

IN THE HIGH COURT OF ORISSA AT CUTTACK

WPC(OAC) No.2175 of 2013

An application under Section 19 of the State Administrative Tribunal's Act, 1985.

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Pratap Kumar Samal

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Petitioner

-versus-

State of Odisha & Others

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Opposite Parties

For Petitioner : M/s. M.K.Khuntia, G.R.Sethi,
J.K.Digal, B.K.Pattnaik &
S.Nanda.

For Opp. Parties : M/s.A.P.Das,
Addl. Standing Counsel.

PRESENT:

THE HONBLE JUSTICE BIRAJA PRASANNA SATAPATHY

संविधिक न्यायो

Date of Hearing:08.12.2022 and Date of Order:03.01.2023

Biraja Prasanna Satapathy, J.

1. The present Writ Petition has been filed challenging the order of discharge passed against the Petitioner vide order dated 06.07.2013 under Annexure-10, pursuant to the order passed by the Opposite Party No.2 on 05.07.2013 under Annexure-9.

2. The factual backdrop giving rise to filing of the present case is that pursuant to the advertisement issued

by the I.G. of Police, Odisha, Cuttack on 08.02.2010, the Petitioner made his application for the post of Sepoy of Special Security Bn., Bhubaneswar under SEBC category. In the advertisement in question, 560 posts of Sepoys were shown vacant in Special Security Bn., Bhubaneswar. The Petitioner with having the requisite qualification and being eligible made his application in SEBC category and the Petitioner was allotted with Registration No.5862.

2.1. The Petitioner after coming out successful in the physical measurement test, he was permitted to face the viva-voce test. After such completion of the viva-voce test and during verification of the certificates, the petitioner was not awarded any mark for the certificate produced in support of his taking part in the East Zone Kabadi Championships and the Petitioner when was deprived from the purview of selection, the Petitioner moved an application before Opposite Party No.3 on 20.07.2010 with a prayer to award 10 marks for his participation in the East Zone Kabadi Championships. As the claim of the Petitioner as made was not considered, the Petitioner approached the learned State Administrative Tribunal (in short 'Tribunal') in O.A No.1058(C) of 2010. The said O.A along with two other similar O.As were disposed of by the Tribunal vide

order dated 02.02.2011 under Annexure-6. The O.As were disposed of basing on the submission made by the learned Government Advocate to the following effect:-

“Mr. Kanungo, learned Government Advocate submits that since no marks has been awarded to the applicants, the O.As may be disposed at this stage with a direction to the respondent No.2 and 3 to take into consideration the certificate which has been issued in favour of the applicant relating to their participation in State/ National Level Competition and after awarding marks for such participation as per their entitlement, if they come within the zone of practicable preferably within one month from the date of communication of this order”.

2.2. Pursuant to the order passed by the Tribunal and after due verification of the certificate with award of mark in favour of the Petitioner for his taking part in the East Zone Kabadi Championships, certificate of which is available under Annexure-1, the Petitioner vide letter dated 05.03.2011 was directed to report before Opposite Party No.3 on 14.03.2011 for consideration of his appointment on provisional basis as a temporary Sepoy. The Petitioner in terms of the communication issued under Annexure-7 joined as a Sepoy in the establishment of Opposite Party No.3. But while also so continuing, the Petitioner all of sudden was discharged from service with immediate effect vide order dated 06.07.2013 under Annexure-10. The said order was passed by the Opposite Party No.3 basing on the

order passed by the Opposite Party No.2 on 05.07.2013 under Annexure-9.

