

HIGH COURT OF ORISSA: CUTTACK

W.P.(C) No.4569 OF 2022

In the matter of an application under Article 226 of the Constitution of India.

Sanjeev Kumar Sahu

...

Petitioner

- Versus -

State of Odisha and Others

...

Opposite parties

For Petitioner

... M/s. U.C. Mishra, A. Mishra
A. Mishra & J.K. Mahapatra

For Opposite Parties

... Mr. R.N. Mishra,
Additional Government Advocate
(For O.P. No.1)

M/s. S.B. Jena & C.K. Sahoo
(For O.P. No.2).

PRESENT:

THE HONOURABLE SHRI JUSTICE BIRAJA PRASANNA SATAPATHY

Date of hearing: 15.09.2022

Date of order : 01.11.2022

Biraja Prasanna Satapathy, J.

1. I have heard Mr. U.C. Mishra, learned counsel appearing for the Petitioner, Mr. R.N. Mishra, learned Additional Government Advocate appearing for the State-Opposite Party

No.1 and Mr. S.B. Jena, learned counsel appearing for the Opposite Party No.2-Odisha Public Service Commission.

2. This writ petition has been filed by the Petitioner challenging the Notice No.1220/P.S.C. dated 10.02.2022 (Annexure-4) issued by the Odisha Public Service Commission, Cuttack (in short 'Commission') wherein the candidature of the Petitioner for his selection and appointment as an Assistant Public Prosecutor (Group-B) in terms of the advertisement No.08 of 2020-21 (Annexure-1) has been rejected on the ground that he did not have the valid Odia Test Certificate as per Para-8(ii) of the advertisement.

3. Mr. U.C. Mishra, learned counsel appearing for the Petitioner, submitted that pursuant to the advertisement issued under Annexure-1 by the Commission, the Petitioner made his application as an unreserved candidate. It is submitted that in consideration of the application of the Petitioner, he was allowed to take the written examination and qualified the same successfully. It is further submitted that vide Notice dated 25.1.2022, the Petitioner was directed to appear on 10.02.2022 for verification of his documents and after such verification, the

Petitioner was issued the impugned notice under Annexure-4 indicating therein the ground of rejection of his application. It is further submitted that the eligibility condition prescribed under Para-8(ii) of the advertisement under Annexure-1 is as follows:-

“He/She must be able to speak, read & write Odia and must have passed either the Middle School standard language test in Odia conducted by the Board of Secondary Education, Odisha or the Matriculation (Class-X/10th standard) Examination with Odia as a subject.”

4. It is further submitted by the learned counsel for the Petitioner that the aforesaid stipulation under Para-8(ii) of the advertisement was prescribed taking into account the provision contained under Rule-5(ii) of the Orissa State Prosecution Service Rules, 1997 (in short “the Rules”). Rule-5 of the said Rules prescribes as follows:-

“5. Eligibility criteria for direct recruits

5.1. In order to be eligible for direct recruitment to Group ‘B’ and ‘A’ services under Rule 4.1 and 4.3 (ii) of these Rules candidate must fulfill the following general conditions-

- (i) He must be a citizen of India*
- (ii) He must be able to speak, read and write Oriya and must have passed either the Middle School standard language test in Oriya conducted by the Director of Secondary Education, Orissa or the Matriculation (Class-X/10th standard) Examination with ‘Oriya’ as a subject”*

- (iii) *He must have good character and satisfactory antecedents as revealed by the Police Verification.*
- (iv) *He must have sound health/good physique, active habits and free from organic defects or bodily/mental infirmity.*
- (v) *He must not have more than one spouse living.*
- (vi) *He must possess a good character as certified by two responsible citizens of India, one of whom must be a Government Servant not below Group 'B' service.*
- (vii) *He must possess a Bachelor's degree in law from a recognized university.*

5.2. Additional eligibility criteria for direct recruitment to Group 'B' service under Rule 4.1 above-

- (i) *He must not be above the age of 35 years on the 1st day of January in which the notification of recruitment is issued.*
- (ii) *He should have at least seven years of experience as practising advocate.*

5.3. Additional Eligibility criteria for direct recruitment of Group 'A' Service under rule 4.3 (ii) above-

- (i) *He must not have completed the age of 45 years on the first day of January in which the Notification for recruitment is issued.*
- (ii) *He should have at least 15 years of experience as practising Advocate.*

5.4. The upper age limit prescribed in sub-rules 5.2 and 5.3 above shall be relaxed in respect of S.C./S.T./Socially and Educationally backward classes/Women candidates/Sportsmen/Ex-

servicemen as per the provisions made by the Government in this respect from time to time:

Provided that in case of candidate falling in more than one of the categories mentioned in sub-rule 4 above, he/she will be eligible to claim only one of the age relaxation prescribed, whichever is more beneficial to him/her."

