

Jyostnamayee Mishra

v.

The State of Odisha and Ors.

(Special Leave Petition (Civil) No. 13984 of 2023)

20 January 2025

[J.K. Maheshwari and Rajesh Bindal,* JJ.]

Issue for Consideration

Whether an employee in an establishment is entitled to claim promotion on a post for which he does not fall in the feeder cadre and the post is required to be filled up 100% by way of direct recruitment; whether a vacancy meant for direct recruitment can be filled up merely by issuing a circular in the establishment and not by issuing an advertisement calling application from the eligible candidates from public at large.

Headnotes[†]

Sub-ordinate Architectural Service Rules, 1979 – Claim of petitioner for the post of Tracer on promotion basis – Petitioner herein was working as a peon with respondent-State – Petitioner disappointed with the various rounds of the litigation before the Tribunal followed by writ petition before the High Court – Petitioner alleged the discriminatory action of the respondent authorities with regard to her promotion to the post of Tracer as two persons were promoted by communications dated 28.06.1999 from the post of peon to Tracer – Petitioner is claiming violation of Article 14 of the Constitution:

Held: The claim of the petitioner has been rejected on the ground that she is not eligible for the post of Tracer – As per 1979 Rules, the post of Tracer is to be filled up to 100% by way of direct recruitment in terms of Rule 5(1)(e) of the 1979 Rules and the method of direct recruitment has been provided in Rule 7 thereof – Undisputedly, the process as provided in the Rules was not followed – The post of Tracer, not being promotional post from the post of Peon, there is no merit in the claim of the petitioner – As far as violation of Article 14 and discriminatory action is concerned, this Court cannot put a stamp on the illegalities committed by the department while perpetuating the same – A litigant coming to

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the Court cannot claim negative discrimination seeking direction from the Court to the department to act in violation of the law or statutory Rules – It is a settled proposition of law that Article 14 does not envisage negative equality – Thus, there is no merit in the petition – In the case in hand there was casualness on the part of the State Authorities while dealing with the litigation – Even before the Tribunal, the petitioner had three rounds of litigation followed by one Writ Petition before the High Court by the State and thereafter this Court – At none of these stages, the relevant statutory 1979 Rules were referred to either in the counter or in the petition – Such conduct is not expected from the State which is the major litigant and the case in hand is an example of unnecessary generation of litigation by the State where the authorities need to circumspect and be more careful. [Paras 30, 31, 33]

Sub-ordinate Architectural Service Rules, 1979 – Rules 5, 6, 7 – Post of Tracer – Category to be filled by direct recruitment – Importance of public advertisement – Whether in the instant case, the procedure prescribed in Rule 7 was followed:

Held: From a perusal of the Rules, it is evident that the post of Tracer in all three categories is to be filled up by direct recruitment only, after following the procedure as prescribed – It is not in dispute that the procedure as prescribed in Rule 7 of the 1979 Rules has not been followed by issuing advertisement and inviting application for the post of Tracer – All what is said is that a Circular was issued in the department inviting applications from the Peons for appointment or promotion for the post of Tracer – The Supreme Court in *Union Public Service Commission v. Girish Jayanti Lal Vaghela and others*, has emphasised the importance of a public advertisement for inviting applications to a post under the State. [Para 22]

Case Law Cited

Saumya Chaurasia v. Directorate of Enforcement [2023] 15 SCR 848 : (2024) 6 SCC 401; *R. Muthukumar & Others v. The Chairman and Managing Director TANGEDCO & Others*, 2022 INSC 157 : [2022] 1 SCR 577 : 2022 SCC OnLine SC 151 – relied on.

Union Public Service Commission v. Girish Jayanti Lal Vaghela and Others [2006] 1 SCR 1006 : (2006) 2 SCC 482; *Basawaraj v. Special Land Acquisition Officer* [2013] 8 SCR 227 : (2013) 14 SCC 81; *Kusha Duruka v. The State of Odisha*, 2024 INSC 46 : [2024] 1 SCR 604 : (2024) 4 SCC 432 – referred to.

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List of Acts

Sub-ordinate Architectural Service Rules, 1979; Orissa Subordinate Architectural Service Rules, 1979.

List of Keywords

Promotion; Direct recruitment; Peon; Tracer; Rule 5(1)(e) of the Sub-ordinate Architectural Service Rules, 1979; Article 14 of Constitution; Casualness on the part of the State Authorities; Discriminatory action; Illegalities committed by the department; Negative equality.

Case Arising From

CIVIL APPELLATE JURISDICTION: Special Leave Petition (Civil) No. 13984 of 2023

From the Judgment and Order dated 12.10.2022 of the High Court of Orissa at Cuttack in WPC(OAC) No. 18463 of 2017

Appearances for Parties

Anand Swain, Siddhartha Chowdhury, Advs. for the Petitioner.

Shibashish Misra, Adv. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Rajesh Bindal, J.

1. This Court had been called upon to examine the validity of an order passed by the Court below where the parties failed to produce proper documents or annexed incorrectly typed documents. This does not happen in isolation, rather is a routine, which sometimes results in miscarriage of justice in case the issues are not examined in detail with proper assistance of the parties, especially the State where it is party to the *lis*. It may also put the Court to ridicule.
2. The challenge in the present petition is to the order of the High Court¹ dated 12.10.2022 passed in Writ Petition² filed by the State

1 High Court of Orissa at Cuttack

2 Writ Petition Civil (OAC) No.18463 of 2017

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where the order passed by the Tribunal³ dated 08.01.2016 in an application⁴ filed by the petitioner was set aside.