3. It is the main contention of the learned counsel appearing for the Petitioner that the Petitioner even though participated in the selection process pursuant to the advertisement issued on 08.02.2010 and 13.02.2010, but the Petitioner initially was not awarded any mark for his participation in the East Zone Kabadi Championships. The Petitioner since had secured 45 marks in all the tests, because of non-award of 10 marks for his having participated in the aforesaid sports championship, the Petitioner was not selected. Had the Petitioner being awarded the 10 marks, which is awarded to similarly situated persons, the Petitioner would have secured 55 mark and got selected as the last person appointed in SEBC category had secured 51 marks. Challenging such action of the Opposite Parties, Petitioner moved the Opposite Party No.2 under Annexure-4 and subsequently approached the Tribunal in O.A No.1058 (C)/2010. Before the Tribunal though the State filed a detailed counter, but considering the stand taken and taking into account the submission of the learned Government Advocate, the

matter was disposed of vide order dated 02.02.2011 under Annexure-6 with a direction on the Opposite Parties to award mark in favour of the Petitioner for his participation in the above said championship. In terms of the said order, the Petitioner was not only awarded 10 marks, but also he was provisionally selected and appointed as a Sepoy in terms of the letter issued under Annexure-7 on 05.03.2011. The Petitioner when so continuing and undergoing the required training, he was discharged from his service vide order dated 06.07.2013 under Annexure-10, which is stated to have been issued basing on the order passed by the Opposite Party No.2 on 05.07.2013 under Annexure-9.

3.1. It is contended that in consideration of his claim as made in O.A No.1058(C)/2010, the Petitioner was not only awarded 10 marks for his participation in the East Zone Kabadi Championships, but also he was issued with the order of appointment under Annexure-7. The Petitioner also was allowed to undergo the training and in the meantime without issuing any show cause and without providing any opportunity of hearing, the order of discharge was passed under Annexure-10 basing on the order passed by the Opposite Party No.2 under Annexure-9.

3.2. Mr. Sethi, learned counsel for the Petitioner vehemently contended that since the Petitioner was duly appointed and acquired the status of a civil servant, prior to such order of discharge, the Petitioner should have been issued with a show cause and given an opportunity of hearing. But the impugned order of discharge was passed in complete violation of the same and that too basing on an order passed by the Opposite Party No.2 under Annexure-9. Opposite Party No.2 even prior to taking such a decision under Annexure-9 never gave an opportunity of hearing to the Petitioner. Accordingly, it is contended that in view of the violation of the principle of natural justice, the order of discharge is liable to be interfered with by this Court.

3.3. It is also contended that the Tribunal while issuing notice of the matter vide order dated 12.07.2013, since stayed the order of discharge passed under Annexure-10, the Petitioner is continuing in the said capacity till date. Therefore, in view of such continuance of the Petitioner for more than 11 years, the impugned order of discharge is liable to be set aside by this Court.

3.4. In support of his aforesaid submission, Mr. Sethi, learned counsel for the Petitioner relied on the decision of

this Court reported in the case of **Bikash Mahalik vs. State of Odisha & Others** reported in **2022(I) OLR-150**.

This Court in Para-27 and 28 of the said judgment has held as follows:-

*“27. In **Pratima Sahoo** (supra), this Court held that the order of disengagement of the petitioner from the post of Sikhya Sahayak, pursuant to decision of the district administration, having found qualified in the selection process and appointed after resigning from her erstwhile post of Anganwadi Worker and having worked for six to eight months, amounts to putting the petitioner in prejudicial and disadvantageous position and the reason assigned for later finding the petitioner not suitable for securing less marks than other meritorious candidates do holds good, the petitioner cannot be found faulted by the mistake committed by the appointing authority in calculating the percentage. Consequentially, direction was given to absorb the petitioner forthwith applying the doctrine of promissory estoppel in the said case.*

28. In view of the law and fact, as discussed above, the irresistible conclusion is that the show-cause notice dated 31.03.2015 under Annexure-13 issued by opposite party no.3, the letter dated 09.02.2015 under Annexure-13/1 issued by opposite party no.2 to opposite party no.1 and letter dated 26.03.2015 under Annexure-13/2 issued by the Government of Odisha, Revenue and Disaster Management Department to opposite party no.2 cannot sustain. Therefore, the same are liable to be quashed and hereby quashed. Pursuant to interim order passed on 07.04.2019 by the Odisha Administrative Tribunal since the petitioner is still continuing, he shall be allowed to continue with all service and financial benefits as due and admissible to him in accordance with law”.

3.5. Mr. Sethi also relied on another decision of the Hon’ble Apex Court in the case of **Vikas Pratap Singh &**

Others vs. State of Chhattisgarh & Others reported in
(2013) 14 SCC-494.

