

HIGH COURT OF ORISSA: CUTTACK

W.P.(C) No.6150 OF 2022

In the matter of an application under Articles 226 and 227 of the Constitution of India.

Barun Sen Khara

...

Petitioner

- Versus -

State of Odisha and Others

...

Opposite parties

For Petitioner

... M/s. S.K. Baral, G. Khilar,
S. Kanhar, J. Sahoo & A. Barik

For Opposite Parties

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

M/s. P.K. Mohanty, P. Mohanty,
P.K. Pasayat & S.N. Dash
(For O.P. Nos.2 & 3).

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. S.K. Baral, learned counsel appearing for the Petitioner, Mr. R.N. Mishra, learned Additional Government Advocate appearing for the State-Opposite Party No.1 and Mr.

P.K. Mohanty, learned Senior Counsel appearing for the Opposite Parties No.2 & 3.

2. This writ petition has been filed by the Petitioner challenging the illegal process of selection undertaken by the Odisha Public Service Commission, Cuttack (in short 'Commission') pursuant to the advertisement No.08 of 2021-22 dated 22.7.2021 under Annexure-2 and for quashing of the final select list published on 16.2.2022 under Annexure-5.

3. Mr. S.K. Baral, learned counsel appearing for the Petitioner submitted that pursuant to the advertisement issued under Annexure-2, the Petitioner made his application as a reserve category candidate with the sub-category mentioned in Serial No.3(b) of Para-2 of the said advertisement. It is further submitted that the Petitioner belongs to Scheduled Caste Category and he has made his application with the sub-category as indicated hereinabove. It is further submitted that as against total vacancies advertised, 4 posts were reserved for persons with disability and out of those 4 (four) posts, 2 posts for persons with low vision and 2 posts for persons with locomotor disabilities including leprosy cured, dwarfism and acid attack

victims. It is further submitted that the Petitioner being a disabled person with 40% disability in relation to locomotion, he was eligible to be considered as against the said reserved vacancy meant for person with disability vide Serial No.3(b) of Para-2 of the advertisement under Annexure-2. It is further submitted that even though the Petitioner qualified in the written test and was allowed to take part in the viva voce test, but while recommending the list of successful candidates, the Commission vide its Notice dated 16.2.2022 under Annexure-5 only one candidate having disability provided under Serial No.3(b) of Para-2 of the advertisement was recommended and accordingly, the Petitioner was deprived from the purview of such selection. It is further submitted that since the Petitioner had made his application under the sub-category for persons with disability, the selection of one candidate as against 2 posts meant for persons with disability vide Serial No.3(b) of Para-2 of the said advertisement, is illegal and needs interference of this Court to the same.

4. Mr. Baral, learned counsel appearing for the Petitioner, in support of his submission, relied on a decision of Hon'ble the

Apex Court in the case of ***Mahish Gupta and Others v. Yashwant Kumar Ahirwar and Others***, reported in (2007) 8 SCC 621. The Hon'ble Apex Court at Paragraph-12 of the said judgment held as follows:-

“12. Disability has drawn the attention of the worldwide community. India is a signatory to various International Treaties and Conventions. The State, therefore, took a policy decision to have horizontal reservation with a view to fulfill its constitutional object as also its commitment to the international community. A disabled is a disabled. The question of making any further reservation on the basis of caste, creed or religion ordinarily may not arise. They constitute a special class. The advertisement, however, failed to mention in regard to the reservation for handicapped persons at the outset, but, as noticed hereinbefore, the vacant posts were required to be filled up for two categories of candidates; one for Scheduled Castes and Scheduled Tribe candidates and other for handicapped candidates. Handicapped candidates have not been further classified as belonging to Scheduled Castes, Scheduled Tribes and general category candidates.”

5. Mr. Baral, learned counsel appearing for the Petitioner also relied on another decision of Hon'ble Gauhati High Court in the case of ***Saidur Rahman v. The State of Assam and 2 Ors.*** (W.P.(C) No.758 of 2019 decided on 14.02.2022). Hon'ble Gauhati High Court at Paragraphs-12, 13 and 17 of the said judgment held as follows:-

“12. In the case of Mahesh Gupta (Supra) referred to by the learned counsel for the petitioner, the Hon'ble Supreme Court has categorically held that a disabled

is a disabled and therefore, the question of making further reservation on the basis of cast, creed and religion would not ordinarily arise. Such a view has been expressed by observing that disabled are by themselves a special class and to that extent their further classification may not be justified. Similar is the view expressed in the case of M. Selvakumar & Anr. (Supra) wherein it has been observed that physically handicapped category is a category in itself and the persons who are physically handicapped have to be treated alike in extending the relaxation and concession regardless of the fact whether they belong to a general category or OBC category.

