

ORISSA HIGH COURT: CUTTACK

**WPC (TAC) No. 35 of 2014 &
WPC (OAC) No. 2620 of 2016**

(Applications under Articles 226 and 227 of the
Constitution of India)

WPC (TAC) No. 35 of 2014

AFR Rajakishor Pradhan Petitioner

-Versus-

State of Odisha & others Opp. Parties

WPC(OAC) No. 2620 of 2016

Harihar Sahoo Petitioner

-Versus-

State of Odisha & others Opp. Parties

Advocate(s) appeared in these cases:-

For Petitioners : M/s. K.K. Swain, P.N. Mohanty
 & S.C.D. Dash, Advocates
 [in **WPC (TAC) No. 35 of 2014**]

Mr. Hara Prasad Rath, Advocate
[in **WPC (OAC) No. 2620 of 2016**]

For Opp. Parties : Mr. H.K. Panigrahi,
 Addl. Standing Counsel

CORAM
JUSTICE SASHIKANTA MISHRA

JUDGMENT
5th July, 2022

SASHIKANTA MISHRA, J. The facts involved in both these applications are similar and involve a common question of law. As such, both the applications were heard together and are being disposed of by this common judgment.

WPC (TAC) No. 35 of 2014

2. Mukundadaspur High School in the district of Khurda was an aided educational institution within the meaning of Section 3(b) of the Orissa Education Act, 1969. Its roll strength having increased beyond 100 from the year 1990-1991 onwards, the petitioner was appointed as Night-watcher -cum-Sweeper as per appointment letter issued on 20.12.1991. Such appointment is said to have been made against the 4th Peon as per the yardstick prescribed by the Government dated 08.07.1981. The petitioner's case was recommended by the Managing Committee to the Inspector of Schools for approval of his appointment but as no action was taken the petitioner approached this Court in OJC No. 13738 of 1997. This Court disposed of the aforesaid case by order dated

29.09.1997 directing the Inspector of Schools, Khurda Circle to take a decision within four months. Pursuant to such order passed by this Court, the Inspector of Schools vide order dated 16.09.1998 rejected the case of the petitioner regarding approval of his appointment on the ground that the post of 4th Peon is not admissible as per yardstick dated 08.07.1981 and the post of Daftary being a promotional post, the same can only be filled up by way of promotion from amongst the Class-IV employees of the School in order of seniority as per Government order dated 21.03.1996.

WPC(OAC) No. 2620 of 2016

Uttar Pratap Gram Panchayat Laxmi Narayan High School, Nahangapatna in the district of Jajpur was an aided three class High School and became a Government High School w.e.f. 07.06.1994. During the academic session 1989-90, the roll strength of the School having exceeded 100, a post of Daftary became admissible from such session as per the prescribed yardstick of the Government dated 08.07.1981. The petitioner was

appointed as Watchman by the Managing Committee purportedly as the 4th Peon w.e.f. 10.03.1990. The Headmaster of the School, vide letter dated 24.01.1991 submitted a proposal to the Inspector of Schools, Jajpur Circle, Jajpur to approve the appointment of the petitioner as 4th Peon, which was followed by a reminder on 02.01.1993 and representation on 06.07.1996. Since no action was taken in the matter, the petitioner approached this Court in OJC No.14930 of 1996 seeking necessary relief. By order dated 02.05.1997, this Court disposed of the writ petition directing Inspector of Schools, Jajpur to consider the aforesaid proposal within three months. By order dated 24.01.2000, the Director of Secondary Education, Orissa, in purported compliance of the aforesaid order passed by this Court, rejected the proposal for approval of the appointment of the petitioner on the ground that such appointment was contrary to Rule 5(2) and 8 of the Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rule, 1974. Challenging

the said order, the petitioner approached the erstwhile Odisha Administrative Tribunal in O.A. No. 3176(C) of 2000. During pendency of the said Original Application, the Supreme Court of India in the case of ***State of Orissa and others vs. Rajendra Kumar Das and another*** delivered a judgment on 29.08.2003 holding that though there is no prescription of a 4th Peon in the yardstick dated 08.07.1981 but a post of Daftary is admissible, which is a promotional post. It was further held that if the School is entitled to have a Daftary, the appointment to the said post is to be made by promoting one of the Class-IV employees, and appointment is to be made against the consequential vacancy of the Class-IV post. The Supreme Court further held that while the institution can move the concerned authorities for approval to the promotional appointment of Class-IV employee as Daftary, it can also simultaneously recommend for appointment to the Class-IV post, in case approval is accorded to the recommendation for promotional appointment of Daftary. In view of such law laid down by the Apex Court, the