Hon'ble Apex Court in Para-24, 26, 28 and 29 of the
said judgment has held as follows:-

"24. In Union of India (UOI) and Anr. v. Narendra Singh, (2008) 2 SCC 750 this Court considered the age of the employee who was erroneously promoted and the duration of his service on the promoted post and the factor of retiring from service on attaining the age of superannuation and observed as follows: (SCC p.758, paras 35-36)

"35. The last prayer on behalf of respondent, however, needs to be sympathetically considered. The respondent is holding the post of Senior Accountant (Functional) since last seventeen years. He is on the verge of retirement, so much so, that only few days have remained. He will be reaching at the age of superannuation by the end of this month i.e. December 31, 2007. In our view, therefore, it would not be appropriate now to revert the respondent to the post of Accountant for very short period. We, therefore, direct the appellants to continue the respondent as Senior Accountant (Functional) till he reaches the age of superannuation i.e. up to December 31, 2007. At the same time, we hold that since the action of the Authorities was in accordance with Statutory Rules, an order passed by the Deputy Accountant-General canceling promotion of the respondent and reverting him to his substantive post of Accountant was legal and valid and the respondent could not have been promoted as Senior Accountant, he would be deemed to have retired as Accountant and not as Senior Accountant (Functional) and his pensionary and retiral benefits would be fixed accordingly by treating him as Accountant all throughout.

36. For the foregoing reasons, the appeal is partly allowed. Though the respondent is allowed to continue on the post of Senior Accountant (Functional) till he reaches the age of retirement i.e. December 31, 2007 and salary paid to him in that capacity will not be recovered, his retiral benefits will be fixed not as Senior

Accountant (Functional) but as Accountant. In the facts and circumstances of case, there shall be no order as to costs.”.

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26. *In Buddhi Nath Chaudhary and Ors. v. Akhil Kumar and Ors., (2001) 2 SCR 18, even though the appointments were held to be improper, this Court did not disturb the appointments on the ground that the incumbents had worked for several years and had gained experience and observed: (SCC p.331, para6)*

“6.....We have extended equitable considerations to such selected candidates who have worked on the posts for a long period....”

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28. *In our considered view, the appellants have successfully undergone training and are efficiently serving the respondent-State for more than three years and undoubtedly their termination would not only impinge upon the economic security of the appellants and their dependants but also adversely affect their careers. This would be highly unjust and grossly unfair to the appellants who are innocent appointees of an erroneous evaluation of the answer scripts. However, their continuation in service should neither give any unfair advantage to the appellants nor cause undue prejudice to the candidates selected qua the revised merit list.*

29. *Accordingly, we direct the respondent-State to appoint the appellants in the revised merit list placing them at the bottom of the said list. The candidates who have crossed the minimum statutory age for appointment shall be accommodated with suitable age relaxation”.*

3.6. Mr. Sethi also contended that since the Petitioner has not committed any illegality or irregularity with regard to his appointment as a Sepoy in terms of order under Annexure-7, the Petitioner is eligible for his reinstatement. In support of the aforesaid submission, Mr. Sethi relied on

a decision of the Hon'ble Apex Court in the case **Anmol Kumar Tiwari and others vs. State of Jharkhand and others** reported in **AIR 2021 SC-1139**.

Hon'ble Apex Court in Para-9 of the said judgment has held as follows:-

"9. Two issues arise for our consideration. The first relates to the correctness of the direction given by the High Court to reinstate the Writ Petitioners. The High Court directed reinstatement of the Writ Petitioners after taking into account the fact that they were beneficiaries of the select list that was prepared in an irregular manner. However, the High Court found that the Writ Petitioners were not responsible for the irregularities committed by the authorities in preparation of the select list. Moreover, the Writ Petitioners were appointed after completion of training and worked for some time. The High Court was of the opinion that the Writ Petitioners ought to be considered for reinstatement without affecting the rights of other candidates who were already selected. A similar situation arose in Vikas Pratap Singh's case (supra), where this Court considered that the Appellants-therein were appointed due to an error committed by the Respondents in the matter of valuation of answer scripts. As there was no allegation of fraud or misrepresentation committed by the Appellants therein, the termination of their services was set aside as it would adversely affect their careers. That the Appellants-therein had successfully undergone training and were serving the State for more than 3 years was another reason that was given by this Court for setting aside the orders passed by the High Court. As the Writ Petitioners are similarly situated to the Appellants in Vikas Pratap Singh's case (supra), we are in agreement with the High Court that the Writ Petitioners are entitled to the relief granted. Moreover, though on pain of Contempt, the Writ Petitioners have been reinstated and are working at present".

