

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.13965 of 2021

Bidyutlata Dixit

....

Petitioner

Mrs. Sumitra Mohanty, Adv.

-versus-

State of Odisha and Ors.

....

Opposite Party

*Mr. P.M. Pattajoshi, SC
(for SC and ME Deptt.)*

CORAM:

DR. JUSTICE S.K. PANIGRAHI

Order

No.

08.

ORDER

27.10.2022

1. This matter is taken up through hybrid mode.
2. The present petition has been filed for quashing Annexure-1 dated 08.02.2021 issued by the Opposite Party No.3, by which the representation of the Petitioner for consideration of her engagement with retrospective effect has been rejected in view of the career advancement policy prescribed in Resolution No. 15107 dated 01.08.2011. The Petitioner further seeks direction to the Opposite Parties to appoint/engage her as Regular Primary School Teacher in Janardanpur Primary School of Nischintakoili Block.

I. FACTS OF THE CASE

3. Shorn of unnecessary details, the substratum of matter presented before this Court remains that the Petitioner had applied for the post of "Shiksha Sahayak" in the Salipur Education District under the Physically Handicapped Category. After due scrutiny, the provisional merit list for appointment of Shiksha Sahayak was published and the Petitioner was found to be selected. But, prior to the publication of the final merit list, the Opposite Party No.1 issued letter dated 16.10.2012, directing all the Collectors to follow the principle of reservation issued by the Govt. from time to time in case of persons with Disability (PWD) categories. Furthermore, directions were also issued towards not entertaining the candidature of the applicants having temporary disability certificate. Subsequently, the final list of physically handicapped persons to be appointed as Shikha Sahayak in the Salipur Education District was published and in the said list the Petitioner's name was not there.
4. The Petitioner approached this Court in WP(C) No. 20975/2012 and in the said petition, he challenged the validity and legality of the final selection list challenging

the final selection list debarring his selection. On hearing the parties this Court was pleased to pass the interim order dated 07.11.2012. The relevant portion is extracted hereinunder for convenience:

"The post which is advertised for hearing impaired persons shall not be filled up without leave of Court."

5. Ultimately, after having gone through the letter of District Project Coordinator and the disability certificate issued by Appellate Medical Board, this Court disposed of the writ petition on 21.03.2014 directing the Petitioner to file representation before Opposite Party No. 2-Collector and directed the Collector to take a decision on the Petitioner's engagement in accordance to the certificate of Appellate Medical Board within a period of two months.
6. In compliance of the direction of this Court, the Petitioner duly filed a representation along with all relevant documents before the Collector/ Opposite Party No. 2 on 25.03.2014. Thereafter, the Petitioner was directed vide letter dated 07.06.2014 to appear personally in the Court of Collector, Cuttack with all records to substantiate her claim for the engagement as Siksha Sahayak for 2011-12. Accordingly, the Petitioner was ready with all relevant records before the Opposite

Party No. 2 on the relevant date and substantiated her case. But the Petitioner's candidature was rejected vide order dated 13.06.2014 on the ground that addition of any sort of eligibility criteria after the cut-off date cannot be considered.

7. Thus, the Petitioner was again forced to approach this Court in WP(C) No.12756/2014 challenging the order dated 13.06.2014 passed by the Collector /Opposite Party No. 2 in rejecting the Petitioner's engagement as Shiksha Sahayak under P.H. Category. On 18.07.2014, this Court was pleased to pass the interim order in M.C. No. 11487/2014. The Court observed:

"One post of Shiksha Sahayak under P.H. Category be kept vacant till the next date."

8. Ultimately, on 19.11.2014, the said writ petition was allowed in favour of the Petitioner and the Opposite Parties were directed to issue engagement order as Shiksha Sahayak in favour of the Petitioner without delay.
9. Despite the specific order of this Court under Annexure-4 to issue engagement order in favour of the Petitioner without any delay, the Opposite Parties sat over the matter by not issuing any engagement order. The Petitioner consistently approached the Opposite Party

No. 2 and 3 with a prayer to comply with the order of this Court by filing several applications. Thereafter, the Collector vide communication dated 04.06.2016 issued a letter to the Opposite Party No. 1 requesting therein for approval of Govt. in School and Mass Education Dept. in respect of the Petitioner's engagement as "Shiksha Sahayak" wherein the Collector has specifically submitted that the inordinate delay has already been caused in the matter to issue engagement order in compliance to this Court's order.

