfer, (iii) Take-up promotion, reversion, retrenchment etc. and was maintaining the seniority list.
3. The CSL of the Irrigation Department was challenged before this Court in OJC No.1617 of 1975. This Court by its judgment dated 7th January, 1976 rejected the said petition. As a result, the CSL list of those in the regular cadres belonging to the different projects of the IPD (now the WRD) became final.

4. On 11th April, 1994 the Orissa Ministerial Services (Method of Recruitment and Conditions of Service of Assistants and Section Officers in the Offices of the Heads of Departments) Rules, 1994 (hereafter the 1994 Rules) came into force. Rule 3 provides for the constitution of the cadre and Rule 4, the method of recruitment. Rule 9 prescribes the eligibility of the candidates. Part V deals with promotion and Part VI sets out the general rules for the constitution of selection committees, etc.

5. Rule 12 (6) and Rules 22 to 26 of the 1994 Rules, which are relevant for the present case, read as under:

“Rule 12 (6): Orders of appointment shall be issued by the concerned Heads of Department (EIC, WRD).

Rule-22: Where the State Government are of the opinion that it is necessary or expedient so to do in the public interest, they may, by order, relax any of the provisions of the Rules in respect of any class or category of employees in the interest of public service.

Rule-23: After successful completion of probation, a person shall be confirmed in his post if a permanent post is available.

Rule-24: All rules, orders and instructions corresponding to these rules and in force, immediately before the commencement of these rules, are hereby repealed.

Provided that any order or appointment made, action taken or things done under the rules, orders or instructions so repealed shall be deemed to have been made taken or done under the corresponding provisions of these rules.

Rule-25: If any question arises relating to the interpretation of these rules, it shall be referred to Government in the General Administration Department for decision.

Rule-26: The State Government may issue such instructions, not inconsistent with the provisions of these rules, as they consider necessary to regulate matters not specifically covered by the provisions of these rules.”

6. The Petitioner was appointed on 11th July, 1997 in terms of the notification dated 13th September, 1990 issued by the General Administration Department (GAD), Government of Odisha. The appointment order was issued by the Chief Engineer, Upper Indravati Irrigation Project. The Petitioner was appointed as Junior Clerk in the regular establishment in the pay scale of Rs.950-1500/- with usual DA and other allowances as sanctioned by the Government of Odisha WRD against an existing vacancy under OCS (Rehabilitation Assistance) Rules, 1990. By order dated 28th May, 1998 issued by the EIC, WRD (being the Appointing Authority), the Petitioner was transferred on deputation to the Office of the EIC, WRD (MIP) CSL Branch.

7. On 11th February, 2004 the EIC, WRD issued an Office Order absorbing the Petitioner in the post of Junior Assistant in his office against the existing vacancies in the interest of the public, subject to the following conditions:

“1) The seniority of Sri Samantaray will be counted from the date of his joining in the office of the undersigned.

2) The lien of Sri Samantaray in the CSL of Major irrigation projects will be ceased consequent on his joining in this office.”

8. On 2nd December, 2005 the Government of Odisha in the WRD sought a clarification from the EIC, WRD regarding the following:

- (i) Total sanctioned posts in the rank of Junior Assistant.
- (ii) Number of posts vacant in the rank of Junior Assistant as on 1st April, 2001.
- (iii) Number of posts vacant in the rank of Junior Assistant at present.
- (iv) Number of Posts of Junior Assistant filled-up by promotion from Group-D employees (year-wise with effect from 1st April, 2001).
- (v) Number of posts filled up by other means (indicates the source by which the posts filled up).

