

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.8706 of 2022

Banaja Kumari Behera *Petitioner*
Mr. Durgesh Narayan Rath, Adv.

-versus-

State of Odisha and Ors. *Opposite Party*
Mr. Biplaba Mohanty, SC
(for SC and ME Deptt.)

CORAM:

DR. JUSTICE S.K. PANIGRAHI

Order

No.

09.

ORDER

27.10.2022

1. This matter is taken up through hybrid mode.
2. The Petitioner has filed this Writ Petition for quashing the order dated 23.05.2018 passed by the Opposite Party No.4 under Annexure-12 and to direct the Opposite Parties to issue engagement order in favour of the Petitioner for appointment to the Post of Contractual Teacher (TGT-Arts) in Government High Schools.

I. FACTS OF THE CASE

3. Shorn of unnecessary details, the substratum of matter presented before this court remain that an advertisement dated 06.06.2013 was published by the Director, Secondary Education, Orissa, Bhubaneswar

towards inviting applications for the engagement of contractual teachers in Government High Schools including the Upgraded High Schools for the academic session 2013-2014. The Petitioner applied for the post of Contractual Teacher in TGT-Arts under SC category.

4. In the said advertisement, Clause-5 (vii) stipulated that the future vacancies upto 50% of the vacancies now advertised arising within one year or till next advertisement, whichever is earlier will also be filled up out of the merit list so prepared.
5. A merit list was published vide order dated 17.09.2013 under Annexure-2 and in the said merit list, the name of Purnima Nayak can be found at SL No. 5 and the name of the Petitioner can be found as enlisted in SL No. 43. Since, Ms. Purnima Nayak secured appointment in the ST & SC Development Department, she resigned from the post of contractual teacher in Upgraded High School, Dhudusi vide letter dated 07.11.2013 and the same was communicated to District Education Officer, Kandhamal, Phulbani.
6. A letter was issued by the District Education Officer, Kandhamal to the Director, Secondary Education, Odisha stating inter alia that in the meantime, the Government vide G.O No. 22403/SME had issued

instructions to fill up the future vacancy upto 50% as per Clause-5 (vii) of the advertisement dated 06.06.2013. It was also requested that necessary permission may be accorded to fill up the vacant Contractual posts out of the existing merit list.

7. The Annexure-B appended to the letter dated 16.01.2014 stated that for TGT-Arts under SC category, the sanctioned strength was 8, the no. of positions that were filled were 7 and therefore, there was only 1 vacancy remaining. Since, Ms. Purnima Nayak, who was placed at SL No. 5, resigned from the post, the Petitioner was next-in-line under the SC category and hence, should've been considered for appointment to the said post as per Clause-5 (vii) of the advertisement dated 06.06.2013.
8. However, no action was taken and the Petitioner approached the Odisha Administrative Tribunal, Bhubaneswar by filing O.A No. 500 of 2014 and the Learned Tribunal vide order dated 15.04.2014 directed the Opposite Party No. 2 to take an independent decision on the matter on its own merit and dispose of the representation in accordance with law.
9. The Opposite Party No.2 vide communication dated 26.08.2014 requested the Additional Secretary to the Government to communicate their order/instruction at

an early date in order to comply with the orders of the Tribunal within the stipulated date. The Additional Secretary to the Government vide order dated 28.11.2014 issued instructions to the Director, Secondary Education, Odisha that the case of the Petitioner cannot be considered as there is a fresh advertisement for the concerned subject-matter.

10. Subsequently, the Petitioner approached the Odisha Administrative Tribunal in O.A No. 4460 (C) of 2014 wherein the Tribunal vide order dated 01.03.2017 dismissed the application of the Petitioner. The Petitioner challenged the order of the Tribunal by filing W.P.(C) No. 6676 of 2017 and this Court disposed of the Writ Petition by setting aside the order of the Tribunal and remitted back the same to the Tribunal for fresh hearing.

11. The Tribunal heard the matter afresh and passed a judgement vide order dated 28.02.2018 wherein the Original Application was allowed. The Tribunal directed the Opposite Parties to fill up the post which had fallen vacant due to resignation of Ms. Purnima Nayak and further stated that if the said post belonged to SC category, then the appointment order be issued in

favour of the Petitioner as she is only candidate available under SC category.

