

AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) Nos.11122 and 13762 of 2017

Rajib Kumar Hota
(In W.P.(C) No.11122 of 2017)

.... ***Petitioners***

Susanta Kumar Mishra and another
(In W.P.(C) No.13762 of 2017)

-versus-

Odisha Mining Corporation Ltd., ***Opposite Parties***
Bhubaneswar and others

Advocates appeared in the cases:

For Petitioners : Mr. Subrat Mishra, Advocate

For Opposite Parties : Mr. Pravat Kumar Muduli,
Advocate for OMC

CORAM:
THE CHIEF JUSTICE
JUSTICE M. S. RAMAN संयमिक न्यायो

JUDGMENT
01.11.2022

Dr. S. Muralidhar, C.J.

1. In both the writ petitions, the background facts are similar and the issue involved is also similar. Accordingly, both the writ petitions are disposed of by this common judgment.

2. In both the writ petitions, the challenge is laid to Rule-8.1 and Annexure-11 (D) of the Odisha Mining Corporation Limited Recruitment & Promotion Rules for Non-Executives, 2012 (hereafter the “2012 Rules”) as being discriminatory and violative

of Articles 14 and 16 of the Constitution of India. A further direction is sought to the Orissa Mining Corporation Limited (OMC)-Opposite Party No.1 and its Managing Director (MD)-Opposite Party No.2 to repeal the Orissa Mining Corporation Ltd Recruitment & Promotion Rules for Non-Executives, 1997 (hereafter the “1997 Rules”) thereby amending Rule-13.1 of the 2012 Rules and introduction of a proper saving clause in its place. The third prayer is for a direction to the OMC to prepare a single gradation list of Junior Pharmacists giving due weightage to the seniority of the employees.

3. While the Petitioner in W.P.(C) No.11122 of 2017 joined as a Pharmacist in the OMC at its Gandhamardan Iron Ore Mines Dispensary at Suakathi, Keonjhar under the 1997 Rules on 16th October, 1992 after being selected in the written test and viva voce, and possessing a Diploma in Pharmacy, he had not earned any promotion for over 25 years till the filing of the writ petition. His grievance is that Opposite Party No.7, who joined the OMC as Pharmacist on 6th March, 2006 on contractual basis, had his services regularized as Junior Pharmacist on 1st May, 2013 under the 2012 Rules and subsequently promoted to Senior Pharmacist on 11th May, 2017 after completion of four years of service by applying Rule-8.1 read with Annexure-11 (D) of the 2012 Rules.

4. Likewise, in W.P.(C) No.13762 of 2017, the two Petitioners were working as Pharmacists in OMC having been directly recruited under the 1997 Rules on 20th October and 19th October,

1992 respectively. Even in their case, no action was taken for granting them promotions whereas Opposite Parties 8 to 12 joined on various dates in March and May, 2006 as Pharmacists on contractual basis and were thereafter regularized under the 2012 Rules on 1st May, 2013. Subsequently, each of them was promoted as Senior Pharmacist on 11th May, 2017 under Rule-8.1 read with Annexure-11 (D) of the 2012 Rules. Here again the complaint is that the 2012 Rules discriminate against the Petitioners who are recruited under the 1997 Rules as there is no avenue for promotion except where a vacancy occurs whereas under the 2012 Rules, the promotion is virtually automatic on completion of four years as Junior Pharmacist.

5. In response to the notice issued in the present petitions, replies have been filed by the OMC in both the writ petitions and the stand taken is similar. It is contended that those appointed under the 1997 Rules and those appointed under the 2012 Rules form two distinct and different cadres. It is contended that the contesting private Opposite Parties having been regularized under the 2012 Rules were also therefore eligible for further promotion as Senior Pharmacists on completion of four years whereas, the Petitioners were appointed under the 1997 Rules and were not eligible to be considered for promotion under the 2012 Rules.

6. It is further pointed out by the OMC that under the 1997 Rules, the qualification prescribed for the post of Pharmacist is Matriculation with Diploma in Pharmacy whereas under the 2012

Rules, the prescribed qualification for Junior Pharmacist is +2 Science with Diploma in Pharmacy. It is contended that with the introduction of the 2012 Rules, OMC aims at bringing better qualified candidates for the post of Junior Pharmacist.

