

SUPREME COURT OF INDIA

State of Orissa

Vs.

Rajkishore Nanda

C.A.No.2808 of 2008

(Dr.B.S.Chauhan and Swatanter Kumar JJ.)

03.06.2010

JUDGEMENT

Dr.B.S.Chauhan, J.

1. The present appeal has been preferred against the Judgment and Order of the Orissa High Court dated 26.10.2005 passed in OJC Nos. 10582, 11262, 11268, 11269, 11271, 11273, 11275, 11279, 11280, 11324 & 11326 of 2000, by which the High Court dismissed the Writ Petition filed by the State of Orissa/Appellant against the Judgment and order of the Orissa Administrative Tribunal, Cuttack (hereinafter called as, "the Tribunal") dated 7.4.2000 issuing direction to the appellant to appoint all the persons whose names appeared in the panel for the selection on the post of Junior Clerk held in 1995.

2. Facts and circumstances giving rise to the present appeal are that in order to fill up 15 posts of Junior Clerks in District Sonepur, applications were invited by an advertisement dated 25.06.1995. The advertisement made it clear that number of vacancies could be increased. The respondents applied in pursuance of the said advertisement along with large number of persons and written examination was held in accordance with the Orissa Ministerial Service (Method of Recruitment to Posts of Junior Clerks in the District Offices) Rules, 1985 (hereinafter called as, "Rules, 1985").

“Before the selection process could complete, the number of vacancies were increased from 15 to 33 and as per the requirement of Rules, 1985, a merit list of 66 candidates was published on 6.11.1995. The appointments were made on the said posts. The respondents, whose names appeared in the merit list and could not be offered appointment, being much below in the merit list, filed applications before the Tribunal praying for a direction to the State to offer them appointments. The Tribunal, vide its Judgment and Order dated 7.4.2000, came to the conclusion that appointments were to be offered to all the candidates till the entire select list stood exhausted.

Therefore, the Tribunal directed to offer appointment to all left over candidates in the select list of 1995.”

3. Being aggrieved, the State preferred the writ petition against the said common Judgment and order of the Tribunal in the High Court of Orissa and the High Court, vide Judgment and order dated 26.10.2005, modified the order of the Tribunal issuing direction to the appellants to offer appointment to those persons who had approached the Tribunal. Hence, this appeal.

4. Sh. Janaranjan Das, learned counsel appearing for the appellant-State, has submitted that number of vacancies cannot be filled up over and above the number of vacancies advertised. Once the advertised vacancies are filled up, the selection process stands exhausted and the selection process comes to an end. Where the Rules provide to determine the vacancy yearly, life of select list cannot be more than one year and once the life of the select list expires, no appointment can be offered from the panel so prepared.

“The Tribunal and the High Court committed an error issuing directions to appoint the candidates from the unexhausted part of the select list, which is not permissible in law. Thus, the appeal deserves to be allowed.”

5. Per contra, Sh. H.P. Sahu and Sh. J.P. Mishra, learned counsel appearing for the respondents vehemently opposed the appeal contending that if the selection is not held in subsequent years, candidates whose names appear in the panel have to be offered appointments. Therefore, no interference is required with the impugned Judgment and order of the High Court. The appeal lacks merit and thus, liable to be dismissed.

6. We have considered the rival submissions of the learned counsel for the parties and perused the record.

7. Relevant Rules from Rules, 1985, which are necessary to be considered for deciding the appeal, read as under:-

“Rule 2 Definitions - In these rules unless the context otherwise requires -
..... "Year" means a calendar year.

Rule 3 Recruitment Recruitment to the posts shall be made through direct recruitment by means of a competitive examination to be held ordinarily once in every year.

Rule 6 Notification of vacancies On the receipt of the requisite information from the District Officers the Chairman of the Board shall notify the total number of vacancies to the local employment exchange indicating therein the number of reserved vacancies for the purpose of conducting the competitive examination.

