

AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.A. Nos. 533 & 534 of 2016

Lokanath Barik

....

Appellant

Mr. S.K. Rath, Advocate

-versus-

Basanta Kumar Barik and others

....

Respondents

Mr. K.K. Swain, Advocate for Respondent No.1

**CORAM:
THE CHIEF JUSTICE
JUSTICE M.S. RAMAN**

**ORDER
28.11.2022**

Order No.

Dr. S. Muralidhar, CJ.

09. 1. The dispute concerning the *inter se* seniority of two Peons of the P.B.M. Mahavidyalaya, Dhenkanal (Respondent No.4) forms the subject matter of the present appeals, which arise from a common judgment dated 3rd November, 2016 passed by the learned Single Judge in F.A.O. No.183 of 2011 and O.J.C. No.399 of 2002.
2. The background facts are that Respondent No.4 institution was established in 1985 for +2 courses. On 15th July, 1985 an advertisement was issued for filling up of 3 Posts of Peons in the said institution. Admittedly, on 27th July, 1985 the Selection Committee, met and evaluated the capabilities of seven candidates who appeared before it. These seven candidates included one Sri

Kulamani Roul as well as the present Appellant Sri Lokanath Barik and Respondent No.1 Sri Basanta Kumar Barik. On 30th July, 1985 on the basis of the mark sheet drawn up by the said Selection Committee, the Governing Body decided on filling up the first post of Peon by Sri Kulamani Roul, who admittedly was first in the merit list. The further admitted position is Respondent No.1 and the Appellant were in the second and third position respectively in the merit list. Both the Appellant and Respondent No.1 were appointed as Peons on 30th July, 1985 and both of them joined on 5th August, 1985. As far as Sri Kulamani Roul was concerned, he also joined on 5th August, 1985.

3. Learned counsel appearing for the Appellant emphasizes that while Kulamani Roul joined at 11.10 am on 5th August 1985, the Appellant joined on the same date at 11.25 am and Respondent No.1 on the same day at 11.45 am.

4. The further admitted position is that Respondent No.4 became eligible to receive 'grant-in-aid' with effect from 1st June, 1994. At a stage when the issue of approval of the three posts of Peons and the release of grant-in-aid was pending before the Director, Higher Education, the present Appellant filed OJC No.14919 of 1999 in this Court. The said writ petition came to be disposed of by the learned Single Judge on 8th May, 2001 with a direction to the Director, Higher Education to dispose of the representation dated 6th March, 1998 filed by the present Appellant. A further direction was issued that while disposing of the representation, "the Director

shall look into the documents produced by the Petitioner as well as the Annexures filed in this writ application”.

5. Following the above order of this Court, the Director, Higher Education on 18th December, 2001 passed an order treating the Appellant as Second Peon for the purpose of the grant-in-aid. The Director, Higher Education, further held that the selection list prepared by the Governing Body was not correct. Further, going by the date of birth of the three candidates, it was opined that the Appellant herein, i.e., Sri Lokanath Barik was entitled for the post of Second Peon in the College.

6. Aggrieved by the above order passed by the Director, Higher Education, Orissa Respondent No.1 filed OJC No.399 of 2002. On 31st December, 2002 the Governing Body of the institution passed a resolution fixing the *inter se* seniority of the Appellant and Respondent No.1 as Second and Third Peon respectively as per the joining time of each of them.

7. Following this, Respondent No.1 filed W.P.(C) No.5890 of 2005 claiming that he should have been appointed to the Second Post of Peon. He sought the quashing of an order dated 15th July, 2004 of the Deputy Director, Department of Higher Education to the effect that the approval order issued in favour of Respondent No.1, as Second Peon of the institution for the purpose of extension of benefit of Block Grant “is hereby cancelled”.

8. Following this, Respondent No.1 filed GIA Case No.83 of 2008 before the Education Tribunal. This case was dismissed by the Education Tribunal on 1st March, 2011. The said order was challenged by Respondent No.1 by way of FAO No.183 of 2011.

9. The learned Single Judge has by the impugned common order dated 3rd November, 2016 disposed of both the aforementioned OJC No.399 of 2002 and FAO No.183 of 2011. The learned Single Judge noted that of the three posts, which were to be filled up by a process of selection, the first post was filled up by Sri Kulamani Roul on the basis of merit. Accordingly, it was held that even for the second and third post, merit had to be the criterion and not the date of birth. On that basis, the plea of the Respondent No.1 herein was accepted and a direction was issued by the learned Single Judge quashing the aforementioned order of the Director and also the corresponding order of the Education Tribunal confirming it. A declaration was issued that Respondent No.1 herein was senior to the present Appellant and would be entitled to all service benefits attached to the second post of Peon in the Respondent NO.4 institution.

10. While admitting the present appeal on 15th January 2019, it was directed that in the mean while status quo as of that date regarding the service condition of the Appellant as well as Respondent No.1 shall be maintained.

11. I.A.No.755 of 2021 was filed by the present Appellant for a direction to the State Government not to release arrears in favour of Respondent No.1 during the pendency of the writ appeal.