3. An interesting issue which arises is as to whether an employee in an establishment is entitled to claim promotion on a post for which he does not fall in the feeder cadre and the post is required to be filled up 100% by way of direct recruitment? Another important issue is whether a vacancy meant for direct recruitment can be filled up merely by issuing a circular in the establishment and not by issuing an advertisement calling application from the eligible candidates from public at large?
4. The petitioner herein was working as a peon with respondent-State. She was appointed as such in the year 1978. The petitioner filed a representation dated 07.01.1999 to be appointed to the post of Tracer.
5. While the said representation was pending, the petitioner filed O.A. No.628(C) of 1999 before the Tribunal at Cuttack. The same was disposed of at admission stage *vide* order dated 26.03.1999, directing the respondent therein to dispose of her representation within these months from date of receipt of order. Pursuant to this, *vide* letter dated 05.07.1999 respondent communicated to the petitioner that the post of Tracer will not be filled up on promotion from the lower category of post since it is not a promotional post and vacancy of Tracer will be filled up in due course by conducting the interview.
6. The petitioner filed another application bearing O.A. No.1126(C) of 2002 before the Tribunal *inter alia* seeking for the intervention of the Tribunal against the discriminatory action of the respondent authorities with regard to her promotion to the post of Tracer. The said O.A. was later transferred to the Principal Bench of the Tribunal at Bhubaneswar and was registered as O.A. No.742 of 2009.
7. Learned Tribunal *vide* order dated 27.09.2010 disposed of the said O.A. directing the respondent to consider the case of the petitioner along with similarly placed Class-IV Employees for their promotion to the post of Tracer against available future vacancy within a period of three months from the date of communication of the order.

3 Orissa Administrative Tribunal, Bhubaneswar

4 O.A. No.1696 of 2010

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8. *Vide* order dated 23.11.2010, passed in compliance to the order of the Tribunal dated 27.09.2010 passed in the Application⁵ filed by the petitioner, her representation for appointment on the post of basic level Tracer was rejected due to ban on recruitments imposed by the Finance Department⁶.
9. In the third round of litigation, in the Application⁷ filed by the petitioner before the Tribunal impugning the order dated 23.11.2010, *vide* order dated 08.01.2016, the respondent was directed to promote/appoint the petitioner on the post of Tracer against any vacant post. In case no post is available, then the last person so promoted, after the direction was issued in the earlier O.A. filed by the petitioner, be reverted. Strangely enough to note here that no person was impleaded as party, who may be affected by the order passed by the Tribunal in case benefit is given to the petitioner. A Review Petition bearing R.P. No.28 of 2016 preferred by Respondent therein, was rejected *vide* order dated 28.02.2017.
10. Aggrieved against these orders passed by the Tribunal, the State preferred Writ Petition No.18463 of 2017 before the High Court. The argument raised was that the petitioner was not eligible for the post of Tracer in terms of paragraph 3(d) of the Letter No.4775 dated 26.02.1980 issued by the Works Department. Hence, she was not found to be eligible. The orders dated 08.01.2016 and 28.02.2017 passed by the Tribunal were set aside. As the retiral benefits had been extended to petitioner for the post of Peon, the High Court disposed of the Writ Petition accordingly.
 - 10.1 We are constrained to note at this stage that the Rules namely Sub-ordinate Architectural Service Rules, 1979, (hereinafter “1979 rules”) as framed in exercise of powers conferred under the proviso to Article 309 of the Constitution of India and notified in the official Gazette on 25.07.1980 *vide* notification No.4773- E-IXR-1/80-E were sought to be referred by the learned counsel appearing before the High Court as Letter No.4775 dated 26.02.1980 issued by the Works Department, and without perusing the proper document, even the High Court has referred those in the judgment in the same manner.

5 O.A. No.742 of 2009

6 Office Memorandum No.10954 dated 14.03.2001.

7 O.A. No.1696 of 2010

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11. Learned counsel for the petitioner argued that the High Court, while accepting the Writ Petition of the State, had wrongly quoted paragraph 3(d) of Letter No.4775 dated 26.02.1980 in which the qualifications for the post of Tracer have been mentioned. The qualification as per paragraph 3(d) required is the experience of 02 years in tracing from blue printing or a certificate of draftsmanship from the Industrial Training Institution. Learned counsel argued that the petitioner possesses the qualification as she had undergone the course of Tracer Training of 03 months with Institute of Survey and Mining Technology, Bhubaneswar for which a certificate was granted on 22.09.1997. The petitioner is fully qualified for the post, but she was not called for the interview, and the findings are erroneous. It is the case of the petitioner that there being an error apparent on record regarding qualification, as such the impugned order passed by the High Court deserves to be set aside and that of the Tribunal be restored.
12. It was further argued, earlier the petitioner was called for interview for the post of Tracer in the year 1991 but was not successful. Thereafter, she was again called for interview on 16.03.1999 which was postponed. Other similarly placed employees, namely, Mr. Lalatendu Rath and Ms. Jhinarani Mansingh were promoted as Tracer from the post of Peon, *vide* order dated 28.06.1999. Hence, looking at the discrimination also the petitioner's case deserves to be considered.
13. On the other hand, the stand taken by the learned counsel for the respondent was that the petitioner is not eligible for promotion from the post of Peon to the post of Tracer as per the letter dated 26.02.1980. It is argued that the case has rightly been considered and finding no merit therein, the High Court had set aside the order passed by the Tribunal.
14. A perusal of the document annexed as Annexure P-2 along with the petition gives it a color of statutory rules but not typed in a proper manner. During the course of arguments, learned counsel for the parties were asked to apprise the Court about the relevant statutory rules applicable for recruitment/promotion for the post of Tracer.
15. Learned counsel for the State had produced a copy of the Gazette Notification and the typed copy of 1979 Rules. While referring to the aforesaid Rules, the submission was that the petitioner does