7. It may be added here that one specific contention of the Petitioners is that under the 1997 Rules, there was no scope of regular promotion for Non-Executives to a higher post after completion of certain years of service. Under Rule-9.13.16 of the aforesaid 1997 Rules, all promotion to the next higher posts is to be vacancy based and at the discretion of the Management. Under Rule-9.13.2 of the 1997 Rules, the head of the Department was to forecast by the last week of April each year in order of priority the number of vacancies likely to arise in the grade due to superannuation, posts to be created under the new schemes or expansion of service cadre. The Petitioners' complain is that for the last 25 years, no such forecast of vacancies was made by the authorities and no DPC was constituted for consideration of the promotion of the Non-Executive employees. Therefore, the Petitioners complain that they have been stagnating in the same post of Pharmacist; their morale is low, which in turn affects their ability to work.

8. The above contention has been disputed by the OMC in its counter affidavit stating that 5 Pharmacists got promotion as Senior Pharmacists during the last 25 years. Examples are given of the promotions made on 30th March 1996, 30th December 2003,

19th August 2004, 2nd June, 2009 and 15th November, 2017. It is stated that the Petitioners are much below the gradation list of Pharmacists and therefore, have not been promoted as Senior Pharmacists yet.

9. The OMC further asserts that all of these Petitioners, may not have been promoted as Senior Pharmacists, but have earned all the increments and the benefit of the Revised Assured Career Progression (RACP) Scheme by getting financial upgradations from time to time.

10. The above submissions have been considered. At the outset, it requires to be noticed that although Opposite Party No.7 in W.P.(C) No.11122 of 2017 and Opposite Parties 8 to 12 in W.P.(C) No.13762 of 2017 were all appointed as Pharmacists on contractual basis under the 1997 Rules, they could not have suddenly been treated as employees under the 2012 Rules only because they happen to be regularized thereunder. Their birthmark was the 1997 Rules and in that respect, they were identical with the present Petitioners except that the Petitioners were regularly appointed under the 1997 Rules whereas the contesting private Opposite Parties were appointed on contractual basis and regularised under the 2012 Rules. As it transpired only because of the regularization of the private Opposite Parties having taken place under the 2012 Rules, their birthmark was suddenly changed from the 1997 Rules to the 2012 Rules and they consequently became the beneficiary of accelerated promotion at

the end of four years of being Junior Pharmacists. On the other hand, the present Petitioners, who were all appointed, like the private Opposite Parties under the 1997 Rules, have had no chance at all of promotion to the next higher post. There is no provision under the 1997 Rules akin to the 2012 Rules granting accelerated promotions to the Junior Pharmacists on completion of four years of service. To that extent, the Petitioners have made out a case for hostile discrimination practiced against them by operation of Rule-8.1 read with Annexure-11 (D) of the 2012 Rules. The explanation offered by the OMC that Pharmacists appointed under the 1997 Rules and those appointed under the 2012 Rules formed distinct and separate cadres may not hold good as far as the present cases are concerned since admittedly the private Opposite Parties were also appointed only under the 1997 Rules, although contractually.

11. The further point to be noted is that both under the 1997 Rules and the 2012 Rules, the prescribed qualification is more or less similar. Under the 1997 Rules, it was the Matriculation with Diploma in Pharmacy whereas under the 2012 Rules, it was +2 Science with Diploma in Pharmacy. It cannot be therefore said that the prescribed qualification for appointment as Pharmacist is substantially different under the 2012 Rules. The fact remains that the private Opposite Parties were not appointed contractually under the 2012 Rules but under the 1997 Rules.

12. As far as the Petitioners were concerned, since they were regularly appointed under the 1997 Rules, there was no occasion for their services to be regularized. Also, the provisions concerning promotion to the next higher post of Senior Pharmacist was vacancy based as far as the 1997 Rules are concerned and virtually automatic on completion of four years of service as Junior Pharmacists under the 2012 Rules. This therefore enabled those appointed as Pharmacists on contractual basis under the 1997 Rules later than the appointment of the present Petitioners, to steal a march on them as far as the promotion to the next higher post of Senior Pharmacist was concerned.

13. On its own showing, OMC appears to have not been regularly making promotion under the 1997 Rules. There is a long gap between 30th March, 1996 and 30th December, 2003 i.e. more than seven years for promotion to be made. Again between 2nd June, 2009 and 15th November, 2017 there was a huge gap. Therefore, the Petitioners are justified in their contention that this has led to the stagnation of persons like the Petitioners, who were appointed as Pharmacists and had continued as such for almost 25 years till the time of filing of the writ petitions. There is no convincing reply to this by the OMC.