12. On the said IA, notice was issued on 25th August, 2021. As far as the pleadings are concerned, the Appellant filed an affidavit dated 26th October, 2022 *inter alia* placing on record a Government Order (GO) on dated 21st October, 1982 which according to the Appellant should govern the situation. According to the Appellant since both he and Respondent No.1 joined on the same date, i.e., on 5th August, 1985, in terms of the said GO, the older among them should fill up the second post of Peon and, therefore, the Appellant should be declared senior to Respondent No.1.

13. It must be mentioned here that today, Respondent No.1 has filed an affidavit dated 25th November, 2022 in purported reply to the above additional affidavit of the Appellant *inter alia* pointing out that even in terms of the said GO dated 21st October, 1982, which in any event has according to Respondent No.1 no application to non-teaching staff of non-Government aided colleges, wherever a selection has been made even for filling up for post of Non-teaching staff, it is the position in merit that will determine the *inter se* seniority. It is pointed out that the same circular dated 21st October, 1982 clarifies this.

14. Learned counsel appearing for the Appellant placed extensive reliance on the decision of the Division Bench of this Court in ***D.P. Das v. Union of India 2011(II) OLR (SC) 728***. It may be noted that

the said judgment in turn refers to the decision of the Supreme Court in ***M.B. Joshi v. Satish Kumar Pandey AIR 1993 SC 267*** which held that in the absence of any specific rule, the seniority amongst persons holding similar posts in the same cadre has to be determined on the basis of length of the service and “not on any other fortuitous circumstances”. It was noted in the said decision that there was an executive instruction of 1946 in terms of which the age of the candidate was a determining factor for seniority. Reliance is also placed by the Appellant on the observation in Para-34 of the said decision where it is held that for determination of seniority of the Officers “who were recommended on the same date, age is the only valid and fair basis...”. It is accordingly submitted that in the present case, since the Appellant is older than Respondent No.1, he should get the second post of Peon and would therefore be senior to Respondent No.1.

15. Learned counsel for Respondent No.1, first raised an objection as to the maintainability of the present appeal since it was against an order of the learned Single Judge in a writ petition challenging the order of the Education Tribunal. It is pointed out that such writ petition could only be under Article 227 of the Constitution and if that were so, no further intra-Court appeal would be maintainable. Reliance is placed on the decision in ***Ramesh Chandra Das v. Kishore Chandra Das AIR 2007 Ori 146***.

16. On merits, Mr. K.K. Swain, learned counsel appearing for the Respondent No.1 has placed reliance on the decisions in ***Chairman, Puri Gramya Bank v. Anand Chandra Das (1994) 6 SCC 301***,

Suresh Chandra Jha v. State of Bihar (2007) 1 SCC 405 and ***Bimlesh Tanwar v. State of Haryana (2003) 5 SCC 604***.

17. The above submissions have been considered. As regards the issue of maintainability, it does appear that there is doubt whether the present appeal would be maintainable. In ***Ramesh Chandra Das v. Kishore Chandra Das*** (*supra*), this Court, after surveying the existing case law, came to the conclusion that such an appeal as the present one would not be maintainable before the Division Bench of the Court. It is pointed out that the subsequent full Bench of this Court in ***Mahammed Saud v. Dr. (Maj) Shaikh Mahfooz 2008(II) OLR (FB) 725*** has upheld this position. In particular, one of the conclusions reached there was that “no Letters Patent Appeal shall lie against the judgment/order passed by a learned Single Judge in proceedings arising out of Special Acts”.

18. Although the Court is satisfied that this writ appeal is not maintainable in view of the legal position explained above, the appeal has nevertheless also been examined on merits.

19. The admitted position is that there was a Selection Committee which assessed the capabilities of the candidates including Sri Kulamani Roul, the Appellant and the Respondent No.1 herein and prepared a merit list giving individual marks to each of the candidates. Kulamani Roul stood first in the merit list with 43 marks, Respondent No.1 with 41 marks and the Appellant herein got 37 marks.

20. The further admitted position is that Kulamani Roul was appointed against the first post of Peon on the basis of his performance in the selection by securing the highest marks in the merit list. Interestingly, the Appellant is not aggrieved by the selection of Kulamani Roul on the above basis.

21. The next question that arises is whether there is any the rule that governs the question of seniority. Here, it must be noted straightway that neither before the Tribunal nor before the learned Single Judge was any particular rule cited that would govern the issue of seniority. It is in this context that the affidavit filed by the Appellant in the present appeal relying on the GO dated 21st October, 1982 is relevant. Even if one were to accept that the above GO of the Government would apply since there is no other specific rule, it is seen that in sub para (iii), it is clarified as under:

“(iii) In case of appointments made on the recommendation of the Selection Board between the 1st Dec.1976 and the 23rd Oct.1981, the inter-se-seniority may be fixed in accordance with the position assigned to them by the Selection Board in the merit list. This category will enbloc be junior to category (ii) above.”

22. It is, therefore, not correct to contend that in terms of the above circular, date of birth or age alone would be the criteria. It is only where there is no such criteria that the other sub-paras of the circular would apply and seniority be determined, in case of two candidates joining on the same date, on the basis of their respective dates of birth.

