

IN THE HIGH COURT OF ORISSA AT CUTTACK

RVWPET No. 233 of 2021

&

W.P.(C) No. 25721 of 2013

Ashok Kumar Behera

Petitioner
....
Dr. J.K. Lenka, Advocate

-versus-

State of Odisha and others

Opposite Parties
....
Mr. Saswata Das
Additional Government Advocate

CORAM:
THE CHIEF JUSTICE
JUSTICE B.P. ROUTRAY

Order No.

ORDER
26.08.2022

RVWPET No.233 of 2021 & W.P.(C) No.25721 of 2013

- 02.
1. This review petition by the Petitioner has been filed seeking review of the Judgment dated 21st October 2021, passed by this Court dismissing W.P.(C) No.25721 of 2013 filed by him.
 2. For reasons to follow, the review petition is allowed. The Judgment dated 21st October, 2021 is recalled and W.P.(C) No.25721 of 2013 is restored to its original file.
 3. The background facts are that the aforementioned writ petition was filed challenging orders dated 21st August, 11th September and 25th September 2013, passed by the Orissa Administrative Tribunal

(OAT) in O.A. No.2382(C) of 2012 and the consequential order discharging the Petitioner from service. It must be noted that the orders dated 21st August, 2013 of the OAT was recalled by it by the second order dated 11th September, 2013 and, therefore the relevant order under challenge was the order dated 25th September, 2013 of the OAT.

4. The dispute in the OAT related to the appointment to the post of Constable against the vacancies reserved for Home Guards in Jagatsinghpur District for the Recruitment Year 2011. The aforementioned O.A. No.2382 (C) of 2012 was filed by Opposite Party No.4, Pramod Kumar Mallick in the OAT aggrieved by his non-selection on the ground that while preparing the Select List, the Opposite Party-State had exceeded the maximum limit of 50% in making reservations. The present Petitioner was impleaded as Respondent No.5 before the OAT. Mr. Mallick (the Applicant before the OAT) contended that despite his having secured 40.25 marks in the Selection List and Respondent No.5, i.e., the Petitioner herein having secured 39.25 marks, Mr. Mallick was not appointed as Constable in the Home Guard category.

5. In the counter affidavit filed before the OAT, the State contended that as far as the present Petitioner was concerned “inadvertently some more marks have been awarded to him for his educational achievements, to which he is not eligible.” It was explained that the present Petitioner was not eligible for 4 marks

and if that was deducted from 43.25 marks awarded to him, his marks would be 39.25 marks.

6. On the above basis, the OAT in the impugned order dated 25th September, 2013 concluded that Mr. Mallick who had scored 40.25 marks would be eligible for appointment as Constable in the Home Guard category. The operative portion of the order of the OAT read as under:

“xxx xxx Considering the submissions made by the learned counsel for both sides, Respondent No.2 is directed to recalculate the marks of Respondent No.5, which has been secured by him in the selection test. After such recalculation, after deduction of 4 marks which has been awarded to Respondent No.5 towards his educational achievements, if it will be found that the applicant has secured more marks than Respondent No.5, then appointment order may be issued in his favour within a period of four weeks from the date of receipt of a copy of this order with intimation to the applicant immediately thereafter.”

7. Consequent upon the above order, the State authorities discharged the Petitioner from service with effect from 31st October, 2013 and appointed Mr. Pramod Kumar Mallick in his place. Aggrieved by the above order of the OAT, as well as the consequential order of discharge, the Petitioner filed W.P.(C) No.25721 of 2013 in this Court on 22nd November, 2013. On 16th December, 2013 while issuing notice in this petition, an interim order was passed to the effect that the appointment of Pramod Kumar Mallick (impleaded as Opposite Party No.4 in the writ petition) would be subject to the final result of the writ petition.

8. Before this Court, the Petitioner advanced two arguments. One was that the OAT had by its order dated 25th September, 2013 not directed the discharge of the Petitioner from service. Secondly, that 10% of the total 86 vacancies in the post of Constable were to be filled up from among the Home Guards and this figure therefore came to 9. Only 6 had been filled up and 3 more vacancies were still available. Since the OAT had not directed the Petitioner's service to be terminated, he could be adjusted against one of the 3 posts.

9. It must be noted here that Mr. Pramod Kumar Mallick belongs to the SC category whereas the Petitioner belongs to the Unreserved (UR) category. However, when this Court in its judgment dated 21st October, 2021 dismissing the writ petition, this Court proceeded on the basis that both the Petitioner and Pramod Kumar Mallick belong to the SEBC category. This was obviously an error since it was never the case of the Petitioner that he belongs to the SEBC category. This Court concluded that since Mr. Mallick has scored 40.25 marks and the Petitioner 39.25 marks, the appointment issued in favour of Mr. Mallick (Opposite Party No.4 in the writ petition) could not be termed illegal. As regards the alternative plea of the Petitioner being accommodated against the remaining vacancies, this Court proceeded on the basis that all the 23 vacancies in the SEBC category had already been filled up. It was further noticed that 10% of the said vacancies

would come to 2.3 which would be rounded to 2 meant for Home Guards and from the affidavit of the Superintendent of Police (SP), Jagatsinghpur, the said 2 vacancies meant for SEBC had already been filled up. Therefore, it was concluded that there were no remaining vacancies in the SEBC category against which the Petitioner could be adjusted.