10. Ultimately, after approval of Opposite Party No.1, the engagement order was issued to the Petitioner vide letter No. 4101 dated 05.10.2016 and she was engaged as "Shiksha Sahayak" in Janardanpur Primary School of Nischintakoili Block w.e.f. 07.10.2016. The Petitioner had been diligently discharging her duties as Shiksha Sahayak from the date of joining with utmost sincerity.

11. It is pertinent to mention that the engagement order in favour of the Petitioner was issued on 05.10.2016 i.e., almost 2 years after the order under Annexure 4. The applicants who were engaged against 2011-12 recruitment year have already been regularized and they have been appointed as Junior Teacher. Therefore, the Petitioner filed an application dated 21.07.2018

before the Collector/ Opposite Party No. 2, praying to regularize her engagement / service as per Career Advancement Policy in Govt. Resolution dated 01.08.2011 under Annexure-2 against 2011-12 recruitment year. But the Petitioner's application dated 21.07.2018 was rejected vide letter dated 12.10.2018 on the ground that her appointment as Regular Primary School Teacher may be considered on attaining 3 years of engagement as Junior Teacher.

12. The Petitioner was appointed as Junior Teacher w.e.f. 06.10.2019 pursuant to "Performance Approval Report" submitted by the Block Education Officer, Nischintakoili and as per Govt. Resolution under Annexure-2 which was communicated by the Opposite Party No. 3 vide order dated 27.05.2020. Therefore, the Petitioner is working as Junior Teacher in the concerned primary school w.e.f. 06.10.2019—legitimately expecting for regularization of her service against the recruitment year of 2011-12. In pursuance of the same, the Petitioner filed a representation dated 14.07.2020 before the Collector/ Opposite Party No. 2 praying to regularize her engagement as per Career Advancement Policy in Govt. Resolution under Annexure - 2.

13.The representation dated 14.07.2020 was rejected on the ground that the engagement with retrospective effect is not permissible in accordance with Career Advancement Policy.

II. SUBMISSION ON BEHALF OF THE PETITIONER

14.It is submitted by Learned Counsel for the Petitioner that the Petitioner's engagement should have been considered along with other applicants for 2011-12 recruitment year. However, she was issued the engagement order in the year 2016 due to the latches and delay on the part of the Opposite Parties; particularly when this Court vide order dated 19.11.2014 directed the Opposite Parties to issue engagement order without delay.

III. SUBMISSION ON BEHALF OF THE OPPOSITE PARTIES

15.Per Contra, it is contended by Learned Counsel for the Opposite Parties that the Petitioner shall come under the zone of consideration for regular appointment only after completion of 6 years of continuous satisfactory service i.e., after 05.10.2022. So, its quite apparent that the prayer of the Petitioner for regular appointment is completely premature, hypothetical and contrary to the policy framed by the Government.

IV. COURT'S REASONING AND ANALYSIS

16. On perusal of the above-mentioned pleadings, this Court is of the view that Para-1 of "Career Advancement Policy" stipulates the completion of 3 years of continuous and satisfactory engagement for the purpose of being eligible for appointment as Junior Teacher. Further, para-4.1 of the aforesaid policy stipulates that a Junior Teacher after completion of 6 years of continuous satisfactory engagement as Shiksha Sahayaka and Junior Teacher taken altogether shall be eligible for appointment as Regular Primary School Teacher. It can be ascertained that the term "satisfactory" in the aforesaid policies mandates that the elevation to Junior Teacher and subsequently, to Regular Primary School Teacher is subject to scrutiny of the appropriate authorities. It can also be interpreted to mean that the selected candidates shall not be regularized for merely holding the post for 6 years; rather their regularization is subject to their performance while being engaged as Shiksha Sahayaka.