5. It is further submitted by the learned counsel for the Petitioner that the Petitioner in terms of the requirement provided under Para-8(ii) of the advertisement read with Rule-5(ii) of the Rules, submitted the certificate, the Petitioner having acquired the said qualification in the examination conducted by the National Institute of Open Schooling vide Annexure-12. It is further submitted that since the Petitioner passed the Central Board of Secondary Examination (CBSE) Standard 10 Examination without having Odia as a subject, he appeared the Odia test conducted by National Institute of Open Schooling and successfully passed the same on 15.12.2018. It is further submitted that the said qualification acquired by the Petitioner is equivalent to the qualification prescribed under Rule-5(ii) of the Rules and Para-8(ii) of the advertisement.

6. Mr. Mishra, learned counsel appearing for the Petitioner also brought to the notice of the Court the notification issued by the Board of Secondary Education Odisha, Cuttack on 5.8.2014

under Annexure-7 wherein the revised list of the Boards'/Organizations in India conducting 10th Class (Secondary) Examination, which are declared equivalent to the High School Certificate (H.S.C.) Examination was notified. In the said notification issued under Annexure-7, the name of National Institute of Open Schooling finds place at Serial No.31. Mr. Mishra also brought to the notice of this Court the communication issued by the National Institute of Open Schooling on 9.12.2010 under Annexure-8 wherein basing on the decision of the High Court of Gujarat at Ahmedabad, it has been indicated that the certificates issued by the National Institute of Open Schooling are equivalent to the certificate issued by the CBSE, CISCE and NIOS, as they are all being constituted by the Education Department, Government of India. It is, accordingly, submitted that since the Petitioner has acquired the required Odia qualification, conducted by the National Institute of Open Schooling vide Annexure-12, the said qualification is equivalent to the qualification prescribed under Rule-5(ii) of the Rules vis-à-vis Para-8(ii) of the advertisement. Accordingly, it is submitted that the rejection of the Petitioner's

candidature on the ground indicated under Annexure-4 is illegal and unjustified. Mr. Mishra, in support of his aforesaid submissions, relied on a decision of Hon'ble Delhi High Court in the case of **Tanishq Gangwar & Ors. -v.- Union of India & Ors.** (W.P.(C) 6773/2018 & CM APPL. 25697-98/2018, 28282/2018, 28287-88/2018 & 29674-75/2018 decided on 17.08.2018). In the said judgment, Hon'ble Delhi High Court at Paragraphs-2, 22 to 24 and 28 to 29 held as follows:-

"2. The impugned Regulations debarred all candidates who have passed 10+2 level with Biology/Biotechnology as an additional subject whether simultaneously or subsequently at 10+2 level. The Regulations were challenged by some students before this Court by W.P.(C) No. 1917 of 2018. During the course of hearing, the MCI, without further amending the impugned Regulations issued a clarification that the impugned Regulations does not apply to students who have studied biology/biotechnology as an additional subject simultaneously with other subjects at 10+2 level, however would debar students who had studied biology/biotechnology as additional subject subsequent of passing 10+2 without these subjects. The MCI, by way of clarification in the Court modified an existing statutory provision, without any formal amendment. The petitioners complain that this has resulted in creation of an artificial and arbitrary sub-classification amongst similarly placed categories of persons who had studied biology as an 'additional subject' at 10+2 level. The court had disposed of W.P.No.1917/2018 without considering whether the impugned regulations of MCI, in respect of petitioners and similarly placed persons who have passed biology/biotechnology as additional subject subsequent of passing 10+2 without these subjects was legal and valid.

