

**SUPREME COURT OF INDIA**

State of Orissa & Ors.

Vs.

Saroj Kumar Jena

C.A.No.1284 of 2011

(P.Sathasivam and B.S.Chauhan,JJ.,)

09.02.2011

**JUDGMENT**

**Dr.B.S.Chauhan,J.,**

1. This appeal has been preferred against the judgment and order dated 5.8.2005 of the High Court of Orissa at Cuttack in O.J.C. No. 11122/1999, by which the High Court has issued directions to the State Govt. to grant particular pay scales with reference to particular dates in the grade of Upper Division Clerk and Head Clerk, to the respondent.

2. Facts and circumstances giving rise to this appeal are that the respondent stood appointed as a Lower Division Clerk (hereinafter called as LDC) by the governing body of Mahanga Puspagiri Mahavidyalaya, Irakana, Cuttack, on 18.8.1985. His appointment was duly approved by the Director of Higher Education (hereafter called appellant No.2), vide order dated 6.11.1990. The said respondent was promoted to the post of Upper Division Clerk (hereinafter called UDC) w.e.f. 3.3.1990 and thereafter to the post of Head Clerk w.e.f.

2.4.1992. In spite of the fact that his appointment and promotion had been duly approved by the appellant No.2, being the statutory authority, his pay was not fixed in the pay scales meant for the respective promotional post.

3. The respondent made a representation to fix his pay in the pay scales of the posts of UDC and Head Clerk. However, the said representation was rejected vide order dated 20.3.1999, in view of the fact that he did not possess the requisite qualifications i.e. he had not passed the accounts examination, as required under the Orissa Non- Government Aided College Ministerial Services (Method of Recruitment and Conditions of Service) Rules, 1999 (hereinafter called Rules 1999).

4. Being aggrieved, the respondent approached the High Court by filing the writ petition No.11122/1999, which has been allowed vide impugned judgment and order dated 5.8.2005. Hence, this appeal.

5. Mrs. Kirti Renu Mishra, learned counsel appearing for the appellants, has submitted that the respondent did not fulfill the requisite qualification as per the Rules 1999. For this reason, the High Court was not justified for granting the said relief. According to Mrs. Mishra, no new post could have been created without the prior approval of the appellant No.2. In the instant case, as no post had been sanctioned, the appointment of the respondent is totally illegal and thus, the impugned judgment and order is liable to be set aside.

6. On the contrary, Shri V.S. Raju, learned counsel appearing for the respondent, has opposed the appeal contending that the High Court has disposed of the writ petition following its earlier judgment in Rajendra Prasad Singh v. State of Orissa, 93 (2002) CLT 346 and in view of the statement made by the State counsel that the matter was squarely covered by the said judgment. Thus, the appeal lacks merit and is liable to be dismissed.

7. We have considered the rival submissions made by learned counsel for the parties and perused the record.

8. Admittedly, the Rules 1999 could not be made applicable with retrospective effect and in case the respondent had been appointed and promoted further to the posts of UDC and Head Clerk and those promotions have been duly approved by the appellant No.2, no fault can be found with the impugned judgment and order. We also find no force in the submission made by Mrs. Mishra that the respondent could not be appointed as no sanctioned post was available and prior approval had not been taken from the appellant No.2 for making the appointment of the respondent. Thus, he stood appointed to a non existing post. The Circular issued by the Education & Youth Services Department, Government of Orissa, dated 27.5.1978 contained a clause as under:

"xx xx xx

Prior concurrence of Govt. should be obtained for increase in seats and opening of new subjects and creation of new posts."

(Emphasis added)

The Letter dated 6.11.1990 granting approval by the appellant No.2 reads as under:

"In pursuance of G.O. No.46209/H, and No.46210/H dated 18.1.85 approval is hereby accorded provisionally to appoint and adjustment of Sri Saroj Kumar Jena, L.D.C., Mahanga Puspagiri Mahavidyalaya, Erakana, Dist. Cuttack with effect from 1.3.90 against the vacancy, caused due to resignation tendered by Sri Khageswar Pradhan on 28.2.90. Sri Jena shall be entitled to draw 1/3rd grant with effect from 1.3.90 to 31.5.90 and 2/3rd grant with effect from 1.6.90 in the scale of Rs.780-1160/-. The post L.D.C. has been admitted to 1/3rd grant in aid from 1.6.88." (Emphasis added) It is evident from the aforesaid letter of approval dated 6.11.1990 that the respondent had not been appointed on a non existing/non-sanctioned post. The post became vacant due to the resignation tendered by Sri Khageswar Pradhan on 28.2.1990.

Therefore, the post was available and the provisions of the Circular dated 27.5.1978 could not be made applicable to the case at hand.

9. In view of the above we do not find force in the appeal. The appeal is accordingly dismissed. No costs. However, in the facts and circumstances of the case, in case the pay scale of the respondent had not been fixed as directed by the High Court, all the formalities shall be completed in compliance with the High Court's judgment within a period of three months from today. Arrears, if any, should be paid to him within a period of three months thereafter.