14. With both the Petitioners and private Opposite Parties being appointed only under the 1997 Rules and not the 2012 Rules, it cannot be said that those appointed contractually under the 1997

Rules formed a separate cadre. The mere accident of regularization of the contractual employees under the 2012 Rules enabled them to get accelerated promotions under the 2012 Rules. Thus, the Petitioners have been discriminated against inasmuch as the private Opposite Parties got accelerated promotions as Senior Pharmacists under the 2012 Rules whereas the Petitioners continued to stagnate as Pharmacists having been appointed under the 1997 Rules.

15. Mr. Muduli, learned counsel for the OMC, sought to place reliance on the decision of the Supreme Court of India in ***H. P. Gupta v. Union of India (2002) 10 SCC 658***. There, the question was whether by giving two advance increments to those acquiring a Degree in Engineering while in service, hostile discrimination was being practiced against Junior Telecom Officers in the Telecommunication Department of Union of India, who were direct recruits having possessed the qualifying degree in Engineering even at the time of joining service. It was observed as under:

“5. We find that the object of giving two advance increments to those officials who did not possess degree in Engineering before joining the service, is only to encourage them to get such a degree so that they could improve themselves while in service. When that object is satisfied, we do not think the contentions advanced on behalf of the appellants that there should be equality in the matter of payment of salary or other emoluments or even there should be parity in the matter of giving increments, cannot be accepted. It is true that in such a situation, as pointed out by the learned Senior Counsel for the appellants, certain anomalies may arise in specific

cases when the official who has acquired degree in Engineering subsequent to joining of service may get higher salary though junior to the appellants. There cannot be perfect equality in any matter on an absolute scientific basis and there may be certain inequities here and there. If the classification is correct and serves a particular purpose, the same is not to be judicially interfered with. If the argument advanced on behalf of the appellant is accepted then the Scheme itself will become ineffective though it may result in giving uniform treatment to all. Thus, the incentive scheme will stand scraped and such an event should be avoided. In this view of the matter, we decline to interfere with this order made by the Tribunal. The appeal is accordingly dismissed. No costs.”

16. However, in the present case, it is not as if the private Opposite Parties have acquired any qualification while in service. Their qualifications were more or less similar since both were only diploma holders. Therefore, the action of the OMC in shifting the private Opposite Parties into the realm of the 2012 Rules was discriminatory since it enabled the private Opposite Parties to get accelerated promotions. They were clearly junior to the present Petitioners since they were contractually appointed several years after the Petitioners were regularly appointed as Pharmacists.

17. Turning now to the decision in *Unikat Sankunni Menon v. State of Rajasthan, AIR 1968 SC 81*, the claim of the Appellant in that case was that being a member of the Rajasthan Secretariat Service (RSS), on appointment as Deputy Secretary, he was entitled to receive the special pay on the ground of being placed

on parity with Members of the Rajasthan Administrative Service (RAS). This was rejected by pointing out that the RSS was distinct and separate from the RAS and that the methods of recruitment and qualifications in the two services were not identical.

18. However, in the present case, the posts are identical. In fact, both sets of employees were appointed under the same 1997 Rules. Consequently, the above decision cannot justify the action of the OMC in not granting promotions to the Petitioners on par with the promotions granted to the private Opposite Parties.

19. In the circumstances, a direction is issued to the OMC to consider the Petitioners for promotion as Senior Pharmacists from the date that their immediate juniors-private Opposite Parties were given promotions as Senior Pharmacists. With the making of the 2012 Rules, regularizations have taken place and promotions made only under those Rules and not under the 1997 Rules. Therefore, the above promotion of the Petitioners would be prospective and a one-time exercise in the peculiar facts and circumstance of the case and would not constitute a precedent. If it results in OMC having to create supernumerary posts, then the same should be done in terms of the present order in order that all the Petitioners may be properly accommodated as Senior Pharmacists. They will not lay any claims to seniority over those already promoted as Senior Pharmacists. The Petitioners' promotion would be prospective and they would not be entitled to

any arrears of pay as a result of such promotion over and above the financial increments they have already earned.

20. The above directions shall be implemented within a period of eight weeks from today. The writ petitions are disposed of in the above terms. No order as to costs.

(S. Muralidhar)
Chief Justice

(M. S. Raman)
Judge

M. Panda