22. Anshul Agarwal has ruled that exclusion of open school and NIOS candidates is both discriminatory and arbitrary.

Apart from the reasons discussed in that judgment, which squarely applies in the present cases, a fortiori given that all students would have undergone regular schooling for 12 years, but only appear in the additional biology subject in the later year, WP(C) No.6773/2018 Page 30 the reasoning given by the court as to why the open school candidates should be permitted participation, apply. Here too, like in the case of open school candidates, the students undergo learning in class in a later year; they undoubtedly have to attend practicals. In any case, wherever there is doubt whether the schooling in any additional subjected takes place during the subsequent year or years, can be verified at an appropriate stage, maybe at the stage of counselling or admission.

23. This court is further of the opinion that the reliance placed on the single judge and Division Bench ruling in Raghukul Tilak does not help the MCI. The regulations were then silent; the MCI's action in refusing participation of similar candidates, was questioned. In the "no rule" period, it was the executive decision that was questioned. However, now the MCI has framed regulations that disqualify such candidates; this court has to examine the reasonableness of such regulations and how they further the larger objective of ensuring that those of a certain calibre are amongst candidates permitted admission. These issues concededly need elaborate consideration, rather than a positive assertion of executive discretion based on expert regulatory judgment. Such elaborate examination would necessarily involve, whether and if so, there are justifiable reasons to exclude such category of candidates from participating in NEET and gaining admissions; also whether such reasons are germane and reasonable.

24. A comparison of Regulation 4 (2) (a) with Regulation 4 (2) (b) would reveal that as the two categories: i.e. those appearing in the concerned State Board on the one hand (Reg. 4 (2) (b)) and CBSE or ICSE public examinations on the other (Reg. 4 (2) (b)) are treated at par. Yet, those WP(C) No.6773/2018 Page 31 appearing in the state intermediate boards do not have to undergo the regular, continuous and simultaneous learning in school/class rooms, like in the case of CBSE/ICSE candidates;

(1) Thus, a candidate appearing in an intermediate board examination with a set of subjects which does not include biology, can appear again in the subsequent examination,

pass in that subject with the requisite qualifying marks; she or he would then be eligible;

(2) The clarification issued in a tabular form, by the MCI (which was discussed in Anshul Agarwal) is silent on the class of candidates covered by Regulation 4 (2) (b). Thus, it is open to the students who appear in a "Intermediate examination in science of an Indian University/Board" to qualify in the relevant subjects, except biology, and then appear in that subject in the next year, to be eligible to appear in NEET. This means that the MCI's position that all candidates should have undergone 2 years' continuous schooling in the +2 stage (whether CBSE/ICSE/ intermediate boards etc) is inapplicable uniformly. Absolutely no rationale is provided for this asymmetry or inconsistency by the MCI, rendering proviso to Regulation 4 (2) (a) (to the extent it excludes those appearing in CBSE with Biology/biotechnology as additional subjects and qualifying in those subjects in a subsequent year, ineligible) arbitrary;

(3) The only rationale discernible in the pleadings that were considered in the Anshul Agarwal batch of cases, for students appearing with biology as additional subjects, can be gathered from the following WP(C) No.6773/2018 Page 32 extract of the affidavit of the Union Human Resource Development ministry, quoted in the judgment, which is extracted below:

"That it is submitted that, in regard to candidates taking Biology/Bio-Technology as additional subjects in class 11th and 12th will not be eligible to appear in the NEET Examinations, this Ministry has no comments to offer as it is the domain of Respondent No. 1 Ministry of Health & Family Welfare, Govt. of India and Respondent No. 2."

There was no material disclosed by MCI to show the Ministry of Health & Family Welfare's position, supporting the class of students and candidates, represented in this writ petition.

(4) The MCI's position that those appearing in additional subjects are disqualified and ineligible from NEET participation is on an assumption that those who offer the relevant subjects (biology/biotechnology) as additional subjects do not undergo classroom learning. There is no

underlying basis in the form of empirical material, or in the form of analysis of various state boards curricula, or syllabi, or even the examination regulations, to support this assumption.