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not have a case made out for promotion because the Rules do not permit promotion to the post of Tracer as the petitioner is not qualified for the post of Tracer. She neither has experience nor a certificate of draftsmanship from an Industrial Training Institute. The certificate sought to be produced by her pertains to “‘Tracer’ Training Course” which is not the qualification prescribed in 1979 Rules. On query by the Court as to whether the post is to be filled by way of promotion, learned counsel for the State was not able to refer to any Rule even though Rule 5(1)(e) of 1979 Rules clearly provides that all posts of Tracers in Categories I, II and III shall be filled in by direct recruitment. He submitted that for filling up the post on direct recruitment, a notice was published in the department and applications were invited and in pursuance of that, the application of the petitioner and earlier by way of similar process, other candidates were considered. The prayer is for dismissal of the petition.

- 16. Heard learned counsel for the parties and perused the paper book.
- 17. The case in hand is a glaring example of casualness on the part of the parties to produce proper documents before the Court. The statutory rules dealing with the post in question, are being termed as letter of department. Even the High Court in the impugned judgment has referred to the same as a letter of the Works Department, failing to appreciate the contents thereof which are in the form of statutory rules.
- 18. To put the record straight, we reproduce in the table below, the relevant Rules as published in Official Gazette and the one placed in the paper book before the High Court and this Court.

Counsel’s True Typed Copy	Orissa Government Gazette
<p>The 26th February, 1980</p> <p>No.4775 E-IRA-1/80-E- In exercise of the power conferred by the provision to Article 309 of the Constitution of India. The governor of Orissa in pleased to make the following rules for the regulation or recruitment. Promotion and other condition of service or this or this is a subordinate architectural service namely:</p>	<p>The 26th February, 1980</p> <p>No. 4773-E-IXR-1/80-E. – In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Orissa is pleased to make the following rules for the regulation of recruitment, promotion and other condition of service of the Orissa Subordinate Architectural Service, namely:-</p>

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<p><u>Method of Recruitment and Condition of Service Rules, 1979.</u></p> <p>1. Short title and commencement</p> <p>(1) these rules may be called or a Subordinate Architectural Service Rules, 1979.</p> <p>2) They shall come into force at once. Provided that nothing in these rules shall be construed as affecting or invalidating appointments already made or orders already issued by the competent authority & all such appointments and orders shall be deemed or have been made or issued under these appropriate provisions of these rules</p>	<p>Method of recruitment and condition of service Rules, 1979.</p> <p>1. Short title and commencement-(1) These rules may be called the Orissa Subordinate Architectural Service Rules, 1979.</p> <p>2) They shall come into force at once:</p> <p>Provided that nothing in these rules, shall be construed as affecting or invalidating appointments already made or orders already issued by the competent authority and all such appointments and orders shall be deemed to have been made or issued under the appropriate provisions of these rules.</p>
<p>2. Definition:</p> <p>a) Department means Govt. in Works Department.</p> <p>b) Government means Govt. of Orissa</p> <p>c) Service means Orissa Architectural service (Non-Gazetted) consisting of Architectural Draftsmen, Head Draftsmen, Asst. Architectural Draftsman and Tracers under the Roads and Buildings Wing</p> <p>d) State means State of Orissa</p>	<p>2. Definition- (a) 'Department' means Government in Works Department.</p> <p>(b) 'Government' means Government of Orissa.</p> <p>(c) 'Service' means the Orissa Architectural Service (Non-gazetted), consisting of Architectural Draftsman, Head Draftsman, Assistant Architectural Draftsman and Tracers under the Roads & Buildings Wing.</p> <p>(d) 'State' means State of Orissa.</p>
<p>2. Position of the service- The service shall consist of following categories of officials, namely.</p> <p>Category-I: Architectural Draftsmen, Asst. Architectural Draftsmen, Tracers in the Architect Branch in the office of the Chief Engineer Roads and Buildings.</p>	<p>3. Composition of the service-The service shall consist of the following categories of officials, namely:-</p> <p>Category I – Architectural Draftsman, Assistant Architectural Draftsman, Tracers in the Architect Branch in the office of the Chief Engineer, Roads & Buildings.</p>