13. Applying the ratio laid down in the case of Mahesh Gupta (Supra) and M. Selvakumar & Anr. (Supra), this Court is of the unhesitant opinion that having reserved four vacancies to be filled up by PWD candidates and having permitted the General Category candidates to participate in the recruitment process, there was no scope for the authorities to further reserve those four vacancies in PWD category to be filled up only by candidates belonging to OBC/ MOBC or ST(H) category.

17. From the above it is clear that the Government would not only have a statutory obligation to identify posts which can be reserved for persons with disability but would also have to earmark such vacancies, not less than 3%, for being filled up only by persons with disability. Such mandate of the statute is de hors any sub-classification and over and above any reservation based on caste, creed and religion. Therefore, viewed from that angle also, the respondents could not have refused to consider the candidature of the petitioner as a candidate belonging to the PWD category against one of the three vacant posts reserved for PWD candidates, more particularly when there was no other contender for those posts.”

6. Making all such submissions, Mr. Baral, learned counsel appearing for the Petitioner submitted that since in

advertisement issued under Annexure-2, 2 posts were reserved for persons with disability, more particularly locomotor disability, the selection of one candidate in the said category ignoring the claim of the Petitioner is illegal and the select list prepared accordingly vide Annexure-5 is required to be interfered with by this Court. It is also submitted that the Commission has not conducted the examination in terms of the advertisement issued under Annexure-2.

7. Mr. P.K. Mohanty, learned Senior Counsel appearing for the Opposite Parties No.2 & 3, on the other hand, made his submission basing on the stand taken in the counter affidavit. It is submitted that though the Petitioner belongs to Scheduled Caste (Male) PWD Category with deformation of locomotor disability, but since 4 posts were reserved for S.C. (Women) category in the advertisement and no vacancy was reserved for S.C. (Male) category candidate and in view of the fact that P.W.D. is a horizontal reservation, candidate having the disability can only be adjusted against the category he/she belongs to. It is further submitted that only S.C. (Women) with P.W.D. locomotor disability can be adjusted to the respective

category only. It is also submitted that since the Petitioner belongs to S.C. (Male) category, his candidature could not be recommended under locomotor disability sub-category as there was no vacancy reserved for S.C. (Male) category candidate in the advertisement. It is, accordingly, submitted that the Commission has done nothing wrong in not recommending the Petitioner for recruitment to the post of Assistant Public Prosecutor.

8. Mr. Mohanty, learned Senior Counsel appearing for the Opposite Parties No.2 & 3, in support of his submission, relied on a decision of the Hon'ble Apex Court in the case of **Saurav Yadav and Ors. V. State of Uttar Pradesh and Ors., (MANU/SC/0960/2020)**. Hon'ble Apex Court at Paragraphs-50 to 53 of the said judgment held as follows:-

“50. As is apparent from a plain reading of the above government order, the only stipulation with respect to treatment of horizontal reservation for women, is that in case a woman candidate is selected, she would be adjusted against the appropriate social category she belongs to (SC/ST/OBC/OC). However, there is no rule, or direction which prohibits the adjustment of socially reserved categories of women in the general category or “open category”. The first indication of this is in Indira Sawhney¹⁵ where B.P. Jeevan Reddy, J stated as follows:

“Horizontal reservations cut across the vertical reservations - what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16 (1). The persons selected against this quota will be placed in the appropriate category; if he belongs to SC category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure.”

