

ORISSA HIGH COURT: CUTTACK

W.P.(C) NO. 13120 OF 2018

In the matter of an application under Articles 226 and 227 of the Constitution of India.

AFR

State of Odisha
and others

.....

Petitioners

-Versus-

Rojalin Mohapatra

.....

Opp. Party

For Petitioners : Mr. S. Jena, Standing Counsel,
S&ME Department.

For Opp. Party : M/s. K.K. Rout, S.K. Rout, A.K.
Dalai, J. Naik and (Ms.) Azra
Jamal, Advocates.

P R E S E N T:

**THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
THE HON'BLE MISS JUSTICE SAVITRI RATHO**

Date of hearing & judgment: 09.05.2022

DR. B.R. SARANGI, J. The State of Odisha and its functionaries have filed this writ petition seeking to quash the order dated 21.07.2017 passed by the Odisha Administrative Tribunal, Bhubaneswar Bench, Bhubaneswar in O.A. No. 2728 of 2013, by which the tribunal has directed them to

call the applicant-opposite party for certificate/ documents verification and, if she is otherwise found eligible and suitable, to give her appointment against unfilled post in SEBC category, and that in event she is appointed, to count her appointment w.e.f. the date the other persons have been appointed, maintaining her seniority below them, and to extend her the notional financial benefits.

2. The factual matrix of the case, in brief, is that an advertisement was issued for the post of contract teacher in TGT (CBZ), pursuant to which opposite party no.1 submitted her application under SEBC (W) category. Though her position in the merit list was at sl. no. 39 and at sl. no. 1 in SEBC category, yet she was not called for the certificate verification. As such benefit was illegally denied to her, she approached the tribunal.

2.1 To the stand taken by opposite party no.1 before the tribunal, a counter affidavit was filed by the present petitioners, stating inter alia that all total 64 posts of contract teacher in the discipline of TGT (CBZ

were advertised, out of which 8 posts were meant for SEBC including one SEBC (W). As per the merit list prepared, in SEBC category 8 candidates were placed above opposite party no.1, for which she could not be selected. The last candidate in SEBC category had secured 197.254% of marks, whereas opposite party no.1 had secured 196.157% of marks. In the 1st phase of selection, out of 8 SEBC candidates, 4 joined and in the second phase 4 candidates were selected where the name of opposite party no.1 did not find place, as she had secured less mark than the last candidate selected. As such, the name of opposite party no.1 did not come within the zone of consideration, for which her grievance merits no consideration.

2.2 To the counter affidavit filed by the petitioners, a rejoinder affidavit was filed by opposite party no.1 before the tribunal stating inter alia that had the reservation policy been followed properly, then two posts would have been reserved for SEBC (W) category; which is 33.1/3% of the total vacancies, and in such situation

opposite party no.1 should have been selected. As per the merit list prepared, 7(seven) candidates were selected who were at Sl. Nos. 5, 8, 9, 14, 16, 18 and 31 and, as such, the 8th post was kept vacant. Since no woman candidate was selected, opposite party no.1 being the next in the select list, ought to have been selected for the said post. One Subash Chandra Sahu, whose position in the merit list was at sl. no.44, was selected, though he had secured 194.555% of marks. However, he was shown to have secured 197.555% of marks, which was by way of manipulation/ tampering of his mark, therefore selection of Subash Chandra Sahu was illegal. When only seven SEBC candidates were selected, the claim of opposite party no.1 for selection could not have been denied. As opposite party no.1 was claiming for selection against reserved vacancy for women category under SEBC quota, non- consideration of the case of opposite party no.1 was illegal, unreasonable and contrary to the provisions of law.

2.3 The tribunal, after due adjudication, passed the following order:-

“Thus, as admittedly one post in SEBC category is still available, the right is accrued to the applicant for consideration of her candidature against the said post and accordingly, the respondent authorities are directed to consider to call the applicant for certificate/ documents verification and if she is otherwise found eligible and suitable for appointment, she may be given appointment against the unfilled up post in SEBC category. While considering the claim of the applicant, persons who have secured more marks than the applicant in the said category, should not be ignored. In the event the applicant is appointed, her appointment should be counted with effect from the date the other persons have been appointed, mainlining her seniority below them and notional financial benefits should be extended to her. The entire exercise be completed within a period of three months from the date of receipt of copy of this order.”

But the State authorities, instead of complying the order of the tribunal, as extracted above, chose to file this writ petition.

3. Mr. S. Jena, learned Standing Counsel for School & Mass Education Department appearing for the State-petitioners vehemently contended that since the last person in the merit list belonging to SEBC category had secured 197.254% of marks, whereas opposite party no.1 had secured 196.157% of marks, thereby she was not

selected. But, it is contended that 7 candidates, out of 8 vacancies meant for SEBC category, were given appointment and, as such, one post was lying vacant belonging to SEBC category. It is further contended that as against SEBC (W) category no candidate was selected, therefore, the said post remained vacant. Consequentially, it is contended that the tribunal has committed gross error apparent on the face of the record by issuing direction to give appointment to opposite party no.1 against the unfilled post of SEBC category. As a result, it is contended that the order of the tribunal cannot sustain in the eye of law and the same is liable to be set aside.

4. Ms. Azra Jamal, learned counsel appearing on behalf of Mr. Kshirod Kumar Rout, learned counsel for opposite party no.1 contended that opposite party no.1 belongs to SEBC (W) category and, as such, as has been stated by learned Standing Counsel for the School & Mass Education Department, the said post was lying vacant. Therefore, opposite party no.1 had a right to be

considered for appointment against reserved category post meant for SEBC (W). As a consequence thereof, non-consideration of the case of opposite party no.1 for such appointment, violates the reservation policy of the State.