Tribunal, vide order dated 26.10.2009 directed the Principal Secretary, School and Mass Education Department to treat the paper book of the Original Application along with the copy of the decision of the Apex Court as a representation and to issue appropriate orders on merit in accordance with the said judgment within a period of three months. Accordingly, the District Education Officer, Jajpur requested the Director of Secondary Education to comply with the order, but ultimately the Director moved the Government. The Principal Secretary, School and Mass Education Department vide order dated 28.03.2014 rejected the claim of the petitioner on the ground that the petitioner was appointed as 4th Peon against a non-existent post without prior approval of the competent authority; such appointment was not in accordance with the statutory Rules; and the Managing Committee has not resolved for promotion of one Class-IV person to the post of Daftary and for adjustment of the petitioner against the consequential vacancy. Challenging such rejection of the

proposal for approval of his appointment, the petitioner approached the erstwhile Odisha Administrative Tribunal in O.A. No. 2620(C) of 2016, which has since been transferred to this Court and registered as the instant writ application.

In both the writ applications, the petitioners have prayed for quashment of the orders of rejection of the proposal for approval of their appointment and to direct the authorities to approve their appointment with all consequential service and financial benefits.

3. The opposite parties have filed a counter affidavit in WPC(TAC) No. 35 of 2014 justifying the rejection of the proposal for approval of appointment of the petitioner on the ground that the cases of all Class-IV employees of the School have been approved and since three posts of Class-IV employees of the School have been created by the Government, the question of approval of appointment of the petitioner as 4th Peon (Daftary) has been rightly rejected, as such post has not been created.

In the counter affidavit filed by opposite parties in WPC(OAC) No. 2620 of 2016, it is stated that as per direction of the Supreme Court of India, the Government vide letter dated 06.10.2003 directed the Director, Secondary Education, Odisha and Inspector of Schools to issue suitable instructions to the Managing Committee of non-Government, Aided High Schools and Headmaster of taken over High Schools to resolve the issue accordingly and to submit proposal with required records for verification. However, no proposal was received from the concerned Schools.

4. Heard Mr. K.K. Swain, learned counsel for the petitioner in WPC (TAC) No. 35 of 2014 and Mr. H.P. Rath, learned counsel for the petitioner in WPC(OAC) No. 2620 of 2016 and Mr. R.N. Acharya, learned Standing Counsel for School and Mass Education Department in both the cases.

5. It is submitted by Mr. K.K. Swain that the case of the petitioner is squarely covered by the decision of the Apex Court in the case of ***State of Orissa and others***

vs. Rajendra Kumar Das and another, reported in (2003) 10 SCC 411, as also of this Court in the case of ***Dipak Kumar Sahoo vs. State of Orissa rep. by its Secretary in School and Mass Education Department and others***, reported in 1999 (II) OLR 176.

According to Mr. Swain, the petitioner having been appointed against the post of 4th Peon, in view of roll strength of School being more than 100 at the relevant time, a right has accrued in his favour. This Court in the case of Dipak Kumar Sahoo (supra) held that if a person has been appointed prior to 21.03.1996 in accordance with the yardstick dated 08.07.1981, his appointment is to be approved against the 4th post of Peon (Daftary). Subsequently, the Supreme Court in the case of Rajendra Kumar Das (supra) held that Daftary being a promotional post, can be filled up by promoting one of the three persons, namely, Office Peon, Office Attendant and Night-Watcher -cum-Sweeper on the basis of merit-cum-seniority and the consequential vacancy so caused is to be filled up by way of adjustment of the so called 4th Peon.

