

IN THE HIGH COURT OF ORISSA AT CUTTACK

WPC(OA) No.1052 of 2012

Lingaraj Gouda

....

Petitioner

-versus-

State of Orissa & Others

....

Opposite Parties

Appeared in this case:-

For Petitioner : Mr. S.K. Das, learned counsel on
behalf of Mr. P. Mohapatra.

For Opp. Parties : Mr. P.C. Das,
learned Addl. Standing Counsel

CORAM:

JUSTICE A.K. MOHAPATRA

JUDGMENT

Date of hearing : 24.02.2022 | Date of Judgment : 31.03.2022

A.K. Mohapatra, J.

1. The grievance of the petitioner in the present writ petition is that though he has been appointed by the Presiding Officer State Education Tribunal, Bhubaneswar, who is the competent authority, to a substantive post and after following due procedure of selection, has now been issued with a notice in pursuance to the impugned order issued by the Opposite Party No.1 requiring the petitioner to file his show-cause as to why his services shall not be terminated. The impugned order issued by the Opposite Party No.1 as well as consequential show-cause notice having been issued on the basis of a letter dated 10.04.2012 of the Finance

Department, Government of Odisha, which has no application to the facts of the present case.

2. The present writ petition has been filed by the petitioner with a prayer to quash the impugned order dated 16.08.2012 issued by the Opposite Party No.1 and the consequential notice dated 24.08.2012 issued by the Opposite Party No.2.

3. The factual back drop of the case, bereft of all unnecessary details, is that to fill up one vacant post of Peon in the office of the Opposite Party No.2, the Opposite Party No.2 issued an advertisement on 05.04.2012. It is revealed from the said advertisement that the post which is sought to be filled up by the Opposite Party No.2 had fallen vacant due to promotion of the incumbent of that post. Therefore, it is pleaded in the writ petition that the post is sought to be filled up as the said regular post is having the budgetary sanction by the Finance Department and that filling up the vacancy in the said post is absolutely necessary for smooth functioning of the office of the Opposite Party No.2.

4. Upon perusal of the advertisement, it is further seen that the requisite qualification as mentioned in the advertisement is being possessed by the petitioner and accordingly, the petitioner submitted his candidature against the said post. Further upon due scrutiny of the application, the office of the Opposite Party No.2 found that the petitioner is suitable for the said post and accordingly, the petitioner was invited to attend an interview, which was scheduled to be held on 07.05.2012.

5. After successfully qualifying in the interview, where the petitioner stood first, the petitioner was given appointment against the substantive post of Peon in the office of the Opposite Party No.2 with a scale of pay Rs.4,440-7,440/- with grade pay of Rs.1,300/- along with other allowances as admissible under the rules. Thereafter, the applicant joined in service on 09.05.2012. After joining his service, he was discharging his duties to the utmost satisfaction of the authorities pursuant to regular appointment order. The petitioner had been sanctioned house rent allowances w.e.f. 01.06.2012 by order dated 27.06.2012 by the Opposite Party No.2.

6. To the utter surprise of the petitioner, he received a show-cause notice dated 24.08.2012 issued by the Opposite Party No.2 along with letter dated 10.04.2012 and 16.08.2012 of the Finance Department, Government of Odisha. Under the impugned show-cause notice at Annexure-6, the petitioner has been asked to show cause as to why his appointment shall not be cancelled and his service shall not be terminated since his appointment to the post of Peon by the Opposite Party No.2 is not in accordance with the provisions laid down under the Finance Department letter. Accordingly, the present writ petition has been filed by the petitioner challenging the show-cause notice as well as letter issued by the Finance Department, Government of Odisha under Annexures-6 and 8 respectively.

7. A counter affidavit has been filed on behalf of the Opposite Party No.1 in this case primarily objecting to the appointment of the petitioner on the ground that the said appointment has been made in contravention of law as incorporated by Finance Department Resolution dated 10.04.2012. As such, the claim of the petitioner has been resisted by the

Opposite Parties on the ground that the appointment of the petitioner is illegal and contrary to the Finance Department Resolution dated 10.04.2012.

8. In the counter affidavit filed by the Opposite Party No.1, the Government has taken a stand that for filling up vacancies in the regular establishment, the candidate must satisfy the eligibility criteria fixed by the State Government, Finance Department. Further, the Finance Department in its resolution dated 10.04.2012 while trying to regulate the expenditure out of the Annual Budget for the year 2012-13 have imposed restriction on the creation and filling up of new posts. Further, it has been stated in the resolution that such posts which are essential for delivery of public service, those posts should be filled up after obtaining concurrence of the Finance Department. Further, it is alleged that while filling up the posts, in the present case, by appointing the petitioner, no concurrence was taken from the Government and as such, the appointment of the petitioner is illegal and contrary to the resolution dated 10.04.2012.