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<p>Category-II: Head Draftsmen, Asst. Draftsmen & Tracers in the Drawing Branches in the office of the Chief Engineer, Roads and Buildings.</p> <p>Category-III: Draftsmen and Tracers in the office of the Superintending Engineers and Executive Engineers under Roads and Buildings Wing.</p>	<p>Category II – Head Draftsman, Assistant Draftsman and Tracers in the Drawing Branches in the office of the Chief Engineer, Roads & Buildings.</p> <p>Category III – Draftsman and Tracers in the office of the Superintending Engineers and Executive Engineers under Roads & Buildings Wing.</p> <p>4. Recruitment The recruitment to the service shall be made-</p> <p>(a) by direct recruitment in accordance with the Rules 5 and 7.</p> <p>(b) by promotion of officials already in service in accordance with the Rule 6.</p>
<p><u>Direct Recruitment And Percentage Of Recruitments.</u></p> <p>1.</p> <p>a) 50 percent of the vacancies, shall be filled in direct recruitment to the post of the Architectural Draftsman under Category I on a result of competitive test to be conducted by the appointing authority.</p> <p>b) 50 percent of the vacancies shall be filled in by direct recruitment in the post of Assistant Architectural Draftsmen under Category I on a result of a competitive test to be conducted by the appointing authority</p> <p>c) 50 percent of the vacancies shall be filled in by direct recruitment in the post of Assistant Draftsmen under Category II.</p> <p>d) 50 percent of the vacancies shall be filled in by direct recruitment in the post of Draftsmen under category III.</p>	<p>5. Direct recruitment and percentage of recruitment (1)(a) 50 per cent of the vacancies, shall be filled in by direct recruitment to the posts of Architectural Draftsman under category I on a result of competitive test to be conducted by the appointing authority.</p> <p>(b) 50 percent of the vacancies shall be filled in by direct recruitment in the post of Assistant Architectural Draftsmen under Category I on a result of a competitive test to be conducted by the appointing authority</p> <p>(c) 50 percent of the vacancies shall be filled in by direct recruitment in the post of Assistant Draftsmen under Category II.</p> <p>(d) 50 percent of the vacancies shall be filled in by direct recruitment in the post of Draftsmen under category III.</p> <p>(e) All posts of Treasures under categories I, II, and III shall be filled in by direct recruitment.</p>

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| <p>e) All posts of Treasures under categories I, II, and III shall be filled in by direct recruitment.</p> <p>f) The competitive test for all these three categories of post shall be separated from each other and shall be conducted by the appointing authorities</p> | <p>(f) The competitive test for all these three categories of post shall be separated from each other and shall be conducted by the appointing authorities.</p> <p>(2) A candidate for direct recruitment to the service shall not ordinarily be under twenty-one years of age and over twenty-five years of age on the 1st August of the recruitment year of recruitment. Provided that the maximum age-limit in case of a candidate belonging to Scheduled Castes and Scheduled Tribes shall be 28 years and in case of candidate already in Government service, shall be 35 years. Preference may be given to the ex-Military personnel.</p> <p>3) (a) A candidate for the post of Architectural Draftsman under category I shall be a pass in Intermediate in Architecture (recognised course) or two years study in any recognised School or College of Architecture with 3 years' experience in an Architect's Office or passed in Draftsman course in any technical institution with five years' experience in Architect's Office.</p> <p>(b) A candidate for the post of Assistant Architectural Draftsman under category I, shall have two years study in any recognised School or College of Architecture with one year office experience in an Architect's Office or passed the Draftsman course in any technical institution with two years' experience in any Architect's Office.</p> |
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	<p>(c) A candidate for the post of Assistant Draftsman under category II and Draftsman, category III, shall be matriculate with a certificate of passed Draftsmanship from Industrial Training Institution.</p> <p>d) Candidates for the posts of Tracer under categories I, II and III shall be matriculates with experience of two years in tracing from blue printing or a certificate of Draftsmanship from Industrial Training Institution.</p> <p>4) A candidate must not have more than one spouse living and further in case of lady candidate, she must not have married a person who has a wife living:</p> <p style="padding-left: 40px;">Provided that the State Government may if satisfied that there are special reasons for doing so exempt from the operation of this clause.</p>
<p>2. A candidate for direct recruitment to the service shall not ordinarily be under twenty one years of age and over twenty five years of age on the 1st August of the recruitment year of recruitment. Provided that the maximum age limit in case of Candidate belonging to scheduled castes and Scheduled Tribes shall be 28 years in case of candidate already in government service shall be 35 years. Preference may be given to the EX- Military personnel.</p>	<p>6. (1) Promotion and percentage of promotion-(a) 50 per cent of the posts of Architectural Draftsman, shall be filled in by promotion from among the suitable Assistant Architectural Draftsman working in Architect Branch.</p> <p>(b) All posts of Head Draftsman, shall be filled in by promotion from among the suitable Assistant Draftsman working in the Drawing Branch.</p>