Referring to the impugned order dated 16.09.1998, Mr. Swain further contends that the same is clearly contrary to the ratio laid down in Rajendra Kumar Das's case as the Management/Headmaster is empowered to promote any one among the three available Class-IV employees and seek approval of the concerned authorities and also simultaneously recommend for appointment of the so called 4th Peon against the consequential vacancy.

6. Mr. Rath, while making similar arguments as Mr. Swain has added that at the time of passing of the judgment in Rajendra Kumar Das's case, the concerned School had already been taken over by the Government and therefore, the question of the Managing Committee resolving for promotion of one Class-IV employee as Daftary and for adjustment of the petitioner in the consequential vacancy as held by the opposite party no.1 in the impugned order, does not arise. It is further contended by Mr. Rath that the petitioner has put in more than two decades of unblemished service and is suffering only for the inaction of the concerned authorities.

7. Mr. R.N. Acharya submits that the petitioners were appointed without prior approval of the competent authority at the relevant time and secondly, the post of Daftary is a promotional post to be filled up by promoting one of the three Class-IV employees. Mr. Acharya, however, fairly submits that both the Schools had roll strength exceeding 100 students at the relevant time and therefore, were entitled to a 4th post of Peon (Daftary) as per the yardstick dated 07.08.1981. Therefore, even accepting that the petitioners' appointment was valid, they can only be adjusted against the consequential vacancy to be caused upon promotion of one of the three existing Class-IV employees to the post of Daftary. For the above purpose, it is for the Headmaster of the concerned Schools to submit appropriate proposal for consideration by the competent authorities.

8. Since it contended that the case of the petitioners is squarely covered by the decision of the Apex Court in the case of Rajendra Kumar Das (supra), it would

be apposite to refer to the said judgment at the first instance.

In the case of Rajendra Kumar Das (supra), it is stated in paragraph-11 and 12 as follows:

11. *It is to be noted that the post of “daftary” carries higher scale of pay and is a promotional post for Class IV employees. That being the position, the High Court was not justified in directing approval of the writ petitioners’ services as “fourth peon”. But one significant aspect cannot be lost sight of. If the school was entitled to have a “daftary”, certainly the appointment was to be made by promoting one of the three persons i.e. office peon, office attendant and night watcher-cum-sweeper, there being no other Class IV post in the institution. It is for the Managing Committee of the institution to decide who is to be promoted and thereafter seek approval of the authorities concerned. That way the claims of the writ petitioners could have been considered by the authorities, on being appropriately moved by the management. It is undisputed that the writ petitioners were appointed by the Managing Committee, maybe, under a misreading of the relevant government orders.*

12. *We, therefore, while allowing these appeals direct that the management of the institution concerned shall move the authorities concerned for approval to the promotional appointment of a Class IV employee, as “daftary”. Simultaneously, it can also recommend for appointment to Class IV post, in case approval is accorded to the recommendation for appointment of “daftary” on promotion. The decision on both motions shall be taken within*

three months from the date of submission of the recommendation in accordance with law, keeping in view the operative yardsticks in force at the time the appointments were made. Even if there has been refusal earlier, the matter shall be reconsidered in the light of what has been stated above.

9. Admittedly both the Schools involved in the present writ applications satisfied the required roll strength criteria at the relevant time and hence, they were entitled to have a Daftary each. As it appears, both the petitioners were appointed against the 4th post in the concerned schools by the then managing committee of the schools and their appointment was sought to be approved by submitting proposals to the appropriate authorities. As already stated, as per the yardstick dated 08.07.1981, one 4th post was admissible and therefore the then managing committees cannot be faulted with for making such appointments.

10. Coming to the grounds on which the proposal for approval of the appointment of the petitioner Raj Kishore for the post of peon was turned down, it is stated that the appointment was made against a post which was not created. In the case of ***Shakuntala Biswal vs. State***

of Orissa reported in **2008 (SUPP.II) OLR 653**, this court held that if the yardstick provides for a post and such post is admissible considering the roll strength and the managing committee of the school appointed a teacher and sought for approval of such appointment, creation of the post is a mere formality and the proposal submitted by the managing committee cannot be turned down only on the ground that the post had not been created. The same analogy can be drawn in relation to the post of a peon also. Therefore the plea taken by the opposite parties that the post had not been created / sanctioned is not tenable in the eye of law.