17. In *Bengal Immunity Co. Ltd. v. State of Bihar & Ors*¹, it was observed by a Constitution Bench of this Court that, if there is any hardship, it is for the legislature to amend

¹ AIR 1955 SC 661

the law, and that the Court cannot be called upon, to discard the cardinal rule of interpretation for the purpose of mitigating such hardship. If the language of an Act is sufficiently clear, the Court has to give effect to it, however, inequitable or unjust the result may be. The words, '*dura lex sed lex*' which mean "the law is hard but it is the law." may be used to sum up the situation. Therefore, even if a statutory provision causes hardship to some people, it is not for the Court to amend the law. A legal enactment must be interpreted in its plain and literal sense, as that is the first principle of interpretation.

18. In the case of ***Rohitash Kumar v. Om Prakash Sharma***², the Supreme Court observed:

"There may be a statutory provision, which causes great hardship or inconvenience to either the party concerned, or to an individual, but the Court has no choice but to enforce it in full rigor. It is a well settled principle of interpretation that hardship or inconvenience caused, cannot be used as a basis to alter the meaning of the language employed by the legislature, if such meaning is clear upon a bare perusal of the Statute. If the language is plain and hence allows only one meaning, the same has to be given effect to, even if it causes hardship or possible injustice."

² (2013) 11 SCC 451

19. In the instant case, the "Career Advancement Policy" clearly provides for regularization after completion of 6 years of service to the satisfaction of the authorities, therefore, the Petitioner cannot claim retrospective seniority from the date when she was not even borne in service. The Court is aware of the fact that there was a delay of 2 years in providing appointment to the Petitioner. However, such delay is attributable to administrative reasons and the same cannot be remedied by interpreting the policy enunciated under Annexure-2 in a different way. Moreover, the Petitioner's eligibility for appointment as Junior Teacher was approved w.e.f. 06.10.2019, pursuant to "Performance Approval Report" submitted by the Block Education Officer, Nischintakoili. Therefore, retrospective seniority cannot be extended specifically when the Government has prescribed certain standards and criteria for further elevation in service.

20. In *State of Bihar v. Akhouri Sachindra Nath*³, it was held that retrospective seniority cannot be given to an employee from a date when he was not even born in the cadre. So also, seniority cannot be given with retrospective effect so as to adversely affect others.

³ 1991 Supp (1) SCC 334

Seniority amongst members of the same grade must be counted from the date of their initial entry into the grade. The Supreme Court observed:

“In the instant case, the promotee respondents 6 to 23 were not born in the cadre of Assistant Engineer in the Bihar Engineering Service, Class II at the time when respondents 1 to 5 were directly recruited to the post of Assistant Engineer and as such they cannot be given seniority in the service of Assistant Engineers over respondents 1 to 5. It is well settled that no person can be promoted with retrospective effect from a date when he was not born in the cadre so as to adversely affect others. It is well settled by several decisions of this Court that amongst members of the same grade seniority is reckoned from the date of their initial entry into the service. In other words, seniority inter se amongst the Assistant Engineers in Bihar Engineering Service, Class II will be considered from the date of the length of service rendered as Assistant Engineers. This being the position in law respondents 6 to 23 cannot be made senior to respondents 1 to 5 by the impugned government orders as they entered into the said service by promotion after respondents 1 to 5 were directly recruited in the quota of direct recruits. The judgment of the High Court quashing the impugned government orders made in Annexures 8, 9 and 10 is unexceptionable.”

21. This decision was cited with approval in *Keshav Chandra Joshi v. Union of India*⁴. The Supreme Court held that when a quota is provided for, then the seniority of the employee would be reckoned from the date when the vacancy arises in his/her quota and not from any anterior date of promotion or subsequent date of confirmation. It was observed that injustice ought not to be done to one set of employees in order to do justice to another set. It was said in *Uttaranchal Forest Rangers' Assn. (Direct Recruit) v. State of U.P.*⁵, on referring to these judgments that:

"We are also of the view that no retrospective promotion or seniority can be granted from a date when an employee has not even been borne in the cadre so as to adversely affect the direct recruits appointed validly in the meantime, as decided by this Court in Keshav Chandra Joshi v. Union of India⁶ held that when promotion is outside the quota, seniority would be reckoned from the date of the vacancy within the quota rendering the previous service fortuitous. The previous promotion would be regular only from the date of the vacancy within the quota and seniority shall be counted from that date and not from the date of his earlier promotion or subsequent confirmation. In order to do justice to the promotees, it would not be proper to do injustice to the direct recruits.