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	<p>(c) 50 per cent of the posts of Assistant Architectural Draftsman shall be filled in by promotion from the Tracers working in the Architect Branch.</p> <p>d) 50 per cent of the posts of Assistant Draftsman shall be filled in by promotion from the Tracers working in the Drawing Branches.</p> <p>(2) No official shall ordinarily be eligible for promotion to the service-(i) Unless he passes the departmental test to be prescribed for the post held by him at the time of promotion, (ii) Unless he maintains a good record of service which will be judged on the basis of C. C. Rolls.</p> <p>(3) The period of probation shall be one year in case of officials appointed by promotion which shall count from the date on which they join their new posts.</p> <p>(4) The appointing authority may extend the period of probation for such further period as he may deem fit and if after the extended period of probation, the promotee is found unsuitable he may be reverted.</p>
<p>3.</p> <p>a) A candidate for the post of architectural draftsman under Category I shall be a pass in Intermediate in Architecture (recognized or college of Architecture with 3years experience in an Architect's officer or passed in Draftsman course in a Technical Institution with fiveyears experience in an Architect's office.</p>	<p>7. Method of recruitment for direct candidate- (1) Direct recruitment to the service shall be made by a competitive test to be prescribed and conducted by the Chief Engineer, Roads & Buildings in consultation with Government Architect.</p>

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<p>b) A candidate for the post of Assistant Architectural Draftsman under Category I shall have two years of study in any recognized school or college of Architecture with lyear office experience in an Architect's office or passed the Draftsman course in any Technical Institution with two years of experience in any architect's office.</p>	<p>(2) The authority shall issue advertisement in the local newspapers and Orissa - Gazette inviting application in a prescribed form along with other certificates including -certificates that they have passed Oriya up to middle class standard and testimonials as may be considered necessary by the authority.</p>
<p>c) A candidate for the post of Assistant Draughtsman under Category II and Draftsman Category III shall be matriculated with a certification of passedDraftsmanship from an Industrial Training Institution.</p>	<p>(3) On examination of the applications, the authority shall call for the written test as well as for a viva voce on the basis of which a list of successful candidates, arranged in order of merit, shall be prepared. The list so prepared, shall be followed till completion of one year.</p>
<p>d) Candidates for the posts of Tracer under categories I, II and III shall be matriculates with experience of 2 years in tracing blueprinting or a certificate of drops Draftsmanship from the Industrial Training Institution.</p>	<p>(4) The authority thereafter shall issue appointments to the successful candidates against the vacant posts to be filled in by direct recruitment.</p>
	<p>(5) At the time of joining, the candidates shall produce the necessary certificates of physical fitness from the medical practitioner.</p>
	<p>6) The name of the candidate, who does not accept the post offered within the time-limit specified in the order of appointment, shall be struck off from the list.</p>
	<p>7) All appointments under direct recruitment shall be made on probation for a period of two years from the date a candidate joins his appointment and if during the period of probation, candidate's work and conduct is found unsatisfactory, the authority may either discharge him from service or may extend the period of probation as they may think fit.</p>

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<p>4. A candidate must not have more than one spouse living and further in case of lady candidate she must not have married a person who has a wife living. Provided that the state government may if satisfied that there are special reasons for doing so exempt from the operation of this clause.</p>	<p>8. Seniority and confirmation- (a) The seniority of the candidates directly recruited shall be determined with reference to their position in the list of successful candidates and seniority of the promotee officials shall also be determined with reference to their position in the list of final selection to be prepared by the Departmental authorities but the promotee officials shall be considered senior to the candidates directly recruited when direct recruitment and promotion are made during the same year.</p> <p>(b) A probationer shall be confirmed at the end of the period of probation if he is considered fit for confirmation by the appointing authority subject to availability of confirmed posts.</p>
<p>6 i) Promotion and percentage of promotion</p> <p>a) 50 percent of the post of Architectural Draftsman shall be filled in by promotion from among the suitable Assistant Architectural Draftsman working in architect branch.</p> <p>b) All posts of head draftsman shall be filled promotion from among the suitable Assistant Draftsman working in the Drawing Branch.</p> <p>c) 50 percent of the posts of Assistant Architectural Draftsman shall be filled in by promotion from the Tracer in the Architect Branch</p> <p>d) 50 percent of the posts of Assistant Draughtsman shall be filled in by promotion from the Traces working in the Drawing Branches.</p>	<p>9. Other conditions of service-Other conditions of service such as leave, pension, pay, allowance, provident fund, etc., shall be regulated by rules applicable to the members of other subordinate non-Gazetted services under State Government from time to time.</p>

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<p>2. No official shall ordinarily be eligible for promotion to the service.</p> <p>I) Unless he passes the department test to be prescribed for the post held by him at the time of promotion.</p> <p>II) Unless he maintains a good record of service which will be judged on the basis of C. C. Rolls.</p> <p>3. The period of promotion shall be one year in case of office appointed by promotion which shall count from the date on which they join their new posts.</p> <p>4. The appointing authority may extend the period of probation for such further period as it may see fit after the extended period of probation the promotion is found unsuitable he may be reverted.</p>	
<p>7. <u>Method Of Recruitment For Direct Candidate.</u></p> <p>10. Direct recruitment to the service shall be made by a competitive test to be prescribed and conducted by the Chief Engineer, Roads & Buildings in consultation with Government Architect.</p> <p>11. The authority shall issue advertisement in The local newspaper "The Orissa Gazette" inviting application in a prescribed form along with other certificates including certificate that they have passed Oriya up to middle class standard and testimonials as may be considered necessary by the authority.</p>	