10. One of the main grounds on which the Petitioner seeks review of the order dated 21st October, 2021 is that the Court erroneously proceeded on the basis that the Petitioner belongs to the SEBC category whereas he belongs to the UR category. This is certainly an error apparent of the face of the record and the Opposite Party-State has not been able to dispute it.

11. The Petitioner on 6th April, 2022 filed I.A. No. 128 of 2022 in the present review petition enclosing a letter dated 24th December, 2021 of the Additional Inspector General of Police (Personnel), Odisha, Cuttack in terms of which in the redrawn select list for Jagatsinghpur District in the UR category of the Home Guard quota, the names of four persons figured. These were Ajay Kumar Rout, who had scored 30.75 marks, Smruti Ranjan Das who had scored 30.50 marks, Gopal Krushna Das who had scored 24.50 marks apart from Mr. Mallick in the SC category who had scored 40.25 marks. The inclusion of the aforementioned 3 persons became possible in view of creation of supernumerary posts as per the office order dated 30th March, 2022 of the Government of

Odisha in the Home Department. It was further pointed out in the said I.A. that the said persons were likely to be appointed on 15th April, 2022 and therefore if that happened there would be no vacancy left for the Petitioner to be accommodated if he succeeded in the review petition and therefore, at least one vacancy should be kept unfilled. Taking note of the above averments, on 8th April, 2022 an interim order was passed by this Court in the present review petition to the effect that one vacancy in the post of Constable under the UR category from the Home Guard quota for Jagatsinghpur should be kept vacant.

12. In the counter affidavit in reply to the review petition, the Deputy Superintendent of Police Headquarters, District Police Office at Jagatsinghpur, stated that:

“7.... The Petitioner was not recruited in SEBC category; he was recruited in UR category. Opposite Party No.4 i.e. Pramod Kumar Mallick belongs to SC category. Due to his higher mark opposite party No.4 was appointed in UR category.”

13. As regards the vacancy position, it was stated that all the 9 vacancies for Home Guard candidates had been filled up and there were no unfilled vacancies remaining.

14. At the hearing of this case on 8th July 2022, it was pointed out by Dr. J.K. Lenka, learned counsel appearing for the Petitioner that despite the order dated 8th April 2022, the Opposite Party-State appeared to have appointed Constables in the UR category in the

Home Guard quota on 15th April, 2022. Secondly, he pointed out that the UR category, candidates in the Home Guard quota scoring less marks than the Petitioner, had been appointed; one of them did not join and therefore, there was perhaps one vacancy is still left. Mr. Saswata Das, learned Additional Government Advocate (AGA) then offered to file an additional affidavit to explain the position.

15. Pursuant thereto, in the additional affidavit filed on 17th August 2022, it has been clarified by the State as under in Para-5:

“5..... as per instruction of State Police Hdqrs, Cuttack one candidate namely Smruti Ranjan Dash securing 30.50 marks has been appointed as Constable on 15.4.2022 and another candidate namely Gopal Krushna Dash has already been appointed as since 30.8.2013 A.M and one post under UR Category is lying vacant. Further it is mention here that out of Home Guard Category, the petitioner was appointed as Constable in the year 2011 but the petitioner was discharged from the service on 31st Oct. 2013.”

16. The position has now become clear viz., that

(i) Neither the Petitioner nor Mr. Pramod Mallick belong to the SEBC category. The Petitioner belongs to the UR category and Mr. Mallick to the SC category;

(ii) In terms of marks, Mr. Mallick did score 40.25 marks which is higher than the 39.25 marks scored by the Petitioner. Therefore, as

far as the appointment of Mr. Mallick is concerned, it cannot be termed illegal;

(iii) There was indeed no specific direction of the OAT that the Petitioner's services should be terminated;

(iv) Going by the vacancy position, it has now clear that one vacancy in the UR category remains unfilled. It is also further clear that in the vacancies of the UR category, Smruti Ranjan Dash securing 30.50 marks and Gopal Krushna Dash securing 24.50 marks have been appointed. In other words, two candidates scoring less than the Petitioner have been appointed.

17. Given all the above facts, it is clear that there was no justification in discharging the Petitioner and by overlooking him, in appointing against the remaining UR vacancies, candidates who had scored lesser marks in the 2011 selection. In fact the above persons were appointed only on 15th April, 2022 during the pendency of the present review petition.

18. In view of the above factors, the Judgment dated 21st October, 2021 of this Court is hereby recalled and reviewed. The impugned order dated 25th September, 2013 of the OAT is set aside and it is directed that:

(i) The Petitioner will now be appointed in the remaining vacancy of Constable in the Home Guard quota in the UR category and will

be treated as continuing in service from the date of his discharge from service, i.e., 31st October, 2013.

(ii) The Petitioner's seniority in the post of Constable is restored on notional basis with all other incidental service benefits, however, subject to the condition that the Petitioner would not be entitled to any arrears of pay for the period during which he was out of service.

(iii) The consequential orders now be issued by the State authorities in compliance with the above directions within a period of four weeks.

19. It is made clear that nothing in this order will affect the appointment of Mr. Pramod Mallick (Opposite Party No.4) as Constable.

20. The review petition is allowed and the writ petition is disposed of in the above terms. An urgent certified copy of this order be issued as per rules.

(Dr. S. Muralidhar)
Chief Justice

(B.P. Routray)
Judge