9. The Director, Personnel in the office of the EIC, WRD wrote a letter dated 2nd December, 2005 in which it was clarified that:

“...the total sanction strength in the grade of Jr. Assistant as on 2001 was 40, 6 nos. of posts were vacant as on 1.4.2004, 4 nos. of abolished and 2 nos. of posts filled up under Rehabilitation Assistance Scheme, therefore 5 nos. of posts are lying vacant. No. of Jr. Asst. was filled up from 1.4.2001. However, 5 nos. of vacant posts were filled up by way of transfer and absorption of Jr. Clerk / Jr. Assistant from different projects due to shortage of hands in the Establishment of Engineer-in-Chief, W.R. after abolition of 75% base level vacant post for the interest of public service.”

10. In the final gradation list of Junior Assistants published in April 13, 2005, the Petitioner's name was reflected at Serial No.13 and his seniority was shown to be with effect from 17th February, 2004.
11. It is stated that in the further gradation list of Junior Assistants approved by the Government of Odisha published on 13th August, 2008 the Petitioner's name was reflected at Serial No.8. On 13th January, 2009 the EIC, WRD recommended the proposal for post-facto approval of the absorption of six Junior Clerks as Junior Assistants, who were brought from the territorial offices, under the administrative control of EIC, WRD. On 11th February, 2009 the EIC, WRD sought information for promotion to the post of Senior Assistant from the post of Junior Assistant indicating the vacancy position. De-reservation was sought since reserved candidates were not available. The Government by letter dated 7th July, 2009 rejected the request for post-facto approval.
12. On 14th June, 2011 the Petitioner made a representation to the EIC, WRD seeking promotion to the post of Senior Assistant on par with other similarly situated persons. By letter dated 20th June, 2011 the WRD rejected the proposal for absorption of six Junior Assistants on the plea that they were a "separate cadre".
13. The Petitioner thereafter filed O.A. No.739 of 2011 in the OAT challenging the orders dated 7th July, 2009 and 20th June, 2011 of the Government of Odisha refusing to grant post-facto approval

for absorption of the Petitioner as Junior Assistant in the office of the EIC, WRD.

14. The final gradation list of Junior Assistants was published on 2nd January 2013. The Petitioner's name stood deleted therefrom. The Petitioner was constrained to file O.A. No.86 of 2013 in the OAT praying for promotion and other financial benefits. It was contended therein that deletion of the Petitioner's name at a belated stage beyond the reasonable period was illegal, arbitrary and untenable in the eye of law.

Impugned order of the OAT

15. The OAT has in the impugned order held that Respondent No.2 viz., EIC, WRD "knew very well that he did not have the jurisdiction to absorb a person as a junior assistant, who had been recruited as a junior clerk." It was further concluded that the EIC, WRD had "resorted to a subterfuge to circumvent the provisions of the Rules in order to confer undue advantage to the applicant by adopting pick and choose method." According to the OAT, there was no merit in the plea that the challenge to the correctness of the gradation list (showing the name of the Petitioner) should be rejected on the ground of limitation since his initial absorption as junior assistant "was itself illegal and non-existent in the eye of law." The plea that the government should use its power of relaxation under Rule 22 of the 1994 Rules was also negated by the OAT on the ground that "such

relaxation cannot be done in respect of a particular person by adopting pick and choose method.”

Submissions on behalf of the Petitioner

16. Mr. U.C. Mohanty, learned counsel for the Petitioner, submitted that the Office Order dated 17th February, 2004 issued by the EIC, WRD absorbing the Petitioner was not challenged or asked to be recalled by any person. It was submitted that the deletion of the name of the Petitioner from the final gradation list published on 2nd January, 2013 was, in absence of any cogent reasons, unsustainable in law. It was contended that under Rule 12 (6) of the OMS Rules, 1974 the authority for appointment was vested with the concerned HoDs. Rule 20 (1) provides that the seniority of each person appointed to a particular cadre of the services in a particular year shall be determined with reference to his position in the respective select list. Reference was also made to Rule 22 of the 1994 Rules which reads as under:

“Where the State Govt. are of the opinion that, it is necessary or expedient so to do in the public interest, they may, by order, relax any of the provision of the Rules in respect of any class or employees in the interest of public service.”

