

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.A. No. 317 of 2018

Bidyadhar Sutar and another ***Appellants***

-versus-

I.G.-cum-Chief Security Commissioner, ***Respondents***
East Coast Railway, Bhubaneswar and
others

Advocates appeared in the case:

For Appellants : ***Mr. Manoj Kumar Khuntia, Advocate***

For Respondents : ***Mr. Chandrakanta Pradhan***
Senior Panel Counsel (for R-1)

Mr. Samir Kumar Mishra
Senior Advocate (for R-2)

CORAM:
THE CHIEF JUSTICE
JUSTICE SAVITRI RATHO

JUDGMENT

25.09.2023

S. Talapatra, C.J.

1. This matter is taken up through Hybrid Mode.
2. Heard Mr. Manoj Kumar Khuntia, learned counsel appearing for the Appellants, Mr. Chandrakanta Pradhan, learned Senior Panel Counsel appearing for the Respondent No.1, i.e. East Coast

Railway and Mr. Samir Kumar Mishra, learned Senior Counsel appearing for the Respondent No.2.

3. By means of this intra-Court appeal, the Appellants have challenged the order dated 27th April, 2018 passed by the learned Single Judge in W.P.(C) No.14022 of 2012.

4. By the said judgment, the learned Single Judge has dismissed the writ petition filed by the present Appellants by holding that the relief as claimed by the writ Petitioners that the Respondents No.3 to 16 cannot be treated at par with the Appellants as the Appellants and the private Respondents were selected and recruited by distinctly separate two recruitment processes. The said claim was discarded based on the order dated 12th August, 2011 passed in W.P.(C) No.2558 of 2011. Before we refer to the judgment/order dated 12th August, 2011, we need that a brief perspective has to be placed.

5. In terms of the letter dated 30th October, 2009 issued by the East Coast Railway (Annexure-1 to the memorandum of appeal), admittedly, the Appellants applied for recruitment to the rank of ASIPF in the Scale of Pay of Rs.5200-20200/- with Grade Pay of Rs.2800/- under Rule-72 of the RPF Rules-1987.

6. It is also an admitted position that both the Appellants and the private Respondents were declared debarred by the Recruiting Authority, as according to them, the Appellants and the private Respondents did not complete 10 years of service on the date of notification.

7. Having faced that bar, the Appellants approached this Court by filing a writ petition being W.P.(C) No.6671 of 2010 and contended that the Respondent No.1 has taken that decision in violation of Rule-63, whereby it has been provided that subject to sub-Rule 2, the period of training including in-service courses shall be treated as duty for all purposes.

8. In W.P.(C) No.6671 of 2010, by an interim order, this Court permitted the Appellants to appear in the selection process as initiated by the letter dated 30th October, 2009 (Annexure-1 to the memorandum of appeal). Thereafter, as per the direction of this Court, the result was published and it was found that the Appellants were successful and accordingly, they were recruited.

9. It appears that being encouraged by the said development, the private Respondents also approached this Court by filing another writ petition being W.P.(C) No.2558 of 2011. In that writ petition,

the present Appellants were not made party. By the order dated 12th August 2011, the said writ petition was disposed of in the following terms:

“5. We have heard the learned counsel for the parties. It is the undisputed fact that the Petitioners in the aforesaid two writ petitions, in which vide order dated 28.10.2010 this Court passed the detailed judgment after going through the rival legal contentions of the parties and interpreting Rule 63 of the said Rules, 1987 and referring to the various decisions of the Supreme Court held that the training period of constable shall be counted for the purpose of qualifying service of ten years and further directed the Opposite Party that they be allowed to take part in the selection process for the promotion to the posts of ASI, have already taken the benefit. Against the said order the Opposite Party filed aforesaid review petitions, which was dismissed by this Court vide order dated 3.8.2011 for the reason that the said order became final and Petitioners in the aforesaid cases had already taken the benefit in participating in the examination.”

10. At this juncture, we must note that the Appellants were allowed to participate in the selection process by virtue of the interim order, not at the decision of the competent authority. Thereafter, in the said judgment dated 12th August 2011, a Division Bench of this Court has observed and directed as under:

“8. In our considered opinion, the Petitioners are entitled for relief as has been granted in the aforesaid two writ petitions as the said benefit was denied to them in the earlier examination though some of them are admittedly senior to the Petitioners in the earlier two writ petitions. Therefore, we direct the Opposite Party to conduct examination in accordance with law inviting applications from the eligible persons and after publication of the result, the correct place of seniority must be maintained amongst the persons who will be found successful vis-à-vis the persons who are selected pursuant to departmental examination held on 28.4.2010.”