12. Since, the order was not complied with, the Petitioner filed a contempt petition before the Tribunal which was subsequently transferred to the High Court and renumbered as CONTC (CPC) No. 81 of 2019. The High Court vide order dated 07.01.2022 dropped the contempt petition considering the statement of the Learned Counsel for the Opposite Party that the order of the Tribunal has been complied with. The claim of the Petitioner was rejected by the Opposite Parties on the ground that the post held by Ms. Purnima Nayak was a UR category post. The said order has been assailed in the present writ petition.

II. SUBMISSION ON BEHALF OF THE PETITIONER

13. It is contended by Learned Counsel for the Petitioner that there was only 1 vacancy under SC category and in such circumstance, if Ms. Purnima Nayak has tendered her resignation, then the post ought to have been filled up taking into consideration the candidature of the Petitioner as she is next-in-line in the merit list under SC category. Therefore, the Opposite Parties have not considered the order of the Tribunal in proper perspective and even though, Ms. Purnima Nayak

belonged to the SC category, the Opposite Parties are claiming that she had been appointed under the UR category.

III. SUBMISSION ON BEHALF OF THE OPPOSITE PARTIES

14. Per Contra, it is submitted by Learned Counsel for the Opposite Parties that the Ms. Purnima Nayak was posted as TGT-Arts teacher in the UG High School, Dhudusi during the year 2012-13 and whereas, the Petitioner applied for the post advertised in the year 2013-14 in which no post under SC category was advertised. So, the claim of the Petitioner to appoint her against the vacancy caused pursuant to resignation of Ms. Purnima Nayak, is totally unacceptable as per rule.

IV. COURT'S REASONING AND ANALYSIS

15. On perusal of the above-mentioned pleadings, this Court is of the view that Ms. Purnima Nayak was appointed to the post of Contractual Teacher in TGT-Arts in UG High School, Dhudusi during the year 2012-13, whereas the Petitioner applied for the post vide advertisement dated 06.06.2013 for the year 2013-2014. Moreover, the advertisement dated 06.06.2013 categorically stated that there were only 4 vacancies (1 UR & 3 SEBC) in TGT-Arts in Kandhamal District. Further, the advertisement dated 22.06.2013, published

in the daily newspaper "The Dharitri" also reflected that there were no posts in TGT-Arts in Kandhamal District under the SC & SC (W) category. The appointment of the Petitioner under SC category for the year 2013-14 cannot be made as there is no post available under the SC category for the concerned year. Therefore, this court is unable to accede to the contention raised by the Petitioner that she should've been considered for appointment against the vacancy created due to the resignation of Ms. Purnima Nayak.

16. Moreover, Ms. Purnima Nayak was appointed against the UR vacancy even though she belonged to the SC category; therefore, the vacancy arising out of her resignation would be carried forward for the subsequent year i.e., 2014-2015 under the UR category if the same was not filled in accordance to Clause 5 (vii). Even if it were to be assumed that the vacancy created due to the resignation of Ms. Purnima Nayak would be filled from the Merit List of 2013-14 as per Clause-5(vii), still, the claim of the Petitioner would not be maintainable as the vacancy so created would've been towards UR category and not SC & SC(W) category. It is submitted by the Opposite Parties that fresh advertisement for selection of contractual teachers for the year 2014-2015 was made

vide Notification No. 23042/SME dated 22.10.2014 and the vacancy created due to resignation of Ms. Purnima Nayak was carried forward in the concerned academic session.

17. It has been held by the Supreme Court in the case of *Arup Das and Others v. State of Assam and Ors*¹ as under :-

"It is well established that an authority cannot make any selection/appointment beyond the number of posts advertised, even if there were a larger number of posts available than those advertised. The principle behind the said decision is that if that was allowed to be done, such action would be entirely arbitrary and violative of Articles 14 and 16 of the Constitution, since other candidates who had chosen not to apply for the vacant posts which were being sought to be filled, could have also applied if they had known that the other vacancies would also be under consideration for being filled up."

18. In the case of *Prem Singh and Others vs Haryana State Electricity Board*², the Supreme Court observed

"..the selection process by way of requisition and advertisement can be started for clear vacancies and also for anticipated vacancies but not for future vacancies. If the requisition and advertisement are for a certain number of posts only the State cannot make more appointments than the number of posts advertised, even though

¹ (2012) 5 SCC 559

² 1996 SCC (4) 319

it might have prepared a select list of more candidates. The State can deviate from the advertisement and make appointments on posts falling vacant thereafter in exceptional circumstances only or in an emergent situation and that too by taking a policy decision in that behalf. Even when filling up of more posts than advertised is challenged the court may not, while exercising its extraordinary jurisdiction, invalidate the excess appointments and may mould the relief in such a manner as to strike a just balance between the interest of the State and the interest of persons seeking public employment. What relief should be granted in such cases would depend upon the facts and circumstances of each case."

