

STATE OF ORISSA AND ORS.

V.

KHIROD KUMAR NAYAK

Civil Appeal No. 1158 of 2009

FEBRUARY 23, 2009

[DR. ARIJIT PASAYAT AND ASOK KUMAR GANGULY, JJ.]

Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 – Circular No. 28365-EYS dated 8.7.1981 and Circular no.155000-XVIIIEP-50/91-E dated 27.3.1992 issued by Government of Orissa, Education and Y.S. Department – Yardstick for fixation of standard staff prescribed in the circulars – Claim for appointment as ‘Fourth peon’ – Held: There is no prescription of a ‘fourth peon’ in the yardstick prescribed – Expression used in the two circulars is ‘Daftry’ and not ‘fourth peon’ – Post of Daftry is a promotional post and it carried higher scale of pay – High Court erred in equating the ‘fourth peon’ with ‘Daftry’ and in upholding the claim for appointment as ‘fourth peon’.

The claim of respondent no.1 was that he was appointed as ‘fourth peon’ by the management of an aided educational institution as defined under the Orissa Education Act, 1969. As the State did not approve the appointment, holding the same to be beyond the prescribed yardstick, writ application was filed for direction to the concerned authorities to accord approval to the appointment. High Court allowed the writ application by equating the ‘fourth peon’ with ‘Daftry’.

In appeal to this Court, appellant-State contended that there was no prescription of a ‘fourth peon’ in the yardstick prescribed; and that the post of ‘Daftry’ was a promotional post which carried higher scale of pay and so last entrant was not entitled to the post of ‘Daftry’.

A Allowing the appeal, the Court

HELD: 1. Government of Orissa, Education and Y.S. Department, issued Circular No. 28365-EYS dated 8.7.1981 fixing standard staff for the non-government secondary schools. The position was further clarified by Circular dated 27.3.1992. A comparison of the two circulars shows that under 1981 Circular the requisite roll strength was 100, which was changed to 500 subsequently in the 1992 Circular. The expression used in the two circulars is "Daftry" and not "fourth peon". The High Court seemed to have fallen in error by proceeding on the basis as if the circulars referred to "fourth peon". The post of "Daftry" carries higher scale of pay and is a promotional post for class IV employees. That being the position, the High Court was not justified in directing approval of the writ petitioner's services as "fourth peon". But one significant aspect cannot be lost sight of. If a school was entitled to have a "Daftry", certainly the appointment was to be made by promoting one of the three persons i.e. Office Peon, Office Attendant and Night Watcher-cum-Sweeper, there being no other class IV post in the institution. It is for the Managing Committee of the institution to decide who is to be promoted and thereafter seek approval of the concerned authorities. That way the claim of the writ petitioner could have been considered by the authorities, on being appropriately moved by the management. It is undisputed that the writ petitioner was appointed by the Managing Committee, may be under a misreading of the relevant government orders. [Paras 8, 10, 11, 12] [974-F; 974-C; 975-H; 976-A-B; 976-C-E]

2. The management of the concerned institution shall move the concerned authorities or approval to the promotional appointment of a class IV employee, as "Daftry". Simultaneously, it can also recommend for appointment to the class IV post, in case approval is accorded to the recommendation for appointment of "Daftry" on promotion. [Para 13] [976-F]

CIVILAPPELLATE JURISDICTION : Civil Appeal No. 1158 A
of 2009

From the Judgement and Order dated 27.11.1996 of the
Hon'ble High Court of Orrisa at Cuttack in OJC No. 6857 of
1996.

Jana Kalyan Das, for the Appellant.

B.S. Sharma, M.K. Michael, for the Respondent.

The Judgement of the Court was delivered by

DR. ARIJIT PASAYAT, J.

1. Delay condoned.

2. Leave granted.

3. Challenge in this appeal is to the order of a Division D
Bench of the Orissa High Court. Factual background can be
adumbrated concisely as follows:

4. The responded no.1 filed a writ application being OJC
No.6857 of 1996 before the Orissa High Court claiming that he
was appointed as "fourth peon" by the management of the E
concerned institution, which is an "aided educational institution"
as defined under the Orissa Education Act, 1969 (in short the
'Act') and Orissa Education (Recruitment and Conditions of
Service of Teachers and Members of the Staff of Aided
Educational Institutions) Rules, 1974 (in short 'Recruitment F
Rules'). It is not in dispute that if an institution is an aided
educational institution, same is governed by the Act and rules
framed thereunder. The Recruitment Rules are framed under
the Act. As the functionaries of the State did not approve the
appointment holding the same to be beyond the prescribed G
yardstick, writ applications were filed for direction to the
concerned authorities to accord approval to the appointment.