4.1 It has also been brought to our notice that this Court, while entertaining the instant writ petition, on 20.12.2018, passed the following order:-

“Heard learned counsel for the State-petitioners.

On perusal of the order dated 21.07.2017, passed by the learned Odisha Administrative Tribunal, Bhubaneswar Bench, Bhubaneswar, in O.A. No.2728 of 2013, it is seen that a direction was given to the petitioners herein to complete the entire exercise within a period of three months from the date of receipt of the order. It appears that without complying the said order, the petitioners have approached this Court on 24.07.2018, i.e. almost after one year.

In that view of the matter, the petitioners are directed to first implement the order passed by the learned Tribunal which shall be subject to the result of the writ petition. Thereafter the matter will be heard. The matter to come up on 24.1.2019.”

In compliance thereof, opposite party no.1 was issued with appointment order on 05.02.2019, which is subject to outcome of the writ petition. It is contended that if opposite party no.1 has already got employment against reserved vacancy meant for SEBC (W), on 05.02.2019,

and is continuing against the said post, now if any contrary view is taken, the same will cause prejudice to opposite party no.1. Thereby, she contended that the writ petition filed by the State-functionaries should be dismissed.

5. This Court heard Mr. S.Jena, learned Standing Counsel for the School & Mass Education Department appearing for the State-petitioners and Ms. A. Jamal, learned counsel appearing on behalf of Mr. Kshirod Kumar Rout, learned counsel for opposite party no.1 by hybrid mode, and perused the record. On the basis of the materials available on record, the matter is being disposed of finally at the stage of admission, with the consent of learned counsel for both the parties.

6. There is no dispute with regard to the fact that an advertisement was issued for appointment to the post of contract teachers in TGT (CBZ). Pursuant to such advertisement, opposite party no.1 submitted her application under SEBC (W) category. Though her position in the merit list was at sl. no.39 and at sl. no. 1

in SEBC category, she was not called for certificate verification. Therefore, she approached the tribunal and by order on 21.07.2017 the tribunal directed to give her appointment, which is the subject matter of challenge in the present writ petition.

7. As a matter of fact, the last candidate in SEBC category had secured 197.254% of marks, whereas opposite party no.1 had secured 196.157% of marks. Therefore, she could not be selected. But fact remains, out of 8 posts meant for SEBC category, 7 candidates were appointed. No candidate from SEBC (W) category was given appointment, even though 8th post belonging to SEBC category was vacant. As such, since opposite party no.1 was belonging to SEBC (W) category and if one post belonging to SEBC category was lying vacant, irrespective of the fact that she had secured less mark than the last person selected under SEBC category, she should not have been disentitled to get the appointment under the reserved category of SEBC (W).

8. It is of relevance to note, since one post of SEBC (W) was lying vacant, this Court, vide order dated 20.12.2018, directed the petitioner to first implement the order of the tribunal subject to the result of the writ petition. The said interim order has been implemented by the petitioners, vide order dated 05.02.2019, by giving appointment to opposite party no.1, who is now continuing in service.

9. In ***State of Bihar v. The Secretariat Assistant Successful Examinees' Union***, (1994) 1 SCC 126, the apex Court held that it is now well settled by a series of decisions of the Supreme Court that the empanelment of the candidate in the select list does not confer any right on the candidate to appointment on account of being so empanelled. At the best it is a condition of eligibility for the purpose of appointment and by itself does not amount to selection nor does it create a vested right to be appointed unless the service rules provide to the contrary.

Such view has been followed in the cases of ***Syndicate Bank v. Shankar Paul***, (1997) 6 SCC 584;

Vinodan v. University of Calicut, (2002) 4 SCC 726;
and **State of U.P. v. Om Prakash**, (2006) 6 SCC 474.

10. In the case of **Shankarsan Das v. Union of India**, (1991) 3 SCC 47, the apex Court held as follows:-

“A Constitution Bench of this Court was examining whether candidates declared successful in a selection process acquire an indefeasible right to get appointed amongst available vacancies. The contention that they do acquire such a right was repealed in the following words. “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”.”

In view of the aforesaid judgments of the apex Court, though opposite party no.1 was selected following due process of selection, but she does not acquire any right to be appointed automatically. As per such decisions, a person whose name appears in the select list does not

acquire indefeasible right for appointment. The empanelment at best is a condition of eligibility for appointment and does not by itself vest a right to be appointed.

11. There is no dispute with regard to the settled position of law, referred to above, but the facts and circumstances of the present case reveal that though name of opposite party no.1, who was a SEBC (W) candidate, was placed in the select list and one vacancy under the said category was withheld by the petitioners, she has got a right to be considered for appointment under reserved quota meant for SEBC (W). In such circumstance, the ratio decided in the above noted case cannot come to the aid of the petitioners. Therefore, considering the above aspects, the tribunal directed the petitioners to give her appointment and by virtue of the interim order passed by this Court, she has already been given appointment. Now, at this stage, nothing more remains to be adjudicated by this Court. Thereby, while

upholding the impugned order of the tribunal, the interim order passed by this Court is made absolute.

12. There is thus no merit in this writ petition, which is accordingly dismissed. There shall be no order as to costs.

SAVITRI RATHO, J.

I agree.

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DR. B.R. SARANGI,
JUDGE

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SAVITRI RATHO,
JUDGE

Orissa High Court, Cuttack
The 9th May, 2022, Arun/GDS