17. It is submitted that on a reading of Rule 2 (2) and 22 of the OMS Rules with Rule 2 of the Odisha Service Code, the power of relaxation can be invoked in ‘the event of its necessity or so experienced in the public interest in respect of any class or category of employees on public service.’ It was contended that there is a ban on direct recruitment of Junior Assistants in view

of the austerity measures imposed by the Finance Department by the OM dated 14th March, 2001. Therefore there was a dearth of manpower to meet the basic needs of the government. Subsequently, by an Office Memorandum dated 31st December, 2004 the ban on filling up of existing vacancies was lifted. It is accordingly contended that the absorption of the Petitioner as Junior Assistant with effect from 17th February, 2004 in terms of Rule 22 of the OMS Rules would be in public interest and ought to be allowed.

18. Reliance was also placed on the decision in ***Ashok Kumar Ratilal Patel v. Union of India (2012) 7 SCC 757***, where it was held that a person who has applied for an appointment on deputation, “has an indefeasible right to be treated fairly and equally and once such person is selected and offered a letter of appointment on deputation, the same cannot be cancelled except on the ground of non-suitability or unsatisfactory work.” Reliance was also placed on the decision in ***S.I. Rooplal v. The Lt. Governor through the Chief Secretary, Delhi AIR 2000 SC 594***, which recognised the right of the deputationist to count the substantive service rendered by him in the parent cadre. As regards the belated challenge to the gradation list, reliance was placed on the decision in ***S. Sumnyan v. Limi Nini AIR 2010 SC 2159***. Reference was also made to the decisions in ***Harshit Agarwal v. Union of India (2021) 2 SCC 710***; ***Kendriya Vidyalyaya Sangathan v. Sajal Kumar Roy (2006) 8 SCC 671*** and ***Ashok Kumar Sonkar v. Union of India (2007) 3 Supreme 956*** to urge

that in public interest and in the interests of the service, the power of relaxation ought to be exercised. It is finally submitted that the absorption of the Petitioner as Junior Assistant *de hors* the 1994 Rules was at the highest an irregularity and not an illegality and therefore the impugned judgment of the OAT should be set aside.

Submissions on behalf of the State

19. In reply, it is submitted by Mr. A.P. Das, learned Additional Standing Counsel (ASC) for the State that the CE, Irrigation (now the EIC, WRD) was the cadre controlling authority. It is stated that the CSL of regular Class III and Class IV employees came about pursuant to the memorandum of settlement arrived at between the Government in the erstwhile IPD and the Balimela Dam Project Workers & Employees Joint Council on 3rd May, 1974. It is explained that, since there was a dearth of Assistants in the office of the EIC,WR, the Petitioner was transferred and absorbed in the cadre of Junior Assistant by the Office Order dated 11th February, 2004. It is sought to be explained that, the applicant was working as Jr. Assistant since 17th February, 2004 when his lien in the CSL cadre where he was working earlier, ceased.
20. On 18th August, 2008, a DPC was held under the Chairmanship of the EIC,WR for promotion of the eligible Junior Assistants to the post of Senior Assistants as per the OMS Rules, 1994. It is pointed out that since he was found fulfilling the eligibility

criteria, the DPC recommended his name for consideration of his promotion against the de-reserved vacancy along with nine other Junior Assistants.

21. It is pointed out by the State that, under Rule 4 of the OMS Rules, 1994, recruitment to the post of Junior Assistants shall be made by the following methods:

“i) Direct recruitment through the competitive examination.

ii) Promotion from among Group-D employees, Rule-12 (1) of the OMS Rules, 1994 stipulates that 5% of vacancies in the post of Junior Assistant in the office of the Heads of Department shall be filled up by way of promotion from among the Group-D employees of that offices on the basis of recommendation of the Departmental Promotion Committee under Rule-16 (ii).”