5. The High Court by the impugned judgment in writ
application came to hold that the functionaries of the State were
not justified in refusing to accord approval. Stand of the State H

A Government was that circular dated 8.7.1981 contained yardstick for fixation of standard staff for the Non-Government Secondary Schools in supersession of earlier circulars. Under the "category of staff" the number of peons which can be appointed was clearly spelt out. Only if the roll strength of the institution exceeded a particular number, one post of "Daftry" was admissible. According to the State Government the post of "Daftry" is a promotional post and, therefore, the concept of a "fourth peon" as sought to be canvassed by the writ petitioners is without any legal foundation. The position was further clarified by Circular dated 27.3.1992. The High Court on consideration of the rival stands came to equate the "fourth peon" with "Daftry" and held the claim of the writ petitioner warranted acceptance.

D 6. In support of the appeal, learned counsel for the State of Orissa submitted that the High Court missed to consider several vital aspects. Firstly, there is no prescription of a "fourth peon" in the yardstick prescribed. The post of "Daftry" is a promotional post and it carries higher scale of pay. That being the position, the last entrant cannot claim the post of the "Daftry".

E 7. Per contra, learned counsel for the writ petitioner submitted that the High Court has considered the circulars and come to the right conclusion that the claim for appointment as the "fourth peon" is legally enforceable.

F 8. At this juncture it is to be noted that at different points of time yardsticks were formulated. Government of Orissa, Education & Y.S. Department, issued Circular No. 28365-EYS dated 8.7.1981 fixing standard staff for the non-government secondary schools. So far as peons are concerned, the relevant portions of the circular read as follows :

G	"Category of staff	3 class	5class	7 class
			
	9.Peons (I) Office Peon	1	1	1
H	(ii) Office Attendant	1	1	1

(iii) Night watcher cum sweeper	1	1	1	A
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Notes

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C)(ii) Where the roll strength of the school exceeds 100 one post of Daftry is admissible.

.....”

9. Subsequently by another circular No.155000-XVIIIEP-50/91-E, dated 27th March, 1992 the position was further clarified as under:-

“I am directed to say that the question of fixation of revised yardstick for appointment of class IV employees in Non-government Secondary Schools was under consideration of Government for some time past. After careful consideration Government have been pleased to decide that the yardstick for class IV employees of Non-Government Secondary Schools shall be as follows:

Category of staff	3 class	5class	7 class	E
(i) Office Peon	1	1	1	
(ii) Science Attendant	1	1	1	
(iii) Night Watcher cum Sweeper	1	1	1	F

Where the roll strength of 10 Class High School is 500 (five hundred) or more, one post of Daftry admissible.

For the schools running shift system for shortage of accommodation one additional post of peon is admissible.

The yardstick will come into force with effect from the 1st January 1992 and Government order referred to above stands modified to the extent indicated above.”

10. A comparison of the two circulars shows that under

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A 1981 Circular the requisite roll strength was 100, which was
changed to 500 subsequently in the 1992 Circular.

B 11. It is fairly accepted by learned counsel for the writ
petitioner that the expression used in the two circulars is "Daftry"
and not "fourth peon". The High Court seems to have fallen in
error by proceeding on the basis as if the circulars referred to
"fourth peon". This is clear from the reading of the various
judgments impugned in this appeal.

C 12. It is to be noted that post of "Daftry" carries higher scale
of pay and is a promotional post for class IV employees. That
being the position, the High Court was not justified in directing
approval of the writ petitioner's services as "fourth peon". But
one significant aspect cannot be lost sight of. If a school was
entitled to have a "Daftry", certainly the appointment was to be
made by promoting one of the three persons i.e. Office Peon,
Office Attendant and Night Watcher-cum-Sweeper, there being
no other class IV post in the institution. It is for the Managing
Committee of the institution to decide who is to be promoted
and thereafter seek approval of the concerned authorities. That
way the claim of the writ petitioner could have been considered
by the authorities, on being appropriately moved by the
management. It is undisputed that the writ petitioner was
appointed by the managing committees', may be under a
misreading of the relevant government orders.

F 13. We, therefore, while allowing this appeal direct that
the management of the concerned institution shall move the
concerned authorities for approval to the promotional
appointment of a class IV employee, as "Daftry". Simultaneously,
it can also recommend for appointment to the class IV post, in
case approval is accorded to the recommendation for
appointment of "Daftry" on promotion. The decision on both
motions shall be taken within three months from the date of
submission of the recommendation in accordance with law
keeping in view the operative yardsticks in force at the time of
appointments were made. Even if there has been refusal earlier,

the matter shall be reconsidered in the light of what has been stated above. A

14. Before we part with this case we must indicate that undisputedly there were several decision of the Division Bench rendered at earlier points of time, taking a view contrary to the one taken in the impugned judgment. Learned counsel for the respondent (writ petitioner) fairly accepted that it is so. In fact, copy of one such decision dated 15.7.1996 in O.J.C. 5108/96 was placed on record and it has been brought to the notice of the learned Judges hearing the writ petition. B

15. The appeal is allowed in the aforesaid terms, leaving the parties to bear their respective costs. C

D.G.

Appeal allowed.