11. The second ground on which the proposal for approval of the appointment of the petitioner was turned down is that the post of Daftary is a promotional post and the managing committee has not taken any steps to grant promotion to the said post from amongst any of the 3 class IV employees. This is also not tenable in the eye of law because for the inaction of the management in submitting proposal for promotion to the post of Daftary,

the petitioner cannot be made to suffer as he must be deemed to have been validly appointed as per the extant rules and yardstick prescribed by the government.

12. As regards the grounds on which the proposal for appointment of the petitioner Harihar Sahoo was rejected, it is seen that the opposite party No. 1 has firstly stated that the appointment of the petitioner by the managing committee is not in accordance with rules 5(2) and (3) of the Odisha Education Rules, 1974. For better appreciation, Rule 5 (1), (2) and (3) are quoted herein below:

“5. Application for recognition.- (1) Any person of body of persons desirous of establishing any private educational institution may, within the prescribed period and in the manner prescribed, make an application to the prescribed authority for according recognition thereto.

(2) While according recognition under sub-section (1) to the establishment of a private educational institution the prescribed authority shall have regard to the following matter, namely:-

- (a) that there is adequate financial provision as may be prescribed for its continued and efficient maintenance;*
- (b) that provision for suitable and adequate accommodation-staff and equipment has been made;*
- (c) that the institution is proposed to be located in sanitary and healthy surroundings; and*

(d) such other matters as may be prescribed.

(3) Any applicant aggrieved by an order of the prescribed authority refusing to accord recognition may, in such manner and within such time as may be prescribed, refer the matter to the State Government whose decision thereon shall be final."

13. From a reading of the above quoted rules, it is abundantly clear that the same relate to grant of recognition to private educational institution whereas the issue involved in the present case is entirely different as has been narrated hereinbefore. Secondly, the appointment of the petitioner being within the yardstick dated 08.07.1981 has to be treated as valid notwithstanding non-sanction/creation of the post. The other ground taken by the opposite party No. 1 to reject the proposal that is, the managing committee of the institution has not resolved to promote one person to the post of Daftary and for adjustment of the petitioner in the consequential vacancy is again not tenable for the reason that for the inaction of the management the petitioner cannot be made to suffer.

14. Both the petitioners have rendered service for more than two decades. As per the law laid down by the

apex court in the case of Rajendra Kumar Das (Supra), thus, their appointment requires to be approved by the authorities. It is for the management to promote anyone among the 3 class IV employees to the post of Daftary by submitting necessary proposal to the government. Significantly, the Govt. in School and Mass Education Department issued an order on 07.05.2008 prescribing modalities for implementation of the judgment of the Apex Court in Rajendra Kumar Das's case. In the case of ***Prasanna Kumar Rout vs. State of Odisha and others***, reported in *MANU/OR/0728/2017*, this Court held that the office order dated 07.05.2008 cannot be held as prospective in nature.

15. In the final analysis, it is seen that the petitioners in both the writ petitions have made out a good case for granting the relief sought for by them. To elucidate, both the petitioners having been appointed against the 4th post of peon at the relevant time which was permissible as per the yardstick of 1981 and such appointment being valid in the eye of law in view of the

judgment of the apex court in Rajendra Kumar Das (supra), the same needs to be approved and the petitioners need to be paid salary accordingly.

16. In the result, both the writ petitions succeed and are therefore, allowed. The impugned orders under Annexures-2 and 8 of WPC (TAC) No.35 of 2014 and WPC(OAC) No.2620 of 2016 respectively are hereby quashed. The opposite party-authorities are directed to approve the appointment of the petitioners against the 4th post of peon in the schools in question along with all consequential service and financial benefits being granted to them within a period of three months from the date of production of a certified copy of this order.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 5th July, 2022/ A.K. Rana