Rule 11 (1) Allotment of successful candidates The Chairman of the Board shall ensure completion of evaluation of answer papers and preparation of the list of

successful candidates who have qualified by such standards as will be decided by him ordinarily within two months from the date of examination. The candidates' names shall be arranged in order of merit on the basis of marks secured by them in the examination conducted by the Board. This list of successful candidates drawn in order of merit shall not ordinarily exceed double the number of vacancies as determined under Rule 6.

Rule 12 The list prepared under Sub-rule (1) of Rule 11 shall remain valid for a period of one year from the date of publication of the same or till drawal of the next year's list, whichever is earlier.”

8. If the aforesaid relevant Rules are read together, the cumulative effect thereof comes to that after determining the number of vacancies taking into consideration the expected vacancies, the same shall stand notified to local Employment Exchange and advertise the same through other means. The select list, after holding the test as required under the Rules, 1985, shall be prepared and published, which shall contain the names of candidates, double the number of vacancies so advertised/determined.

9. Rule 14 merely enables the State Government to relax the eligibility conditions by recording reasons in respect of any class or categories of persons in public interest.

10. It is a settled legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised as "the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution", of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. Filling up the vacancies over the notified vacancies is neither permissible nor desirable, for the reason, that it amounts to "improper exercise of power and only in a rare and exceptional circumstance and in emergent situation, such a rule can be deviated and such a deviation is permissible only after adopting policy decision based on some rational", otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, not permissible in law. (Vide *State of Bihar & Chairman, Banking Service Recruitment Board & Ors.*¹).

11. In *State of Punjab v. Raghbir Chand Sharma and Ors.*², this Court examined the case where only one post was advertised and the candidate whose name appeared at Serial No. 1 in the select list joined the post, but subsequently resigned. The Court rejected the contention that post can be filled up offering the appointment to the next candidate in the select list observing as under:

“With the appointment of the first candidate for the only post in respect of which the consideration came to be made and select list prepared, the panel ceased to exist and has outlived its utility and at any rate, no one else in the panel can legitimately contend that he should have been offered appointment either in the vacancy arising on

account of the subsequent resignation of the person appointed from the panel or any other vacancies arising subsequently.”

12. In *Mukul Saikia and Ors. v. State of Assam and Ors.*³, this Court dealt with a similar issue and held that "if the requisition and advertisement was only for 27 posts, the State cannot appoint more than the number of posts advertised". The Select List "got exhausted when all the 27 posts were filled". Thereafter, the candidates below the 27 appointed candidates have no right to claim appointment to any vacancy in regard to which selection was not held. The "currency of Select List had expired as soon as the number of posts advertised are filled up, therefore, the appointments beyond the number of posts advertised would amount to filling up future vacancies" and said course is impermissible in law.

13. A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate.

*Union of India*⁴, held that appearance of the name of a candidate in the select list does not give him a right of appointment. Mere inclusion of candidate's name in the select list does not confer any right to be selected, even if some of the vacancies remain unfilled. The candidate concerned cannot claim that he has been given a hostile discrimination. (*see also Asha Kaul Ors.*⁵).

15. Select list cannot be treated as a reservoir for the purpose of appointments, that vacancy can be filled up taking the names from that list as and when it is so required.

“It is the settled legal proposition that no relief can be granted to the candidate if he approaches the Court after expiry of the Select List. If the selection process is over, select list has expired and appointments had been made, no relief can be granted by the Court *Government of National Capital Territory of Delhi & Anr.*⁶, *Commission, Trivendrum & Ors.*⁷, *Deepa Keyes Subha B. Nair & Ors. (supra)*.

16. The instant case is required to be examined in view of the aforesaid settled legal proposition. The Rules, 1985 provide for determining the number of vacancies and holding competitive examination ordinarily once in a year. Select list prepared so also valid for one year. In the instant case, 15 vacancies were advertised with a clear stipulation that number of vacancies may increase. The authorities had taken a decision to fill up 33 vacancies, thus, select list of 66 persons was prepared. It is also evident from the record that some more appointments had been made over and above the 33 determined vacancies. Thus, once the selection process in respect of number of vacancies so determined came to an end, it is no more open to offer appointment to persons from the unexhausted list. It is exclusive prerogative of the employer/State Administration to initiate the selection process for filling up vacancies occurred during a particular year. There may be vacancies available but for

financial constraints, the State may not be in a position to initiate the selection process for making appointments. Bonafide decision taken by the appointing authority to leave certain vacancies unfilled, even after preparing the select list cannot be assailed. The Courts/Tribunals have no competence to issue direction to the State to initiate selection process to fill up the vacancies. A candidate only has a right to be considered for appointment, when the vacancies are advertised and selection process commences, if he possess the requisite eligibility.