(5) A comparison of category (3), (4) and (6) in the tabular chart issued by the MCI on the one hand with category (7) on the other would reveal that there is no consistency internally in the MCI's interpretation of Regulation 4 (2) (a). On the one hand, in the first two classes (Sl. Nos 3 and 4) the clarification covers those who appear in compartment or supplementary examinations to improve their performance, or those who fail in either in class XI or Class XII, but WP(C) No.6773/2018 Page 33 later qualify in the concerned examination board, the students are deemed eligible; the third class (Sl. No. 6) covers those who appear in the examination after a "gap" year. On the other hand, in Sl. No. 7 (which covers the present petitioners) the "gap" is only in respect of the additional subject. There is consequently, no consistent pattern in the manner of exclusion of such artificially categorized candidates. The glaring and stark arbitrariness in the MCI's interpretation is facially evident, because in Sl. No. 3, the candidate might have failed in biology or biotechnology- a performance which he might repeat. In such case, he would get the benefit of both Sl. No 3 and 4. Equally, the subject in which the candidate fails might also be the same (biology) etc, in the Board examination. Yet, the candidate is deemed eligible to appear in NEET. This amounts to treating those within the same class of candidates in a discriminatory manner; there is no nexus with the objective of ensuring that only candidates with the basic level of proficiency and attainment gain admission to medical seats, covered by NEET.

(6) This court's reasoning with respect to exclusion of NIOS candidates from NEET, for reasons discussed in Anshul Agarwal logic squarely apply.

(7) Candidates who fall in Sl. No. 7 (i.e. those who had cleared in biology as an additional subject in schools) are permitted to apply for the medical entrances in All India Institute of Medical Sciences and also for selection in Jawaharlal Institute of Postgraduate Medical Education and Research (JIPMER, for short), Puducherry. These are WP(C) No.6773/2018 Page 34 premier medical schools. The exclusion of the petitioners and others like them solely

because of a unidimensional understanding (based on curricula of CBSE/ICSE and without analysis of any state board syllabi) that those with additional subjects are in some manner not "up to the standard" is illogical and arbitrary.

28. Lack of any empirical study, supporting the MCI's conclusion that those who qualify from regular scholastic study in the 10+2 exams with additional subjects of biology/biotechnology either at one go, or after a year, do so without laboratory experience, render Regulation 4 (2) (a) to that extent arbitrary. Juxtaposed with clauses (b) (of Regulation 4 (2) which talks of Intermediate state boards) which does not speak of any such disqualification, the irrational and arbitrary nature of the regulation stands out in sharp relief. As outlined in para 24, the MCI's regulations are based on its conclusions rather on any data or objective material. For these reasons, it is held that the category covered in Sl. No. (7) of the clarification issued by MCI and the regulation (Regulation 4 (2) (a)) to the extent it sets out the impugned disqualification "Furthermore, study of WP(C) No.6773/2018 Page 39 Biology/Biotechnology as an Additional Subject at 10+2 level also shall not be permissible..." are hereby set aside as discriminatory and arbitrary.

29. As a result of the above discussion as well as in view of the reasoning in Anshul Agarwal it is held that the petitioners (and the applicants in CM 29675/2018, i.e. Govind Yadav, Ms. Kiran, Mahesh Ranwa, Harkesh Poonia and Savita Bhadu) all of who had appeared in NEET and qualified in the entrance examination, and were also successful during counselling, but not granted final admission in the allotted seats, awaiting the decision in this proceeding, shall be granted final admission. The writ petition and application (CM 29675/2018) are allowed in these terms. No costs."

7. Mr. Mishra, learned counsel appearing for the Petitioner also relied on another decision of Hon'ble Gujarat High Court in the case of **Sidharth Jagdishbhai Panchal Thro' father Jagdish D. Panchal -v.- Admission Committee for Professional Diploma Course (ACPDC) & 4 (Special Civil**

Application No.7406 of 2010 decided on 23.8.2010).

Hon'ble Gujarat High Court at Paragraph-15 of the said judgment held as follows:-

“It has not been disputed that CBSE, CISCE, as also NIOS, all Boards have been constituted by the Education Department, Government of India. For all purposes, they are equivalent. It is also not in dispute that there are institutions in the State of Gujarat, including the institution in which the petitioner has studied, which is recognized by the NIOS and certificate is granted by NIOS. Previously, on behalf of the NIOS, CBSE used to grant the certificate and now after the decision of the Central Government, since 2002, it has been granted by NIOS.”