19. The Supreme Court iterated this principle in *Madan Lal & Ors vs The State of Jammu & Kashmir And Ors*³. The Court observed:

"A mere look at the rule shows that Pursuant to the requisition to be forwarded by Government to the Commission for initiating the recruitment process, if the Commission has prepared merit list and waiting list of selected candidates such list will have a life of one year from the date of publication in Government Gazette or till it is exhausted by the appointment of candidates, whichever is earlier. This means that if requisition is for filling up of 11 vacancies and it does not include any anticipated vacancies, the recruitment to be initiated by the Commission could be for selecting 11 suitable candidates. 'The Commission may by abundant caution prepare a

³ 1995 SCC (3) 486

merit list of 20 or even 30 candidates as per their inter se ranking on merits. But such a merit list will have a maximum life of one year from the date of publication or till all the required appointments are made whichever even happened earlier. It means that if requisition for recruitment is for 11 vacancies and the merit list prepared is for 20 candidates, the moment 11 vacancies are filled in from the merit list the gets exhausted, or if during the span of one year from the date of obligation of such list all the 11 vacancies are not filled in, the moment the year is over the list gets exhausted. In either event, thereafter, if further vacancies are to be filled in or remaining vacancies are to be filled in, after one year, a fresh opportunity to all the open market candidates to compete. This is the thrust of rule 41. It is in consonance with the settled legal position as we will presently see. We cannot agree with the learned counsel for respondents that during the period of one year even if all the 11 vacancies are filled in for which requisition is initiated by the State in the present case and if some more vacancies arise during the one year, the present list can still be operated upon because the Commission has sent the list of 20 selected candidates. As discussed above, the candidates standing at serial nos. 12 to 20 in the list can be considered only in case within one year of its publication, all the 11 vacancies do not get filled up for any reason. In such a case only this additional list of selected candidates would serve as a reservoir from which meritorious suitable candidates can be drawn in order of merit to fill up the remaining requisitioned and advertised vacancies, out of the total 11 vacancies. If that

cannot be done for any reason within one year of the publication of the list, even this reservoir ill dry up and the entire list will get exhausted."

20. In the present case, Ms. Purnima Nayak was appointed in the year 2012-2013; therefore, only the merit list of 2012-13 could've been used for making any appointment against any anticipated vacancy for that concerned year. Ms. Purnima Nayak resigned on 07.11.2013 and the advertisement concerning appointment of contractual teachers in TGT-Arts for the year 2013-14 was announced on 06.06.2013. Hence, it cannot be said that the vacancy arising out of the resignation dated 07.11.2013 ought to have been filled through the waiting list of 2013-14. The validity of the merit/waiting list for the year 2013-14 is restricted to appointments and vacancies arising in that particular year. In the 2013-14 period, only 4 vacancies (1 UR + 4 SEBC) were announced and none of the vacancies were pertaining to SC category. Moreover, since Ms. Purnima was appointed against UR category, it is only plausible that upon her resignation, a post under the UR category has fallen vacant and the benefit of the same cannot be extended to the Petitioner who has applied for the said post under the SC category.

21. In the case of *Shankarsan Dash vs Union Of India*⁴, the Supreme Court observed:

"It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted."

22. In conspectus of the facts and guided by the precedents herein stated above, this Court is of the view that the order dated 23.05.2018 passed by the Opposite Party No. 4 doesn't suffer from any infirmity. The decision to fill any anticipated vacancy from the waiting/merit list because of resignation of applicants in the later stage or to carry forward the same to the subsequent year is a policy decision by the State and this Court, in the garb of

⁴ 1991 SCR (2) 567

Judicial Review, cannot usurp the policy decisions and jurisdiction of the State and make the decision itself.

23. In the final analysis, this Court is of the opinion that the Writ Petition is devoid of merits for the foregoing reasons and is, accordingly, liable to fail. The Writ Petition is, accordingly, dismissed as no case has been made out by the Petitioner.

B.Jhankar



(Dr. S.K. Panigrahi)
Judge