51. This rule was affirmed and applied in *Anil Kumar Gupta v State of UP*, MANU/SC/0747/1995 : 1995 (5) SCC 173, *Swati Gupta v State of UP*, MANU/SC/2175/1995 : 1995 (2) SCC 560 and *Jitendra Kumar Singh v State of UP*, MANU/SC/0032/2010 : 2010 (3) SCC 119 and *Rajesh Kumar Daria v Rajasthan Public Service Commission*, MANU/SC/7813/2007 : 2007 (8) SCC 785. The manner of filling the horizontal reservation category and the vertical, social categories, was explained in *Rajesh Kumar Daria (supra)* in the following terms:

“Social reservations in favour of SC, ST and OBC under Article 16 (4) are 'vertical reservations'. Special reservations in favour of physically handicapped, women etc., under Articles 16(1) or 15(3) are 'horizontal reservations'. Where a vertical reservation is made in favour of a backward class under Article 16 (4), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their numbers will not be counted against the quota reserved for the respective backward class. Therefore, if the number of SC candidates,

who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under Open Competition category. [Vide Indira Sawhney, R. K. Sabharwal vs. State of Punjab, Union of India v Virpal Singh Chauhan and Ritesh R. Shah v Dr. Y.L. Yamul. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for scheduled castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of 'Scheduled Castes-Women'. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of scheduled caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women.”

52. The features of vertical reservations are:

- (i) They cannot be filled by the open category, or categories of candidates other than those specified and have to be filled by candidates of the concerned social category only (SC/ST/OBC);*
- (ii) Mobility ('migration') from the reserved (specified category) to the unreserved (open*

category) slot is possible, based on meritorious performance;

(iii) In case of migration from reserved to open category, the vacancy in the reserved category should be filled by another person from the same specified category, lower in rank,

(iv) If the vacancies cannot be filled by the specified categories due to shortfall of candidates, the vacancies are to be 'carried forward' or dealt with appropriately by rules.

53. Horizontal reservations on the other hand, by their nature, are not inviolate pools or carved in stone. They are premised on their overlaps and are 'interlocking' reservations¹⁶. As a sequel, they are to be calculated concurrently and along with the inviolate 'vertical' (or "social") reservation quotas, by application of the various steps laid out with clarity in paragraph 11 of Justice Lalit's judgement. They cannot be carried forward. The first rule that applies to filling horizontal reservation quotas is one of adjustment, i.e. examining whether on merit any of the horizontal categories are adjusted in the merit list in the open category, and then, in the quota for such horizontal category within the particular specified/ social reservation."

9. Mr. Mohanty, learned Senior Counsel appearing for the Opposite Parties No.2 & 3, also brought to the notice of this Court the guideline dated 19.1.2021 issued by the Government of Odisha in General Administration and Public Grievance Department. It is submitted that vide the said notification, Government of Odisha in General Administration and Public Grievance Department issued the principles to be followed on vertical and horizontal reservation during filling up of various State Civil Services and Posts.

10. This Court, after going through the said guideline, finds that the reservation in favour of women, physical handicapped, ex-servicemen and sports person are termed as horizontal reservation. This Court further finds that in the said guidelines vide Clause-6, the reservation for persons with disability is provided, which runs as follows:-

“Reservation for Persons with Disability:-

Government have prescribed reservation of not less than 4% in case of direct recruitment to Gr A, B, C and D posts for Persons with Disabilities (PwD) out of which one percent reservation shall be earmarked for women with disability. These reservations will be filled up following the principles of horizontal reservation. The women quota in this category will be counted while computing the women reservation in the relevant category in the vertical reservation.”

11. Mr. Mohanty, learned Senior Counsel appearing for the Opposite Parties No.2 and 3 further submitted that that since the Petitioner belong to S.C. (Male) Category and no reservation having been provided in the advertisement for S.C. (Male) Category, basing on the fact that the reservation for P.W.D. candidate is a horizontal reservation, no illegality has been committed by the Commission in not recommending the Petitioner, as the Petitioner originally belongs to S.C. (Male) Category.

12. Heard the learned counsel for the Parties. Perused the materials available on record. This Court, after going through the same, finds that the Petitioner made his application as a S.C. (Male) category with the sub-category person with disability. In view of the clarification issued by the Government of Odisha in General Administration and Public Grievance Department dated 19.1.2021 coupled with the decision of the Hon'ble Apex Court rendered in the case of *Saurav Yadav and Ors.* (supra), this Court finds that no illegality has been committed by Commission in not recommending the case of the Petitioner as against the sub-category, persons with disability.

13. This Court, accordingly, is not inclined to interfere with the prayer made in the writ petition and while dismissing the same, this Court vacates the interim order dated 9.3.2022 passed in I.A. No.3086 of 2022.

14. The writ petition is dismissed accordingly.

(Biraja Prasanna Satapathy)
Judge

Orissa High Court, Cuttack
The 1st November, 2022/D. Aech, PA.