11. The Respondent No.1 did not publish any separate recruitment notification but as on 11th August 2012, they had published a recruitment notification for 29 vacant posts of ASIRPF (Assistant

Sub-Inspector Railway Protection Force). They sent the letter individually to all the private Respondents whether they are willing to participate in the said process. Mr. Chandrakanta Pradhan, learned Senior Panel Counsel for the Respondent No.1 has stated very clearly that all the private Respondents appeared in the said process and came out successful.

12. Thereafter, in terms of the said order dated 12th August, 2011, a combined gradation list was published by a notification dated 18th January, 2012 (Annexure-11 to the memorandum of appeal). The names of the Appellants find place at Serial Nos.19 and 23 whereas the names of the private Respondents find place at Serial Nos.1, 2, 3, 4, 5, 6, 7, 8, 11, 12 and 13 of the said gradation list.

13. The said decision of the Respondent No.1 had been challenged in the writ petition being W.P.(C) No.14022 of 2012 which was disposed of by the impugned judgment dated 27th April, 2018 (Annexure-13 to the memorandum of appeal). By the said judgment dated 27th April, 2018 as already stated, the writ petition filed by the Appellants has been dismissed and, this is the reason for their filing of this intra-Court appeal.

14. Mr. Manoj Kumar Khuntia, learned counsel at the outset of his submission, pointed out to the judgment dated 27th April, 2018 passed in W.P.(C) No.1435 of 2012 and batch, which was filed by the unsuccessful constables and head constables including some of the Petitioners in W.P.(C) No.2558 of 2011. Those writ petitions were disposed of by a common judgment dated 27th April, 2018. It has been observed in the following manner:

“It can be analyzed by way of an analogy suppose 20 vacancies are to be filled up in a selection process and in the said selection process 30 candidates have been found to be successful on the basis of the minimum cut off marks fixed by the selection committee and a merit list of 30 candidates have been prepared, since vacancy is only 20 then category-wise and after following the roster, from 1 to 20 the candidates will be selected and appointed and rest of the candidates will not be selected due to lack of vacancy, as such the successful candidate cannot be said to be a selected candidate and this Court, while directing the same to maintain the seniority which itself suggests that seniority is only after selection and not only after being successful in the selection process,

here the word successful will mean the selection, as such the connotation given by the Petitioner by interpreting the word successful is not acceptable to this Court, accordingly the same is rejected.”

15. It has been also observed as under:

“In view of the discussion made herein above and considering the fact that the Petitioners are trying to compare themselves with the selected candidates of the selection year 2009-10, they cannot be said to be selected candidates, hence the reason given by Opposite Party No.1 in the counter affidavit justifying the reason of their non-selection which is secure of lesser marks than the last selected candidate on the basis of “The Select” year cannot be said to be unjustified.”

16. The said decision was challenged again in a series of intra-Court appeals being W.A. No.294 of 2018 and batch. By a common order dated 1st December 2022, the co-equal Bench of this Court dismissed all the writ appeals by observing *inter alia* that:

“The fact remains that the present Appellants did approach the Court but a subsequent point in time and in their cases, the Division Bench of this Court passed a

separate judgment on 12th August, 2011, the operative portion of which has already been extracted hereinbefore. That only required the ECR to hold a separate selection test in which the present Appellants could participate. This Court did not order that the evaluation of the performance of the present Appellants would be on the basis of the last selected candidate of the earlier selection test. In that sense therefore what the ECR has done is to strictly go by the directions issued by the Court in its judgment dated 12th August, 2011. The Court is therefore not able to accept the plea that the present Appellants were unfairly denied the right to be considered for promotion on par with the successful Petitioner in W.P.(C) No.6671 of 2010.”

17. However, this Court had directed the Respondent-ECR to grant the Appellants of those writ appeals notional promotion as ASI, without any claim to seniority vis-à-vis the private Respondents or without any claim to arrears of pay. The private Respondents as mentioned in the said order dated 1st December, 2022 include the present Appellants.

18. Mr. Khuntia, learned counsel has referred to Rule-97 of the Railway Protection Force Rules (RPF Rules), 1987 in respect of fixing the seniority of departmental promotees. For purpose of reference, the said provision is extracted below:

“97- Seniority of Departmental Promotees.— The seniority of promotees shall be determined according to the position assigned to them in the select panel by the Departmental Promotion Committee. Those who fail to qualify in the initial or pre-promotion training course and qualify in the second attempt shall be placed below all those who had qualified in the first attempt in order of their names on the select panel.”

19. Having situated thus, we have queried Mr. Chandrakanta Pradhan, learned Senior Panel Counsel appearing for the ECR that how they have published the impugned gradation list and what rule they have followed in preparation of the same.