4. Mr. A.P.Das, learned Addl. Standing Counsel on the other hand made his submission basing on the stand taken

in the counter affidavit filed by the Opposite Parties. It is submitted that the Petitioner even though secured 45 marks in the recruitment test, but initially he was not awarded any mark for his sports achievement. But on receipt of the order passed by the Tribunal in O.A No.1058(C) of 2010, Opposite Party No.1 when was requested to issue necessary clarification in the matter, the same was referred to the Director of Sports in terms of the resolution issued by the Home Department on 23.06.2010 under Annexure-C/3. Subsequently, Asst. Director of Sports & Services, Odisha, Bhubaneswar intimated the Opposite Party No.3 to contact Secretary, Orissa Kabadi Association to ascertain the status of the event, for which the Petitioner claims for award of marks. On receipt of the request, Secretary, Odisha Kabadi Association vide his letter dated 02.12.2010 intimated that the Sports certificate submitted by the Petitioner is a genuine one and East Zone Kabadi Championship 2006 is treated as Open National Kabadi Championship as per the guidelines of Amateur Kabadi Federation of India. Subsequently, in terms of the order passed by the Tribunal on 02.02.2011 a meeting of the selection board was convened for consideration of appointment of the petitioner and another. In terms of the

proceeding of the meeting dated 01.03.2011, the present petitioner was appointed on 14.03.2011 as Sepoy temporarily under Opposite Party No.3.

4.1. But subsequently vide letter dated 08.11.2013 when the Director of Sports and Research Odisha, intimated that East Zone Kabadi Championship is not a National Level Competition, an Empowered Committee was constituted by the Opposite Party No.2. The Empowered Committee after scrutiny of the relevant records came to a conclusion that the Petitioner is not entitled to get any mark for his sports achievement i.e. taking part in the East Zone Kabadi Championship, 2006. Therefore, it is found that the Petitioner is not entitled to get any mark for his sports achievement and after deduction of 10 marks which was awarded to him, the mark secured by the Petitioner came down to 45 marks in the recruited test. Since the cut-off mark of the last candidate selected in SEBC category was 51 marks, Opposite Party No.2 vide order dated 5.7.2013 under Annexure-9 directed for disengagement of the Petitioner. In terms of the said order, the Petitioner was discharged from his service vide order dated 06.07.2013 under Annexure-10.

4.2. It is contended that in view of the letter issued by the Director on 08.11.2013 under Annexure-C/7, the clarification furnished by the under Secretary of the Kabadi Association on 02.12.2010 vide Annexure-C/4 became invalid.

4.3. It is also contended that by the time the Petitioner was discharged from his service, he had not completed the required 2 years of basic and advance course of training as the Petitioner joined in the said training on 05.09.2012 only. Since the Petitioner was under probation, the protection provided under Article-311 of the Constitution of India is not applicable to the case of the Petitioner.

4.4. It is also contended that while discharging the Petitioner vide order under Annexure-10, the provision of PMR-813 has been strictly followed and the procedure laid down in Appendix-49 of the Police Manual Rule is not applicable to the case of the Petitioner as the appointment of the Petitioner was purely on temporary basis and he had not completed the required two years of training. Since the Petitioner had not completed the basic and advance course of training, though he had completed two years of service by the time the order of discharge was passed, it cannot be

construed that the Petitioner has completed his probation period.

4.5. Lastly, it is contended that since the Petitioner is an ineligible and unsuitable person, he has no right to continue in service and there was no need to hold a departmental proceeding for that purpose. Since the Petitioner was continuing on temporary basis and had not completed the required training, he was rightly removed as he was found ineligible and unsuitable for the post of Sepoy.

