

A STATE OF ORISSA AND ORS.
v.
BHIKARI CHARAN KHUNTIA AND ORS. ETC.

SEPTEMBER 22, 2003

B [DORAISWAMY RAJU AND ARIJIT PASAYAT, JJ.]

Service Law :

C *Appointment—Inclusion of name in Merit List/Select List and/or
recommended by Employment Exchange—Held, does not confer indefeasible
right to appointment if vacancies exist—State under no legal duty to
fill up all or any of the vacancies—Interference with decision of State—
Held, it is a policy decision and unless arbitrary, no interference
is required—Decision not to fill up posts has to be taken for proper
D reasons—In the facts, held, decision not to fill up posts based on proper
reasons.*

E **Respondents' names were sponsored by Employment Exchanges
for filling up 150 posts of Junior Assistants by direct recruitment in
the cadre of Local Fund Service for appointment in different Muni-
cipalities/Notified Area Councils. Respondents filed writ petitions when
no steps were taken to fill up the said posts, which was allowed by the
High Court. Hence, these appeals by the State.**

F **State contended that respondents have no indefeasible right to
appointment once their names were called from the employment
exchanges; and that State took policy decision to abolish Octroi and
not to make any further appointment by abandoning the process
initiated through Employment Exchanges to adjust persons rendered
surplus by abolition of Octroi.**

G **Respondent contended that several persons were appointed despite
stand of the State regarding ban on further appointment.**

Allowing the appeals, the Court

H **HELD : 1. Candidates whose names appear in the merit list do**

not acquire indefeasible right of appointment if vacancies exist. The State is under no obligation to fill up all or any of the vacancies, unless the relevant recruitment rules so indicated. Though, the State is under no legal duty to fill up all or any of the vacancies, it does not mean that State has licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken *bona fide* for proper reasons. If vacancies or any of them are filled up, the State is bound to respect the comparative merit of candidates as reflected in the recruitment test and no discrimination can be permitted. [991-A-C]

Shankarsan Dash v. Union of India, [1991] 2 SCR 567, followed.

All India SC & ST Employees Association and Anr. v. A Arthur Jeen and Ors., [2001] 6 SCC 380 and *Ludhiana Central Co-operative Bank Ltd. v. Amrik Singh and Ors.*, [2003] 6 Supreme 196, relied on.

2. Whether to fill up or not to fill up a post, is a policy decision and unless it is arbitrary, the High Court or the Tribunal has no Jurisdiction to interfere with such decision of the Government and direct it to make further appointments. No selection was made and not even any select list was in existence. Even if there had been any such selection or inclusion of any of the names in the select list, same could not have given any right. Therefore, mere sending of name by the employment exchange could not have conferred any right. The writ applications were thoroughly mis-concieved, and the court mis-directed itself as to the nature of relief to be granted. [991-E, F]

Government of Orissa through Secretary, Commerce and Transport Department, Bhubaneswar v. Haraprasad Das and Ors., [1998] 1 SCC 487, relied on.

3. The reasons which persuaded the Government to absorb those who were rendered surplus on account of abolition of Octroi and the decision taken to abolish substantial number of posts to minimize expenditure cannot be said to be either extraneous or irrelevant for the purpose, to be ignored by the Court in according relief to the writ petitioners. [991-G-H, 992-A]

4. The appointments made in respect of some who got empanelled

A on regular selections made by the recruitment Board pursuant to the selection process undertaken does not give any sustenance to the writ petitioners to claim parity of treatment when their claims cannot be equated to those of such empanelled candidates. [992-A-B]

B CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 7938 - 7940 of 2003

From the Judgment and Order dated 30.6.2000 of the Orissa High Court in O.J.C. Nos 14221/96, 458 and 4091 of 1997.

C WITH

C.A. Nos. 7941 and 7942 of 2003.

Mukul Rohatgi, Additional Solicitor General and Radha Shyam Jena for the Appellants.

D B.A. Mohanti, Ms. M.Tripathy and Ashok Mathur for the respondents.

The Judgment of the Court was delivered by

E **ARIJIT PASAYAT, J. : Leave Granted.**

Since by common judgment learned Single Judge of the Orissa High Court disposed of three writ petitions (O.J.C. Nos. 14221 of 1996, 458 of 1997 and 4091 of 1997), impugned in these appeals, the present judgment shall govern each one of them.

F Factual position, almost undisputed, is as follows :

Respondents filed writ petitions before the Orissa High Court taking the stand that their names were sponsored by the concerned employment exchanges. When requisitions were sent to them by competent functionaries of the State their names were sponsored. The requisition indicated that 150 posts of Junior Assistants were to be filled up by direct recruitment in the cadre of Local Fund Service for appointment in different Municipalities/ Notified Area Councils (for short 'N.A.Cs'). The proforma attached to the requisition letter in question indicated the types of workers required as

H Junior Assistants in the cadre of Local Fund Service and the minimum

qualifications for the post was H.S.C. It was also indicated in the requisition that preference will be given to those who have passed Local Self Government Diploma Examination. Writ petitioners by writ applications under Article 226 of the Constitution of India, 1950 (in short the 'Constitution') made grievance before the High court that through their names were sponsored by the employment exchanges, no interview was conducted and no action was taken to fill up the posts. Prayers in the writ petitions were as follows :

"(i) issue a writ of mandamus directing the opposite parties to complete the recruitment process and select the petitioners for appointment as Junior Assistants in Municipalities/N.A.Cs. and

(ii) pass such other orders as may be deemed fit and proper in the facts and circumstances of the case."