23. The decision in ***D.P. Das v. Union of India*** (*supra*) is not particularly helpful to the Appellant in this context. There, the decision turned on a particular executive instruction of 1946. Even in terms of the circular referred to by the Appellant, it is not as of the date of birth will be the sole criteria. It is only when there is no selection held will such criteria apply.

24. If one were to proceed on the basis that there is in fact no rule on the basis of which seniority should be fixed, then the decision in ***Bimlesh Tanwar v. State of Haryana*** (*supra*) would become relevant. There it was observed, relying on the decision in ***Chairman, Puri Gramya Bank v. Anand Chandra Das*** (*supra*) as under:

“In this case also, although there does not exist any statutory rule but the practice of determining inter se seniority on the basis of the merit list has been evolved on interpretation of the rules. A select list is prepared keeping in view the respective merit of the candidates. Not only appointments are required to be made on the basis of such merit list, seniority is also to be determined on that basis as it is expected that the candidates should be joining their respective posts almost at the same time. Yet again in *Chairman, Puri Gramya Bank v. Ananda Chandra Das* (1994) 6 SCC 301 this Court held: (SCC p.301, para 2)

It is settled law that if more than one are selected, the seniority is as per ranking of the direct recruits subject to the adjustment of the candidates selected on applying the rule of reservation and the roster. By mere fortuitous chance of reporting to duty earlier would not alter the ranking given by the Selection Board and the arranged one as per roster. The High Court is, therefore, wholly wrong in its conclusion that the seniority shall be determined on the basis of the joining reports given by

the candidates selected for appointment by direct recruitment and length of service on its basis.”

25. Again, in *Suresh Chandra Jha v. State of Bihar* (*supra*) the same principle was adopted and after referring to the decision in *Chairman, Puri Gramya Bank v. Anand Chandra Das* (*supra*), it was observed as under:

“8. Since there was no rule in operation, obviously the ranking in the merit list was to decide the respective seniority. The ratio in *Chairman, Puri Gramya Bank v. Ananda Chandra Das* (1994) 6 SCC 301 has full application to the facts of the case. The appellant's claim that he was to be treated as senior to the respondent no.8 was rightly accepted by learned Single Judge. Unfortunately, the Division Bench did not address itself to the specific question and has placed undue stress on the respondent no.8 having joined earlier.”

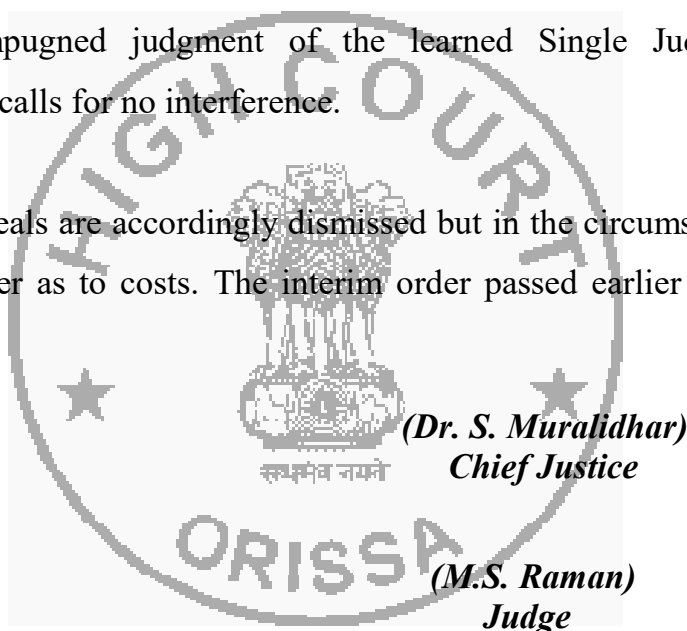
26. Therefore, even if one were to presume that there is no rule, it is plain that once a selection has taken place, it is merit which will govern the issue of *inter se* seniority of the candidates. The learned Single Judge was right in observing that with the first post of Peon having been filled up on the basis of merit, since Kulamani Roul was the highest in the order of merit and was accordingly appointed to the first post of Peon, the question of changing the criteria when it came to the appointments to the second and third posts of Peon did not arise. The learned Single Judge rightly noted that if age were to be the criteria, then Kulamani Roul being the youngest, could not have possibly been appointed to the first post of Peon.

27. Interestingly, the Appellant has not challenged the appointment of Kulamani Roul on the basis of merit. It is therefore obvious that

in this particular case, the appointments to the various posts were not on the basis of either the dates of birth or the lengths of service but on the basis of merit in the selection that took place. Since that was the criteria, the *inter se* seniority of the Appellant and Respondent No.1 had to be fixed only on the basis of merit and not otherwise.

28. For all of the aforementioned reasons, the Court is unable to find any error having been committed by the learned Single Judge and the impugned judgment of the learned Single Judge is accordingly calls for no interference.

29. The appeals are accordingly dismissed but in the circumstances with no order as to costs. The interim order passed earlier stands vacated.



S. Behera