⁴ 1992 Supp (1) SCC 272

⁵ (2006) 10 SCC 346

⁶ 1992 Supp (1) SCC 272

This Court has consistently held that no retrospective promotion can be granted nor any seniority can be given on retrospective basis from a date when an employee has not even borne in the cadre particularly when this would adversely affect the direct recruits who have been appointed validly in the meantime."

22. In the case of ***Pawan Pratap Singh v. Reevan Singh***⁷, all relevant precedents on the subject were considered, including the Constitution Bench decision in ***Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra***⁸ and the legal position was summarized (by Lodha, J.) as follows:

"(i) The effective date of selection has to be understood in the context of the service rules under which the appointment is made. It may mean the date on which the process of selection starts with the issuance of advertisement or the factum of preparation of the select list, as the case may be.

(ii) Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be

⁷ (2011) 3 SCC 267

⁸ (1990) 2 SCC 715

consistent with the requirements of Articles 14 and 16 of the Constitution.

(iii) Ordinarily, notional seniority may not be granted from the backdate and if it is done, it must be based on objective considerations and on a valid classification and must be traceable to the statutory rules.

(iv) The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even been borne in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime."

23. In service jurisprudence, a direct recruit can claim seniority only from the date of his regular appointment. He/She cannot claim seniority from a date when he/she was not borne in the service. This principle is well settled. In *N.K. Chauhan v. State of Gujarat*⁹, Krishna Iyer, J. stated:

"Later direct recruit cannot claim deemed dates of appointment for seniority with effect from the time when direct recruitment vacancy arose. Seniority will depend upon length of service."

⁹ (1977) 1 SCC 308

24. In *Shitla Prasad Shukla vs. State of UP and Ors*¹⁰, the Supreme Court speaking through M. P. Thakkar, J held that:

"The late comers to the regular stream cannot steal a march over the early arrivals in the regular queue. On principle the appellant cannot therefore succeed. What is more in matters of seniority the Court does not exercise jurisdiction akin to appellate jurisdiction against the determination by the competent authority, so long as the competent authority has acted bona fide and acted on principles of fairness and fair play. In a matter where there is no rule or regulation governing the situation or where there is one, but is not violated, the Court will not overturn the determination unless it would be unfair not to do so..."

25. In the case of *Ganga Vishan Gujrati and Ors. vs. State of Rajasthan and Ors*¹¹, D. Y. Chandrachud, J speaking for the Court opined as under:-

"A consistent line of precedent of this Court follows the principle that retrospective seniority cannot be granted to an employee from a date when the employee was not borne on a cadre. Seniority amongst members of the same grade has to be counted from the date of initial entry into the grade. This principle emerges from the decision of the Constitution Bench of this Court in Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra (supra). The

¹⁰ (1986 SCR (3) 106

¹¹ (2019) 16 SCC 28

principle was reiterated by this Court in State of Bihar v Akhouri Sachindra Nath(supra) and State of Uttaranchal v Dinesh Kumar Sharma¹²

26.Further, in the case of *State of Bihar v. Arbind Jee*¹³, the Supreme Court observed:

“As earlier noted, the respondent entered service only on 10.2.1996 and yet under the impugned judgment, the High Court directed counting of his seniority from 20.11.1985 when he was not borne in service. The jurisprudence in the field of service law would advise us that retrospective seniority cannot be claimed from a date when an employee is not even borne in service. It is also necessary to bear in mind that retrospective seniority unless directed by court or expressly provided by the applicable Rules, should not be allowed, as in so doing, others who had earlier entered service, will be impacted.”

27.In conspectus of the facts and guided by the precedents herein stated above, this Court is of the view that seniority cannot be given on retrospective basis when an employee has not even been borne in the service as doing so will adversely affect the rights of the employees who have been appointed validly in the meantime.

28.In the final analysis, this Court is of the opinion that the Writ Petition is devoid of merits for the foregoing

¹² (2007) 1 SCC 683

¹³ Civil Appeal No. 3767 of 2010

reasons and is, accordingly, liable to fail. The Writ
Petition is, accordingly, dismissed

(Dr. S.K. Panigrahi)
Judge

B.Jhankar