5. I have heard Mr.G.R.Sethi, learned counsel for the Petitioner and Mr.A.P.Das, learned Addl. Standing Counsel for the State. On the consent of the learned counsel appearing for both the Parties, the matter was taken up for final disposal at the stage of admission and disposed of by the present order.

6. This Court after going through the materials available on record finds that the Petitioner was not selected initially when no mark was awarded for his sports achievement. But in terms of the clarification issued by the Opposite Party No.6 vide Annexure-C/4 as well as the order passed by the Tribunal on 02.02.2011 under Annexure-6, the

claim of the Petitioner was considered by the Selection Committee in its proceeding dated 01.3.2011 under Annexure-C/6. Pursuant to the decision taken in the proceeding of the meeting dated 01.03.2011 and after due verification of the documents in terms of Annexure-7, the Petitioner was appointed as a Sepoy on temporary basis in the establishment of Opposite Party No.3 on 14.03.2011.

6.1. This Court finds that subsequent to such appointment and basing on the clarification issued by the Director of Sports and Youth Services, Odisha on 08.11.2011 under Annexure-C/7, Opposite Party No.2 directed for constitution of an empowered committee to look into the matter and the committee after scrutiny of all the relevant records came to a conclusion that the Petitioner is not entitled to get any mark for his sports achievement. Basing on the said report of the committee, Opposite Party No.2 passed the order on 05.07.2013 under Annexure-9 directing the Opposite Party No.3 to discharge the Petitioner from his service. On receipt of the order under Annexure-9, the Petitioner was discharged from his service vide order dated 06.07.2013 under Annexure-10. The Petitioner prior

to passing of such order of discharge was never show-caused nor any opportunity of hearing was provided to him.

6.2. This Court in view of the decision of the Hon'ble Apex Court in the case of **V.P. Ahuja vs. State of Punjab (SC)** reported in **2000(2) SLR-1** is unable to accept the submission of the State counsel that since the Petitioner was continuing as a temporary employee and he had not completed the required training and was under probation, there was no requirement to follow the principle of natural justice.

The Apex Court in Paragraph-7 of the judgment in the case of **V.P.Ahuja** (supra) has held as follows:-

"7. A probationer, like a temporary servant, is also entitled to certain protection and his services cannot be terminated arbitrarily, nor can those services be terminated in a punitive manner without complying with the principles of natural justice".

6.3. Even though the Petitioner was under the probation, in view of the decision of the Hon'ble Apex Court as cited (supra), the Petitioner was required to be given an opportunity of hearing prior to his discharge from his service. Since that has not been followed in the instant case, as per the considered view of this Court, the said

order of discharge is a nullity in the eye of law. Similarly since the Petitioner in terms of the order passed by the Tribunal under Annexure-6 was considered and found eligible for his appointment and the Petitioner is no way responsible for his appointment, the Petitioner is entitled for reinstatement in service, in view of the decision of the Hon'ble Apex Court reported in **AIR 2021 SC-1139**.

6.4. Not only that in view of the continuance of the Petitioner in his service for the last 11 years, and the provision contained under Section-115 of the Indian Evidence Act, 1872 dealt with by the Apex Court in the case of **Vikas Pratap Singh as cited (supra)**, the Petitioner is eligible and entitled for his reinstatement and continuance. Hence, in any view of the matter, the order of discharge passed against the Petitioner under Annexure-10 basing on the order passed by the Opposite Party No.2 under Annexure-9 cannot sustain legal scrutiny and are liable to be quashed. While quashing the orders at Annexures-9 & 10 and taking into account the fact that by virtue of the interim order passed on 12.07.2013, the Petitioner is continuing as a Sepoy till date, the Opposite Parties are directed to allow the Petitioner to continue in the said post. It is however open for the Opposite Parties to allow the

Petitioner to undergo and complete the required training, if he has not completed the same in the meantime.

4. With the aforesaid observations and directions, the Writ Petition stands disposed of.

(Biraja Prasanna Satapathy)
Judge

Orissa High Court, Cuttack
Dated the 3rd of January, 2023/ Subrat (Sr. Steno)