9. It has also been stated in the counter affidavit that while filling up the post of Peon by the office of the Opposite Party No.2 no advertisement was issued as averred by the petitioner. Only a notice was affixed to the Notice Board and on the very next day, the incumbent got appointment. In the said context, the Opposite Parties had relied upon a judgment of the Hon'ble Supreme Court of India in the matter of ***State of Orissa and others vrs. Mamata Mohanty*** : reported in ***(2011) 3 SCC 436***. It has also been stated in the counter affidavit that the advertisement in the present case was not given wide publicity by either publishing the

same in the local daily newspaper or by advertising the said post in the Electronic Media.

10. In the counter affidavit filed by the Opposite Party No.1, a stand has also been taken to the effect that although the petitioner stood first in the interview held for the post of Peon in SET, due to lack of proper advertisement only four persons applied for the said post and participated in the interview. The case of the Opposite Parties is that had the advertisement been given wide publicity as indicated hereinabove, then many eligible candidates would have participated in the interview. Further, it is stated that the recruitment in the present case contravenes provisions of Employment Exchange (Compulsory Notification of Vacancies) Act, 1959 and Rule, 1960.

11. Heard Mr. S.K. Das, along with Mr. P. Mohapatra, learned counsel for the Petitioner as well as Mr. P.C. Das, learned Additional Standing Counsel for the State. Perused the writ petition as well as documents annexed to the writ petition.

12. Learned counsel for the petitioner submits that the Opposite Party No.2 Office has not committed any illegality at all in the matter of selection and appointment of Peon of the SET. It is further submitted by Mr. Das that the Finance Department Circular dated 10.04.2012 came into force after vacancy in the present case was notified. Therefore, he strenuously argued that the circular dated 10.04.2012 has no application so far as the recruitment in the present case is concerned.

13. Learned counsel for the State, on the other hand, submits that although the circular of the Finance Department came into force after notification of the vacancy, the applicant had applied for the post on

18.04.2012 and all steps for filling up the said post were taken subsequent to the circular dated 10.04.2012 came into force. Therefore, the plea of the petitioner that the Finance Department Circular in question is not applicable to the fact of this case is not correct. He further submits that even there are so many earlier circulars of the Finance Department prior to the one issued on 10.04.2012 making such appointment of the petitioner by the Opposite Party No.2 contrary to the executive instruction and rules. It is further submitted by learned counsel for the State that since the concurrence of the Finance Department as well as Higher Education Department has not been obtained in the present case to fill up the posts, the appointment is illegal and void *ab initio*.

14. In reply to the aforesaid stand of the Government, learned counsel for the petitioner submits that the petitioner was appointed against a regular and substantive post after following due selection procedure. Moreover, the circular dated 10.04.2012 came into force after vacancy was notified. Therefore, the Opposite Party No.2 has not committed any illegality at all in going ahead with the selection process and appointing the present petitioner, who had requisite qualification and stood first in the interview. He further submits that the selection was made basing upon the notice dated 05.04.2012 at Annexure-1. In such eventuality, according to the counsel for the petitioner, the same would amount to changing the rules of the game while the game is on. Therefore, he submits that the selection to the post of Peon has been made strictly on the basis of advertisement dated 05.04.2012. In support of his contentions, the learned counsel for the petitioner relies upon a judgment of the Hon'ble Supreme Court in the matter of ***K. Manjusree vrs. State of Andhra Pradesh and another*** : reported in (2008) 3 SCC 512. In the

aforesaid judgment of the Hon'ble Supreme Court, the criterion for selection is sought to be changed after the advertisement was issued for filling up the post and rules were finalized for selection and while the process of selection was on. While analyzing the facts of that case, Hon'ble Supreme Court of India has held that no doubt the authorities have power to fix selection criterion, however, the attempt to change the same while selection process was on is not permissible under the law. In other words the decision under resolution dtd.10.04.2012 was brought into force after the recruitment process was advertised/notified by SET i.e while the selection process had already commenced, therefore, such decision is not applicable to the selection process under challenge in the present case as the same would amount to changing the rules of game while the game is on. Applying ratio laid down by the Hon'ble Supreme Court to the facts of the present case, this Court is of the considered view that the circular dated 10.04.2012 is not applicable to the facts of the present case as the same came into force after the recruitment process was notified in the present case.