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12. In execution of the application the authorities shall call for the written test as well as for a Viva voice on the basis of which in list of successful candidates arranged in order of merit shall be announced. The list so prepared shall be followed till completion of one year
13. The authority there after shall issue appointment to the successful candidates against the vacant post to be filled in by direct recruitment.
14. At the time of joining the candidates shall produce the necessary certificate of physical fitness from medical practitioners.
15. The name of the candidate who does not accept the post offered within the time limit specified in the order of appointment shall be struck of from the list.
16. All appointments under direct recruitment shall be made on probation for a period of 2 years from the date of candidate joins his appointment and if during the period of probation candidates work and conduct is found unsatisfactory the authority may either discharge him from service or may extend the period of probation as they may think fit

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<p>17. Seniority and confirmation:</p> <p>c) The seniority of the candidate directly recruited shall be determined with reference to their position in the list of successful candidates and seniority of the promoting officials shall also be determined with references to their position in the list of final selection to be prepared by the departmental authorities but the promoter official shall be considered senior to the candidates directly recruited when direct recruitment and promotion are used during the same year.</p> <p>d) A probation shall be confirmed at the end of the period of probation if he is considered fit for consideration by the appointing authority subject to available of confirmed posts.</p>	
<p>18. Other conditions of service: Other conditions is service such as leave pension, pay allowance, provident fund etc., shall be regulated by rules applicable to the members of other subordinate gazetted service under State Government from time to time</p>	
<p>BUY ORDER OF THE GOVERNOR A.C. PADHI ENGINEER- IN -CHIEF -CUM- SECT. TO GOVT. OF ORISSA. ///TRUE TYPED COPY/// <i>[sic]</i></p>	

19. The so-called letter dated 26.02.1980 produced as Annexure P-2 contains 18 paragraphs while the statutory rules contain 9 rules in total. Paragraph No.2 has been typed twice. After paragraph No.4,

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paragraph No.5 is missing. Paragraph nos.8 and 9 are also missing. Paragraph No.2 (repeat) in the alleged letter is sought to be shown as 'position of the service' which is not mentioned in the 1979 Rules as such. Rule 4, which deals with the recruitment, has been skipped. Rule 5 has been typed without giving the same paragraph numbers. Besides this, there are other major discrepancies in the document produced by the petitioner along with the petition. If we had relied upon the same, it would certainly mislead the Court in reaching to a right conclusion.

20. The argument raised by the learned counsel for the petitioner was that in terms of paragraph 3(d) of the letter dated 26.02.1980, she was eligible for promotion as she possesses the requisite qualification. However, if the scheme of 1979 Rules is considered, Rule 3 thereof provides for composition of service. The post of Tracer finds mention in three categories namely category I, II and III. The bifurcation is with reference to the office/department in which they have to work.
 - 20.1 Rule 5 provides for direct recruitment and the percentage of sources. Rule 5(1)(e) provides that all posts of Tracers under categories I, II and III shall be filled in by direct recruitment. Rule 5(3) provides for qualifications required for different posts. Rule 5(3)(d) provides for the qualification for the post of Tracer under all three categories.
 - 20.2 Rule 6 provides for promotion and percentage of promotion. As the post of Tracer in all the three categories is to be filled up only by way of direct recruitment, the post in question does not find mention in Rule 6.
21. The method of recruitment for the direct recruited candidates is provided in Rule 7. Sub-rule 1 thereof provides that direct recruitment to the service shall be made by a competitive test to be prescribed and conducted by the Chief Engineer, Road and Building in consultation with the Government Architect. Sub-rule 2 provides that the authority shall issue an advertisement inviting applications in the local newspapers and the Orissa Gazette. The eligible candidates are then required to be called for a written test and viva voce on the basis of which the merit list is required to be prepared. Thereafter, the offer for appointment is to be made to the selected candidates.
22. From a perusal of the aforesaid Rules, it is evident that the post of Tracer in all three categories is to be filled up by direct recruitment

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only, after following the procedure as prescribed. It is not in dispute that the procedure as prescribed in Rule 7 of the 1979 Rules has not been followed by issuing advertisement and inviting application for the post of Tracer. All what is said is that a Circular was issued in the department inviting applications from the Peons for appointment or promotion for the post of Tracer. This Court in ***Union Public Service Commission v. Girish Jayanti Lal Vaghela and others***⁸, has emphasised the importance of a public advertisement for inviting applications to a post under the State:

“12. ... The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made. A regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner which may in some cases include inviting applications from the employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution. (See B.S. Minhas v. Indian Statistical Institute [(1983) 4 SCC 582 : 1984 SCC (L&S) 26 : AIR 1984 SC 363].)”

23. Now coming to various documents placed on record by the petitioner, at Annexure P-3 is a letter addressed to the Chief Engineer, Public Health seeking appointment to the post of Tracer. It was mentioned therein that she is already working as a Peon for about 09 years and has come to know that some post of Tracer is lying vacant for which