The State of orissa filed counter affidavit, *inter alia*, taking the stand that the selection could not be held as the vacancy position of all urban local bodies could not be specifically ascertained. It was also stated that the vacancies assessed had been found already filled up through irregular promotions and appointments made by the respective local bodies. Accordingly instructions were issued to revert/retrench all such irregular appointees or promotees. Further counter affidavit was filed indicating that the Government took a decision abolishing 50% base level posts as on 1.7.1999. It was also indicated that w.e.f. 30.11.1999 policy decision was taken to abolish octroi and 3400 persons who were rendered surplus to be adjusted. The number included a large number of clerical staff also. As there was no scope for further appointment, the process which was initiated by getting names from the employment exchanges was abandoned. After considering the rival stands, the High Court by the impugned judgment gave the following directions :

"Considering the submission of the learned counsel for the petitioners in the three writ petitions, and submission of the learned Standing Counsel and the averments made in para-6 of the counter, it is directed that the opposite parties shall hold interview for selection of candidates for appointment to the posts of Junior Assistants in the cadre of Local Fund service within a period of three months from today. While preparing the merit list,

A preference will be given to the candidates who have passed Local Self Government Diploma.

B It is contended by Mr. Das that some petitioners have become overaged in the meantime for appointment. It appears from Annexure-4 that instructions were sponsored by the Employment Exchange and some directly applied for the post, but till today no interview has been conducted. Keeping in view the said fact in my opinion, the authorities shall also consider age of the petitioners who are found to be overaged. It is further directed that after preparation of merit list, appointment shall be made depending on the availability of vacancies."

C In support of the appeals, learned counsel for the Appellant-State submitted that the High Court proceeded as if writ petitioners had indefeasible right for getting appointment once their names were called for from the employment exchanges. It is a settled position in law that even after a candidates' name is empanelled, no right is conferred on him. When the State took conscious decision not to pursue further action to make any further appointment particularly keeping in view to adjust persons who have rendered surplus by abolition of the octroi, there was no scope for the High Court to direct in the manner done.

E In response, learned counsel for the writ petitioners-respondents submitted that a hope was kindled in the hearts of the unemployed applicants when their names were sponsored by the employment exchange. Instead of pursuing the process, appointments were done clandestinely and finally after a long lapse of time the process was claimed to have been abandoned. It is pointed out that though the stand of the State is ban on further appointment, and/or decision not to appoint persons, in fact, several persons have been appointed in various local bodies. It is submitted that the High Court took a view in equity taking into account plight of the unemployed applicants. This is not a case where the jurisdiction under Article 136 of the Constitution should be exercised. Learned counsel for the appellants-State submitted that the instances referred to by the respondents do not have any bearing. Regular recruitment examinations were held in the year 1996 and result was published in June, 2000 and the list was H revalidated. Out of 32 posts, 13 appointments were under Rehabilitation

Assistance Scheme. That being the position, no assistance is available to the writ petitioners-respondents. A

A Constitution Bench of this Court in *Shankarsan Dash v. Union of India*, [1991] 2 SCR 567 held that candidates whose names appear in the merit list do not acquire indefeasible right of appointment if vacancies exist. The State is under no obligation to fill up all or any of the vacancies, unless the relevant recruitment rules so indicated. Though, the State is under no legal duty to fill up all or any of the vacancies, it does not mean that State has licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken *bona fide* for proper reasons. If vacancies or any of them are filled up, the State is bound to respect the comparative merit of candidates as reflected in the recruitment test and no discrimination can be permitted. This position was reiterated in *All India SC & ST Employees Association and Anr. v. A Arthur Jeen and Ors.*, (2001) 6 SCC 380 and *Ludhiana Central Co-operative Bank Ltd. v. Amrik Singh and Ors.*, (2003) 6 Supreme 196. B C D

As was observed by this Court in *Government of Orissa through Secretary, Commerce and Transport Department, Bhubaneswar v. Haraprasad Das and Ors.*, [1998] 1 SCC 487, whether to fill up or not to fill up a post, is a policy decision and unless it is arbitrary, the High Court or the Tribunal has no jurisdiction to interfere with such decision of the Government and direct it to make further appointments. In the present case, even no selection was made and not even any select list was in existence. Even if there had been any such selection or inclusion of any of the names in the select list, same could not have given any right. Therefore, mere sending of name by the employment exchange could not have and in fact has not conferred any right. The writ applications were thoroughly mis-conceived, and the court mis-directed itself as to the nature of relief to be granted. E F

It cannot be lost sight of that because of certain circumstances and policy decision which were also brought to the notice of the High Court, appointments could not be made. The reasons which persuaded the Government to absorb those who were rendered surplus on account of abolition of octroi and the decision taken to abolish substantial number of posts to minimize expenditure cannot be said to be either extraneous or H

- A** irrelevant for the purpose, to be ignored by the Court in according relief to the writ petitioners. But the High Court notwithstanding chose to give directions as quoted above. The appointments made in respect of some who got empanelled on regular selections made by the recruitment Board pursuant to the selection process undertaken does not give any sustenance to the writ petitioners to claim parity of treatment when their claims cannot be equated to those of such empanelled candidates.
- B**

In view of legal position highlighted above, the decision of the High Court is clearly unsustainable and is set aside. The appeals are allowed. Parties to bear their respective costs.

C

A.K.T.

Appeals allowed.