17. As the appointments had been made as per the select list prepared in 1995 and selection process came to an end, there was no occasion for the Tribunal to entertain the Applications in 1997, 1998 and 1999 for the simple reason that once the number of vacancies determined are filled, the selection process came to an end, no further appointment could be made from 1995 panel. The purpose of making the list of double of the vacancies determined is to offer the appointment to the persons from the waiting list in case persons who are offered appointment do not join. But it does not give any vested right in favour of the candidates whose names appeared therein.

18. It appears from the Judgment of the Tribunal that Rule 11(1) of the Rules, 1985 did not provide originally to prepare the list double the number of determined vacancies and it was only for preparing the list containing the names equal to the number of vacancies advertised/determined. In such a fact-situation, the select list could have been prepared only containing 33 names i.e. equivalent to the number of vacancies determined. In such a fact-situation, selection process would come to an end automatically whenever 33 candidates are appointed. However, if the appellant had prepared a list double the number of vacancies determined, that would not create any vested right in favour of the respondents. Thus, Tribunal committed grave error issuing direction to offer appointments to all the left over candidates.

19. The Tribunal held as under:-

“In this case by preparing the panel far exceeding the number of vacancies, the Rules have been violated.

For this lapse on the part fo the Collector, the candidates who have been subjected to a rigorous selection at more than one stage, should not be penalised.....The validity of the select list has expired long since. Both learned counsel for the applicant and the learned Government Advocate concede that no further recruitment has been conducted by the Collector, Sonapur. During this intervening period of four years vacancies must be arisen due to promotion, retirement, creation of new posts etc. in different offices.”

(Emphasis added)

20. The Tribunal, after recording the finding of fact that life of select list had expired, held that as the selection could not be held in subsequent years, thus, candidates whose names appeared in the panel should be offered appointment by granting relaxation of Rules.

“Issuance of such a direction is not permissible in law as no appointment can be made from the panel after expiry of the life of select list.”

21. The High Court has concluded as under:-

“Here the advertisement stipulated that there were vacancies and the vacancy position might go up.

The select list prepared admittedly contained the names of 66 successful candidates. A cumulative reading of Rules 6 & 11(1) of the OMS Rules, 1985 vis-à-vis the select list which contained the names of 66 successful candidates leads to an irresistible conclusion that the number of vacancies at the time of publication of the select list was 66. The stand of the State before this Court is that under the impression that the select list should contain double the number of vacancies, a list of 66 candidates was published. But then, if the said statement is accepted, the vacancies that existed at the time of publication of the select list would have been 33. But it appears that the total number of candidates already appointed is 40.....The submission of the State that as one year had expired from the date of publication of the select list, the same had spent its validity cannot also be accepted. If vacancies were available, the candidates selected but illegally not sponsored for appointment should not suffer.”

In view of the above, the High Court directed to offer the appointment to the persons whose names appeared in the panel and had approached the Tribunal.”

22. The aforesaid view taken by the High Court cannot be held to be in consonance with law. More so, if the State has committed an error in preparing the merit list containing the names of candidates double the number of vacancies determined, that would not mean that select list has become immaterial and all those persons whose names appeared in the list would be offered appointment even after expiry of the life of select list.

23. In view of the above, the Judgment and order impugned hereinabove cannot be sustained in the eyes of law. The appeal is allowed. The Judgments and orders of the Tribunal dated 7.4.2000 and the High Court dated 26.10.2005 are set aside. No order as to costs.

¹AIR 1996 SC 932

²AIR 2001 SC 2900

³AIR 2009 SC 747

⁴AIR 1991 SC 1612

⁵(2009) 2 SCC 479

⁶(1999) 1

⁷(2007) 6 SCC 190