22. Mr. Das, learned ASC points out that the appointing authority is not competent to absorb the Government employees of different cadres on their lien ceasing in the territorial offices. Reference is also made to the Office Memorandum (OM) dated 14th March, 2001 issued by the Government in Finance Department. Under para 2.2 (ii) it is stipulated that:

“there shall be selective ban on filling up the base level vacant posts meant for direct recruitment. In case there is absolute necessary for filling up base level vacant post in connection with enforcing collection of Govt. revenue or enforcing law and order or meeting the basic needs of Govt. or other Government organization like security and the like, it can be filled up only with the prior concurrence of Finance Department. Further,

the Finance Department vide Office Memorandum No.55764/F, dt.31.12.2004, while lifting the ban partly have stipulated that 75% of the base level vacant post, if any base level vacant post as on 01.04.2004 should be abolished and status report should be furnished to the Finance Department. After abolition of 75% of the base level vacant post, if any base level vacant post is essentially required to be filled up, the same should be made on contract basis at consolidated salary.”

23. As regards similar cases, it is submitted by Mr. Das that those appointments were with prior approval whereas in the case of the Petitioner, such approval was sought post facto. Therefore no comparison could be drawn between those cases and that of the Petitioner.

Issues arising for determination

24. Having heard counsel for the parties, the issues that arise for consideration by this Court are:

(a) Whether the WRD was justified in declining post-facto approval to the absorption of the Petitioner as Junior Assistant with effect from 17th February, 2004 in terms of the Office Order No.1471 dated 11th February, 2004 in the interest of public service, although his lien in the parent cadre ceased from the aforesaid date?

(b) Whether by invoking the power of relaxation in consonance with Rule-22 of OMS Rules, 1994 in respect of other similarly situated persons in the post of Junior Assistant in the Heads of Department (HoD) cadre from the territorial cadre (CSL) and not in respect of the Petitioner, the WRD had subjected the Petitioner to discrimination in violation of Articles 14 and 16 of the Constitution of India?

Issue (a)

25. Certain facts which are not in dispute is that at the time of being brought over on deputation to the office of the EIC, WRD on 28th May 1998, the Petitioner was working as a Junior Clerk for less than a year, i.e. with effect from 11th July, 1997. He had been appointed as such under the OCS (Rehabilitation Assistance) Rules, 1990. Although the Petitioner would like to attribute the reasons for the shift on deputation to the higher post of Junior Assistant to his efficiency and ability to work, the fact remains that by this time the 1994 Rules, which provided for the method of appointment of Junior Assistants, were already in place. The admitted position is that there was no provision in the 1994 Rules whereby a Junior Clerk in WRD could have been appointed as Junior Assistant by way of deputation. To compound this illegality is the fact that this was done without any prior approval of the government. Unlike other similar cases, where such approval was sought in advance, in the Petitioner's case a post facto approval was sought and was refused on two separate occasions. Therefore, the undisputable fact is that the Petitioner's appointment on deputation as Junior Assistant by the orders of the EIC, WRD was *de hors* the 1994 Rules. Consequently, neither the decision in *Ashok Kumar Ratilal (supra)* nor the one in *S.I. Rooplal v. The Lt. Governor through the Chief Secretary, Delhi (supra)* can come to the aid of the Petitioner.

26. In *Ashok Kumar Ratilal Patel (supra)* a distinction was sought to be made between “transfer on deputation” and “appointment on deputation” and it was explained as under –

“13. Ordinarily transfers on deputations are made as against equivalent post from one cadre to another, one department to another, one organization to another, or one Government to another; in such case a deputationist has no legal right in the post. Such deputationist has no right to be absorbed in the post to which he is deputed. In such case, deputation does not result into recruitment, as no recruitment in its true import and significance takes place as the person continues to be a member of the parent service.