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she is eligible. No date as such is mentioned. The same request was repeated in a letter, at Annexure P-4, to the Superintendent Engineer, Public Health Circle, Bhubaneshwar. It is worth noting that a Letter No.189 dated 03.08.1981 of the Deputy Minister of H & T. W Department was enclosed therewith. Copy of the letter dated 24.01.1990 (Annexure P-5) from Executive Engineer, Puri Public Health Division addressed to Superintending Engineer, P.H. Circle has been annexed by which the application of the petitioner was forwarded for consideration. At Annexure P-6 is a letter dated 02.05.1990 from the Petitioner to the Minister of Public Health Department, Bhubaneshwar requesting appointment against the post of Tracer as some posts are lying vacant. A letter dated 05.11.1990 from Executive Engineer, Puri Public Health Division to Superintending Engineer, P.H. Circle forwarding the application of the petitioner is annexed as Annexure P-7. It is followed by a letter written by petitioner dated 07.11.1990 to the Chief Minister, Orissa (Annexure P-8). Immediately thereafter, a letter for the same relief was written by the petitioner on 30.12.1990 to the Minister of Works and U.D. Department, Orissa (Annexure P-9). *Vide* letter dated 09.03.1999 (Annexure P-13) Peons including the petitioner working in the department were called for appearance in the test on 16.03.1999 for the post of Tracer. Nothing has been mentioned as to the result of this test.

24. At Annexure P-14 and 15, there are two letters dated 28.06.1999 *vide* which Miss Jhina Rani Mansingh and Sri Lalatendu Rath were appointed as Tracer on promotion basis. From the aforesaid letters, it is evident that they were promoted as Tracer, but on which post they were working is not mentioned. Their names are not mentioned in the letter dated 09.03.1999 *vide* which documents of Peons working in the Department were forwarded for consideration against the post of Tracer.
25. It was at this stage that the petitioner filed O.A. No.628(C) of 1999. The Tribunal *vide* its order dated 26.03.1999 disposed of the application at admission stage, directing the respondent to dispose of her representation within three months from date of receipt of order. Entitlement of the petitioner to the relief was required to be considered before direction is issued to the authorities to decide the representation. The Tribunal failed to apply its mind on this issue at that stage. Pursuant to this, *vide* letter dated 05.07.1999, the

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respondent communicated to the petitioner that the post of Tracer is not to be filled up on promotion from the lower category of post, since it is not a promotional post and vacancy of Tracer will be filled up in due course by conducting an interview. As wrong action by the authorities is root cause of lot of avoidable litigation and other Peons may have been promoted from the post of Peon to Tracer, aggrieved by the respondent's decision, the petitioner again filed a representation dated 30.01.2001 for redressal of her grievance and sought promotion on higher post considering her qualification and experience.

26. The petitioner filed another application bearing O.A. No.1126 (C) of 2002 before the Tribunal *inter alia* praying for the intervention of the Tribunal against the discriminatory action of the respondent authorities with regard to her promotion to the post of Tracer. The aforesaid O.A. filed by the petitioner was transferred from Cuttack to the Principal Bench of the Tribunal at Bhubaneswar which was disposed of *vide* order dated 27.09.2010. It was the admitted case of the petitioner before the Tribunal that there are no specific Rules for promotion from Class IV to the post of Tracer but there are precedents available, hence, in the absence of any rule the precedents should be followed. As is evident from paragraph 6 of the aforesaid order, this fact was not disputed by the learned counsel for the State. He had failed to place before the Tribunal the 1979 Rules, which clearly deal with the recruitment to the post of Tracer. Direction was given by the Tribunal to consider the case of the petitioner along with other similarly situated Class IV employees for promotion to the post of Tracer.
27. The representation was rejected by the Chief Engineer *vide* order dated 23.11.2010 on account of ban on recruitments imposed by the Finance Department. The order was challenged by the petitioner before the Tribunal by filing O.A. No.1696 of 2010. Strange enough to note that, in the counter affidavit filed by the State to the above O.A. filed by the petitioner before the Tribunal, not a single line has been mentioned that the post of Tracer is to be filled up only by way of direct recruitment and not promotion in terms of 1979 Rules. The Tribunal, noting the history that there were two earlier appointments on the post of Tracer by way of promotion and that even the petitioner was earlier considered; the petitioner's case having not been considered on account of ban imposed on recruitment, disposed of the O.A.,

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quashing the order dated 23.11.2010 and directing the respondents to consider the case of the petitioner for promotion to the post of the Tracer against any vacant post. In case no post is available, then reverting the last promoted person after direction in the earlier O.A. No.742 of 2009 filed by the petitioner. As the State failed to point out that the 1979 Rules govern recruitment to the post of Tracer, the Tribunal also did not notice the same and went on with the direction to consider the case of the petitioner for promotion. The order passed by the Tribunal was challenged by the State before the High Court.

28. From a perusal of grounds on which the order passed by the Tribunal was challenged by the State shows total non-application of mind, especially in a case which had already undergone three rounds of litigation. Proper facts were not pointed out at any stage. The same legacy followed. In the Writ Petition, reference was made to Works Department No.4775 dated 26.02.1980 and it was mentioned that the petitioner was found to be ineligible in terms thereof. Towards the end in the aforesaid paragraph reference has been made to Rule 3(d) of the Orissa Service of Architect Rules, 1979. A copy of which was annexed with the Writ Petition. The same also has been annexed with the present petition as Annexure P-1. Firstly, there is no Rule 3(d) in the aforesaid rules and secondly, this does not deal with the post of Tracer. It shows that even at the stage of filing SLP before this Court, proper care was not taken to examine the relevant Rules and place the same on record.