20. Mr. Chandrakanta Pradhan, learned Senior Panel Counsel has fairly submitted that they had to follow the direction dated 12th August 2011, where it has been stated that seniority be fixed according to the past service.

21. We have also heard Mr. Samir Kumar Mishra, learned Senior Counsel appearing for the Respondent No.2. Mr. Mishra has submitted that the private Respondents cannot be pushed to a separate class of category only because they had appeared in the subsequent recruitment process. According to Mr. Mishra, they cannot be discriminated inasmuch as this Court had categorically observed that they were unlawfully debarred from appearing in the first recruitment process. Therefore, there is no infirmity in the gradation list as challenged by the Appellants. Even, he has strongly supported the judgment of the learned Single Judge by which the writ petition has been dismissed.

22. The judgment dated 12th August, 2011 has not been challenged and it has reached its finality. But the said judgment has left some vacuum so far as the rule of fixing of seniority is concerned.

23. Rule-97 of the RPF Rules, 1987 as extracted hereinbefore clearly provides that the seniority of the promotees shall be determined according to the position assigned to them in the select panel by the Departmental Promotion Committee. The admitted position is that there are two separate select panels and the Appellants had been selected by the first recruitment process and the private Respondents had been selected by the second

recruitment process along with others who participated in the said recruitment process. Those, who were successful along with the private Respondents, are also not before us and their seniority as they have been selected in the same recruitment process would also be determined in terms of Rule-97 of the RPF Rule, 1987. As in the said judgment dated 12th August, 2011, no consideration was made in respect of Rule-97, this created a legal impasse which needs to be addressed by this Court.

24. On a collective reading of the various judgments/orders that we have referred, it would further appear that this Court passed divergent opinions so far as the seniority is concerned. In the decision dated 27th April, 2018 passed in W.P.(C) No.1435 of 2012, this Court refused to acknowledge the merit position secured by the Petitioners of that case in order to accommodate them in the select panel as the last person selected in the first recruitment process according to those Petitioners secured less marks than them. That apart, what Mr. Khuntia, learned counsel has additionally indicated that the recruitment process was not confined to the persons who were debarred at the first recruitment exercise. It was a regular recruitment process which commenced by publication of the

notification on 11th August, 2011, i.e. one day prior to the judgment dated 12th August, 2011.

25. The private Respondents participated voluntarily in the said recruitment process without reserving any right in respect of the seniority. Here, we have to pause for a while as the non-arraigned selected persons who secured their position in the select panel, which was prepared in the second recruitment process, have right to the seniority position in accordance with their merit.

26. For illustration, we may examine a hypothesis. The person, who has occupied the position No.1 in terms of the merit panel, may be placed below those persons who are in the lower position in the merit panel by operation of the said judgment. The persons in the lower position, who claimed that they were unlawfully debarred, would be placed above the person who occupied the top position.

Rule 97 of the Railways Protection Force Rules, 1987 thus loses all its force. At the time of passing the judgment dated 12th August 2011, the learned Single Judge did not consider the ambit of Rule 97 or its effects. There is no guidance in the judgment how to reconcile the merit panels of two recruitment processes without affecting the provisions of Rule 97 of RPF Rule, 1987. In such circumstances, we are of the considered view that not the judgment

but Rule 97 will prevail, as the persons who did not challenge their debarment at the first instance and did observe from the ringside cannot be treated at par with the person who immediately challenged the action of the Respondent No.1. Moreover, they participated in the selection with other persons who have their own claim to seniority by virtue of their merit position. Their right cannot be eclipsed. The writ Petitioners-Respondents may be equal in other respects but they shall be treated as a separate class, as the past seniority does not have any role in view of Rule 97 of the RPF Rules, 1987.

27. Having regard to this direction, a fresh gradation list shall be published and consequently, we set aside the gradation list published on 18th January, 2012 (Annexure-11 to the memorandum of appeal). The Respondent No.1 shall treat the select panel of the first recruitment exercise and the second recruitment exercise differently and in order to prepare the gradation list, Rule-97 of the RPF Rule, 1987 shall strictly be followed.

28. As consequence of those observations, we set aside the impugned judgment dated 27th April, 2018 passed in W.P.(C) No.14022 of 2012.

29. Accordingly, the writ appeal is allowed but in the circumstances, there shall be no order as to costs.

(S. Talapatra)
Chief Justice

(Savitri Ratho)
Judge

S. Behera

Signature Not Verified

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Signed by: SUMANTA BEHERA
Designation: Jr.Stenographer
Reason: Authentication
Location: High Court of Orissa, Cuttack
Date: 30-Sep-2023 14:11:20