14. However, the aforesaid principle cannot be made applicable in the matter of appointment (recruitment) on deputation. In such case, for appointment on deputation in the services of the State or organization or State within the meaning of Article 12 of the Constitution of India, the provisions of Article 14 and Article 16 are to be followed. No person can be discriminated nor is it open to the appointing authority to act arbitrarily or to pass any order in violation of Article 14 of the Constitution of India. A person who applies for appointment on deputation has an indefeasible right to be treated fairly and equally and once such person is selected and offered with the letter of appointment on deputation, the same cannot be cancelled except on the ground of non-suitability or unsatisfactory work.”

27. The facts of that case were noted in para-15 as under :

“It is a case of appointment on deputation for which advertisement was issued and after due selection, the offer of appointment was issued in favour of the appellant. In such circumstances, it was not open for the respondent to argue that the appellant has no right to claim deputation and the respondent cannot refuse to

accept the joining of most eligible selected candidate except on ground of unsuitability or unsatisfactory performance.”

28. In the present case, the Petitioner’s appointment under deputation was *de hors* the 1994 Rules and therefore no parallel can be drawn with the aforementioned decision.

29. In ***S.I. Rooplal v. The Lt. Governor through the Chief Secretary, Delhi*** the issue was about equivalence of pay for the same posts in two different services, i.e. the post of Sub-Inspector in Border Security Force and the Delhi Police. It was in that context certain observations were made in para-17, as under—

“the true criterion for equivalence is the status and the nature and responsibility of the duties attached to the two posts.”

30. Reliance is also placed on the observation in the above decision to the effect that, “the State should only play the role of an impartial employer in the inter se disputes between the employees.” The above observations are of no application in the present context. Here there is no dispute between the two sets of employees. The cause of action in the present case arose when the government deleted the name of the Petitioner from the combined seniority list of Junior Assistants. Opposite Parties 3 to 9 are Junior Assistants in their own right, whereas the Petitioner has come on deputation as Junior Assistant *de hors* the Rules.

31. Once the initial appointment as Junior Assistant is shown to be illegal, the plea of limitation to question such appointment cannot possibly be countenanced. Therefore, the reliance by earned counsel for the Petitioner on the decision in *S. Sumnyan v. Limi Nini* (*supra*) appears misplaced.
32. The reliance of the Petitioner on the decision in *Secretary, Govt. of Karnataka v. Uma Devi* (*supra*), is to no avail for the simple reason that his initial appointment as Junior Assistant was itself illegal. The OAT was therefore right in relying on the decision in *Md. Asif v. State of Bihar* (*supra*) to reject the plea of the Petitioner that a mandamus should be issued to the Opposite Parties to ratify the illegal appointment of the Petitioner as Junior Assistant only because he had continued as such for a number of years.
33. The stand of the State was that although concerted efforts were in fact made by the EIC, WRD to have the absorption on deputation of persons including the Petitioner as Junior Assistants ratified through a post facto approval, the Government in the WRD did not agree. The proposal was twice rejected, first on 7th July, 2009 and again on 20th June, 2011. The WRD has consistently found that the absorption of Junior Clerks of territorial offices as Junior Assistants in the office of the EIC, WRD to be *de hors* the Rules and therefore illegal. The argument that this was done “to manage the day-to-day official works in the interest of public service” obviously did not find favour with the government. As a

result, the Petitioner's name, which had appeared in the provisional gradation list of Junior Assistants, published on 8th November 2012, had to be deleted when the final list was published on 2nd January, 2013.

34. As a result of the above discussion Issue (a) is decided against the Petitioner by holding that the Opposite Party (State) was justified in declining to grant post facto approval to the appointment of the Petitioner as Junior Assistant in the office of the EIC, WRD on deputation.