8. Making all such submissions, Mr. Mishra, learned counsel appearing for the Petitioner submitted that since in terms of the provisions contained under Rule-5(ii) of the Rules read with Para-8(ii) of the advertisement, the Petitioner has the required qualification in Odia, his candidature should not have rejected on the ground indicated in the impugned notice dated 10.02.2022 under Annexure-4. It is also submitted that this Court vide its order dated 10.5.2022 passed an interim order with a direction to keep one post vacant and the said interim order is in force.

9. Mr. S.B. Jena, learned counsel appearing for the Opposite Party No.2-Odisha Public Service Commission, on the other

hand, submitted that since the Petitioner has passed CBSE Class-10 from the Kendriya Vidyalaya without Odia as a subject, the certificate produced by the Petitioner under Annexure-12 is not in terms of the advertisement. Accordingly, his candidature has been rightly rejected vide the impugned notice. It is also submitted that the Commission after completing the test has recommended the list of successful candidates to the Additional Chief Secretary to Government, Home Department, Bhubaneswar vide its letter dated 17.2.2022. Accordingly, it is submitted that since the qualification acquired by the Petitioner vide Annexure-12 is not in terms of the provision contained in Para-8(ii) of the advertisement, no illegality has been committed by the Commission in rejecting his candidature.

10. A rejoinder affidavit has been filed by the Petitioner and in the said rejoinder affidavit, it is indicated that since the Petitioner passed the CBSE Class-10 without Odia as a subject in accordance with the Rules, he appeared the required examination conducted by National Institute of Open Schooling

and the said examination was conducted in Ravenshaw Girls' High School, Cuttack in the year 2018.

11. Mr. Mishra, learned counsel appearing for the Petitioner further submitted that as provided under Rule-5(ii) of the Rules, a candidate must be able to speak, read and write Oriya and must have passed either the Middle School standard language test in Oriya conducted by the Board of Secondary Education, Orissa or the Matriculation (Class-X/10th standard) Examination with 'Oriya' as a subject. It is further submitted that since the Petitioner has acquired the said examination from National Institute of Open Schooling, which has been declared as equivalent by the Board of Secondary Education, Odisha, Cuttack vide Annexure-7, the action of the Commission in rejecting the Petitioner's candidature needs interference by this Court. It is also submitted that due to such rejection of candidature of the Petitioner vide the impugned Notice dated 10.2.2022, the Petitioner was not allowed to take the viva voce test even though the Petitioner in his written examination has secured 114.206 marks and the last candidate selected in UR Male Category taking into account the marks secured in written

and viva voce is 116.486. It is submitted that if the Petitioner will be allowed to take viva voce test, there is every possibility of securing the mark so secured by the last such candidate in UR Category.

12. Having heard learned counsel for the parties and after going through the materials on record and taking into account Rule-5(ii) of the Rules which prescribes that a candidate must be able to speak, read and write Oriya and must have passed either the Middle School standard language test in Oriya conducted by the Board of Secondary Education, Orissa or the Matriculation (Class-X/10th standard) Examination with 'Oriya' as a subject and the said rule being incorporated in Para-8(ii) of the advertisement, since the Petitioner has passed the CBSE Class-10 without having Odia as a subject, he appeared the Odia test conducted by the National Institute of Open Schooling and the certificate issued under Annexure-12 is to be treated as equivalent as to the certificate issued by the Board of Secondary Education, Odisha, Cuttack in conducting such test, this Court finds that the ground on which the Petitioner's candidature was

rejected vide Notice dated 10.02.2022 under Annexure-4 is illegal.

13. Therefore, while interfering with the same, this Court directs the Opposite Party No.2 to allow the Petitioner to take the viva voce test by the same Board which has earlier conducted such viva voce test in respect of other successful candidates. This Court further directs that on being allowed to take viva voce test and after adding the mark so secured by the Petitioner in his written examination with the mark in the viva voce test, the Petitioner if found to have secured the mark obtained by the last candidate in UR Male Category, necessary order of appointment be issued in his favour. This Court also directs the Opposite Party No.2 to complete the entire exercise within a period of two months from the date of receipt of this order.

14. With the aforesaid observation and direction, this writ petition stands disposed of.

(Biraja Prasanna Satapathy)
Judge