15. In reply to the contention of the learned counsel for the State to the effect that it is not open for the petitioner to challenge a show-cause and the present writ petition challenging the show-cause notice is not maintainable, the learned counsel for the petitioner submits that show-cause notice dated 24.08.2012 has been issued only as a formality and the decision to cancel the order of appointment of the petitioner has already been taken by the Opposite Party No.1 vide order under Annexure-8 even before issuance of show-cause notice. Therefore, he submits that the cancellation of appointment was a foregone conclusion already arrived at by the Opposite Party No.1 and the issuance of show-cause notice is a mere formality sought to be observed by the Opposite

Party No.2. In such view of the matter, learned counsel for the petitioner submits that the Tribunal has not committed any illegality in entertaining the O.A. application, which was later transferred to this court after abolition of the Odisha Administrative Tribunal.

16. In the aforesaid context, learned counsel for the petitioner submits that where a show-cause notice has been issued with a premeditation and outcome of such notice is apparent and predictable, a writ petition would always be maintainable. So far as the present case is concerned, the authorities have already formed an opinion to terminate the services of the present petitioner. Show-cause notice issued by the Opposite Party No.2 is mere follow up action of the formality to the final decision already taken at the level of Opposite Party No.1. To support his contention, learned counsel for the petitioner relies upon a judgment of the Hon'ble Supreme Court of India in the matter of *Siemens Ltd. vrs. State of Maharashtra and others* : reported in (2006)12 SCC 33 wherein the Hon'ble Supreme Court of India has held that when a notice was issued with pre-meditation, a writ petition would be maintainable as because in such an event, even if the Court directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose.

17. Considering the pleadings in the present case, this Court is of the considered view that the ratio laid down in *Siemens Ltd. case* (supra) squarely applied to the facts of the present case, therefore, the present writ petition is maintainable and the objection of the State counsel in this regard is unsustainable in law.

18. This Court feels that the argument of the learned counsel for the petitioner to the effect that from a plain reading of Paragraph-(vi) of the

letter under Annexure-7, a post which is to be created and is to be subsequently filled up after 10th April, 2012 can only be done after getting concurrence of the Finance Department and that in the instant case since post in which the petitioner was appointed validly and is a substantive and existing post available to be filled up prior to the issuance of the circular dated 10.04.2012, prior approval of the Finance Department is not at all required, has force in it.

19. Moreover, the circular dated 10.04.2012 cannot be given any retrospective effect. In other words, appointment, which were advertised/notified after 10.04.2012 would be governed under the terms contained in circular dated 10.04.2012. Even assuming that the concurrence of the Finance Department was required in the present case, the appointment having not been made by following due selection procedure and in absence of any specific condition that the appointment would be rendered invalid in the event it is found that the same has been done in violation of Finance Department resolution, the appointment in the present case can at best be said to be an irregular appointment, which can be regularized by obtaining post-facto approval of the concerned department of the Government. Therefore, the defect, if any, is curable and it doesn't vitiate the entire selection process adopted in the present case. Further no fault can be found with the petitioner in the present case, hence, he should not be penalized for the irregularities committed by the appointing authority.

20. With regard to the allegations concerning the advertisement/notice in question to fill up the vacant regular post or giving it wide publicity is concerned, this Court upon consideration of the rival contentions of the parties, as well as upon perusal of the record is of the concerned view

that the Opposite Party No.2 has not committed any illegality that would render the entire selection procedure *ab initio* void. Pursuant to the advertisement four candidates appeared in the interview and the petitioner, who stood first, was selected and given appointment. In absence of any complain by any of the candidates who was desirous to be appointed to such posts and did not get any opportunity to participate in the selection process, it is not open to the authority to take advantage of the irregularities committed by them and penalize the petitioner by terminating his service. No doubt some irregularities have been observed by this Court while conducting the selection process, the same should have been regularized by taking post-facto approval from the authorities. In this context, the ratio of the judgment of this Court in the case of ***Biswambar Behera vrs. State and others*** : reported in **2012(I) OLR 839** relied upon by learned counsel for the petitioner supports the contention of the petitioner.

21. In view of the aforesaid facts and circumstances and analysis of the legal position, this Court is of the considered view that the decision of the Government under letter dated 10.04.2012 is not applicable to the facts of the present case and therefore, the letter dated 16.08.2012 under Annexure-8 and the show-cause notice dated 24.08.2013 under Annexure-6 are highly illegal and untenable in law and as such, the same are liable to be quashed and are hereby quashed.

22. The writ petition is allowed. However, there shall be no order as to cost.

(A.K. Mohapatra)
Judge