Issue (b)

35. The Petitioner is conscious of the above factual position. Therefore, his prayer is that since he was allowed to continue as a Junior Assistant for many years, his appointment should be regularized by exercising the power of relaxation in terms of Rule 22 read with Rule 2 (2) of the 1994 Rules.
36. The posts of Junior Clerk and Junior Assistant are neither comparable not of the same rank and status. The switching from one to the other by deputation without any prior approval of the government and de hors the 1994 Rules can hardly be legally sustainable. The Court does not, in the above background, find the refusal by the government to exercise the power of relaxation in favour of the Petitioner to be arbitrary or unreasonable.

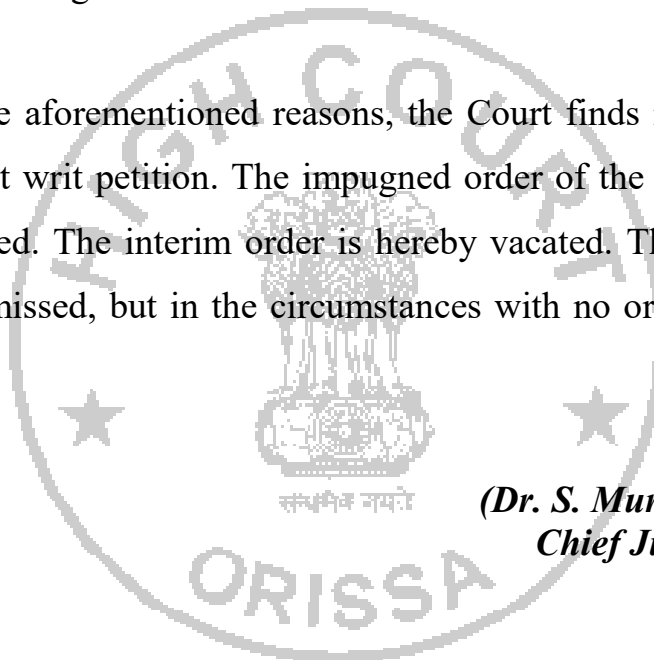
37. As regards the cases of persons named by the Petitioner in whose cases similar orders of appointment as Junior Assistants were approved, it has been explained by the government that the absorption of Smt. Binapani Pati, Shri Kartik Parsad and Smt. Ailala Pradhan in the office of the EIC, WRD was made “after receipt of approval of govt. in relaxation of OMS Rules, 1994”, whereas in the case of the Petitioner “approval was sought for by EIC, WR post facto.” The Court finds that this is an important distinction, and forms a valid basis to deny the Petitioner the benefit of a post facto approval even by way of relaxation.
38. Turning to the decisions relied upon by the Petitioner, ***Harshit Agarwal*** (*supra*) it had to do with the non-acceptance of the recommendation of the Dental Council of India to lower the qualifying cut off percentile. The issue in ***Ashok Kumar Sonkar v. Union of India*** (*supra*) was about possessing the requisite educational qualification for the post of Lecturer in “Tridosha Vigyan” in the Banaras Hindu University. The issue in ***Kendriya Vidyalyaya Sangathan v. Sajal Kumar Roy*** (*supra*) was about age relaxation. The issue here is not one of relaxation of educational or experience requirements. In ***Government of Karnataka v. Gowramma*** AIR 2008 SC 863, the well-settled position in law was reiterated, viz., that the Court should not place reliance on decisions without examining whether the factual situation fits the factual situation on which the decision relied upon is based.

39. Accordingly, Issue (b) is decided against the Petitioner by upholding the Government's refusal to exercise the power of relaxation in favour of the Petitioner.

Conclusion

40. The net effect of the impugned orders challenged by the Petitioner before the OAT would be that he stands reverted as Junior Clerk. The Petitioner cannot claim any prejudice on that score, given the above background facts.

41. For the aforementioned reasons, the Court finds no merit in the present writ petition. The impugned order of the OAT is hereby affirmed. The interim order is hereby vacated. The writ petition is dismissed, but in the circumstances with no orders as to cost.



(Dr. S. Muralidhar)
Chief Justice

(A. K. Mohapatra)
Judge

S.K. Parida