- 28.1 The importance of responsible drafting and diligent pleading was emphasized by this Court in **Saumya Chaurasia v. Directorate of Enforcement**⁹, where it was observed that:

“13. It cannot be gainsaid that every party approaching the court seeking justice is expected to make full and correct disclosure of material facts and that every advocate being an officer of the court, though appearing for a particular party, is expected to assist the court fairly in carrying out its function to administer the justice. It hardly needs to be emphasised that a very high standard of professionalism and legal acumen is expected from the advocates particularly

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*designated senior advocates appearing in the highest court of the country so that their professionalism may be followed and emulated by the advocates practising in the High Courts and the District Courts. **Though it is true that the advocates would settle the pleadings and argue in the courts on instructions given by their clients, however their duty to diligently verify the facts from the record of the case, using their legal acumen for which they are engaged, cannot be obliterated.***"

29. There cannot be more casualness than this where the authority of the State is fighting litigation and does not apprise the Tribunal or the Court about the relevant applicable rules. The effort may be to put under covers the illegalities committed by them earlier by granting promotion from the post of Peon to that of Tracer in violation of the 1979 Rules. Even the High Court in the impugned order has not referred to the 1979 Rules but has quoted paragraph 3(d) of the Letter No.4775 dated 26.02.1980. The scheme of the Rules has already been explained in paragraph above. What is said to be paragraph 3(d) of the letter is in fact Rule 5(3)(d) of the 1979 Rules.
30. Though, the claim of the petitioner has been rejected on the ground that she is not eligible for the post of Tracer, however, we need not enter into that arena for the reason that as per 1979 Rules, the post of Tracer is to be filled up to 100% by way of direct recruitment in terms of Rule 5(1)(e) of the 1979 Rules and the method of direct recruitment has been provided in Rule 7 thereof. Undisputedly, the process as provided in the Rules was not followed. The post of Tracer, not being promotional post from the post of Peon, there is no merit in the claim of the petitioner.
31. Another argument was raised while referring to two communications dated 28.06.1999 appointing Ms. Jhina Rani Mansingh and Sri Lalatendu Rath as Tracer on promotion, claiming to be from the post of Peon, on the basis of which the petitioner is claiming violation of Article 14, namely the discrimination. Suffice to add, this Court cannot put a stamp on the illegalities committed by the department while perpetuating the same. A litigant coming to the Court cannot claim negative discrimination seeking direction from the Court to the department to act in violation of the law or statutory Rules. It is a

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settled proposition of law that Article 14 does not envisage negative equality. Reference for the purpose can be made to a judgment of this Court in **R. Muthukumar & others v. The Chairman and Managing Director TANGEDCO & others**¹⁰. Relevant para thereof is extracted below :

“28. A principle, axiomatic in this country’s constitutional lore is that there is no negative equality. In other words, if there has been a benefit or advantage conferred on one or a set of people, without legal basis or justification, that benefit cannot multiply, or be relied upon as a principle of parity or equality. In Basawaraj v. Special Land Acquisition Officer”¹¹, this court ruled that:

“8. It is a settled legal proposition that Article 14 of the Constitution is not meant to perpetuate illegality or fraud, even by extending the wrong decisions made in other cases. The said provision does not envisage negative equality but has only a positive aspect. Thus, if some other similarly situated persons have been granted some relief/benefit inadvertently or by mistake, such an order does not confer any legal right on others to get the same relief as well. If a wrong is committed in an earlier case, it cannot be perpetuated.”

32. For the reasons mentioned above, we do not find merit in the present petition and the same is accordingly dismissed.
33. Before parting with the order, we are constrained to observe that the case in hand is a glaring example of casualness on the part of the State Authorities while dealing with the litigation. The issue could be resolved at the very first stage when a representation was made by the petitioner seeking promotion to the post of Tracer way back in the year 1991. The chapter could have been closed merely while responding to the same while referring to the relevant statutory 1979 Rules. To some extent it was done but false hopes are created in the minds of employees if some other similarly situated are granted the

¹⁰ 2022 INSC 157 : 2022 SCC OnLine SC 151

¹¹ 2013 INSC 551 : (2013) 14 SCC 81

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benefit, which itself is contrary to the Rules. The letters continued flowing from the petitioner to the respondent, and from one department to another as a shuttlecock, as if there is no other constructive work to do. Even before the Tribunal, the petitioner had three rounds of litigation followed by one Writ Petition before the High Court by the State and thereafter this Court. At none of these stages, the relevant statutory 1979 Rules were referred to either in the counter or in the petition. Such conduct is not expected from the State which is the major litigant and the case in hand is an example of unnecessary generation of litigation by the State where the authorities need to circumspect and be more careful.

34. This lackadaisical approach of the State was also noticed by this Court in **Kusha Duruka v The State of Odisha**¹² where during pendency of the matter before this Court, a fresh bail application was filed and High Court even granted bail to the petitioner. The affidavit filed by the Principal Secretary, Law Department, Govt. of Odisha revealed that the State Counsel was not aware about the rejection of his first bail application as well as the filing of SLP. Noticing efforts being made to pollute the stream of administration of justice, this Court issued several instructions with a view to streamline the proceedings and avoid anomalies with reference to the bail applications.
35. A copy of this order be sent to the Chief Secretary, State of Odisha for perusal and taking appropriate corrective steps.
36. Pending application (if any) shall stand disposed of.

Result of the case: Petition dismissed.

[†]Headnotes prepared by: Ankit Gyan