

IN THE HIGH COURT OF ORISSA AT CUTTACK

A.F.R.

W.P.(C) No. 16984 of 2020

Dr. Rabindra Naik

Petitioner

Mr. Avijit Mishra, Advocate

-versus-

State of Odisha and another Opposite Parties

Mr.P.K.Mohanty, Sr. Advocate instructed

by Mr. P.K.Pasayat, Advocate for OP No.2

Mr. R.N.Mishra, AGA for OP. No.1

CORAM:

JUSTICE M.S.SAHOO

ORDER

12.05.2022

Order No.

11. **1.** This matter is taken up by hybrid mode.
- 2.** The petitioner in the writ petition is the applicant pursuant to the advertisement No.12 of 2018/19 (Annexure-1) issued by the Odisha Public Service Commission(OP No.2) for selection of Assistant Professor in the discipline of Obstetrics and Gynaecology, in the Odisha Medical Education Service.
- 3.** The facts of the case as narrated in the writ petition, which also remain uncontroverted, are that the petitioner applied in the category of ST for selection. He was considered and evaluated as per the selection process of O.P.No.2-OPSC. Five candidates were recommended in the ST category as per the advertisement pursuant to the requisition of the State Government and one post for ST candidate remains unfilled inasmuch as the candidate Dr. Ms. Snehalata Mallick working in the cadre of Assistant Professor in the Odisha Medical Education Service (Method

of Recruitment and Conditions of Service) Rules, 2009 pursuant to the advertisement no.10 of 2016/17 had got appointed earlier by notification No.28408 dated 06.11.2018 (Annexure-3) issued by the Government of Odisha, Health and Family Welfare Department-opposite party no.1 and she choose to apply again for the post of Assistant Professor against the subsequent notification No. 12 of 2018/19 pursuant to the subsequent requisition of the State Government. Apparently, the post already occupied by Dr. Ms. Mallick as Assistant Professor could not have been taken as a vacant post and requisition could not have been sent by the State to the OPSC as indicated above.

The selection of the petitioner herein pursuant to the subsequent notification No. 12 of 2018/19 is the subject matter for consideration in the present writ petition.

4. In the peculiar facts and circumstances, after Dr. Ms. Mallick while working as Asst. Professor, was recommended for the second time, the Government in the Department of Health and Family Welfare, has come up with the notification no.12868 dated 04.06.2020 (Annexure-10) issued by opposite party no.1-Government of Odisha, Health and Family Welfare Department filed along with I.A. No.820 of 2020. The said notification is extracted herein:

*“Government of Odisha
Health & Family Welfare Department*

NOTIFICATION

No. 12868 Dated 04.06.2020

*The following regular Assistant Professors are
already appointed and working under Odisha
Medical Education Service Cadre after duly*

recruited pursuant to the OPSC advertisement no.10 of 2016/17. But their names are once again recommended by OPSc in the respective discipline pursuant to the advertisement no.12 of 2018/19. Therefore, they are not considered for appointment pursuant to the advertisement No.12 of 2018/19."
(emphasis supplied)

5. The Memo No.12869 dated 04.06.2020 forwarding the aforesaid notification dated 04.06.2020 (Annexure-10) to OPSC-opposite party no.2 for information and necessary action, indicates :

"In lieu of the above said candidates, the OPSC is requested to recommend names of suitable candidate in the respective discipline, selected under the corresponding category as per merit, out of the waiting list, if any, for their appointment."

(emphasis supplied)

6. The writ petition was presented before this Court on 16.07.2020 after recommendation of the OPSC dated 06.06.2019 (Annexure-6) and also after the OPSC (opp. party no.2) had responded by letter dated 02.01.2019 (Annexure-7) to the grievance of the petitioner as stated in the writ petition.

7. Counter affidavit by opposite party no.2-OPSC sworn to by its Joint Secretary dated 18.01.2022, has been filed on 19.01.2022.

8. The petitioner has filed rejoinder dated 18.02.2022 to the counter affidavit dated 18.01.2022 and I.A. No.820 of 2020. The OPSC has filed additional counter affidavit dated

02.04.2022 and pursuant to the order of this Court dated 25.04.2022 the OPSC has filed additional affidavit dated 09.05.2022.

9. The matter was heard on 21.3.2022 and the following order was passed :

“1. This matter is taken up through hybrid mode.

2. It is submitted by the learned counsel for the petitioner that as averred in the writ petition and based on reliable information, the petitioner was duly considered and his merit was evaluated and he was placed by the opposite party no.2-Public Service Commission, just below the candidate, Dr.Snehalata Mallik, who was continuing as Asst. Professor (O & G) in the cadre of Odisha Medical Education Service (OMES), as she was selected earlier and appointed by order dated 06.11.2018 issued by the Government of Odisha, Health & Family Welfare Department, as Assistant Professor of Obstetrics & Gynecology in PRM Medical College & Hospital (MCH), Baripada.

3. On perusal of the counter affidavit filed on behalf of opposite party no.2, the affidavit is completely silent about the merit position of the petitioner qua, Dr. Mallik.

The affidavit on behalf of opposite party no.2 has been sworn to by one Sri Judhisthir Naik working as Joint Secretary in the office of Odisha Public Service Commission, who was stated to be authorized by the Secretary and sworn the affidavit

dated 18.01.2022. At internal page-3, sub-paragraph-(2) of the affidavit, the following has been stated :

“.... ... As per the terms and conditions of the advertisement there was no provision to reject the candidature of any candidate if he/she previously got appointed to the said post by the Government.”

4. The advertisement no.12 of 2018/19 pursuant to which the applicant had applied, has been annexed as Annexure-1, i.e., dated 11.10.2018, provides eligibility at paragraph-2, which is quoted herein:

“2. Eligibility:- The following categories of persons are eligible to apply for the post of Assistant Professors in different disciplines (Specialty and Super Specialty).

(i) Selection shall be made through the Odisha Public Service Commission, from amongst the Tutors and senior Residents having P.G. Degree in the same discipline with three experience as such.

Provided that, the recruitment may also be made from amongst the Assistant professors in any other Specialty of Higher Specialty subject to the condition that seniority in the Specialty or Higher Specialty, as the case may be shall be determined from the date of appointment in the new discipline

in accordance with the placement given by the Commission, and accepted by Government.”

(emphasis supplied)

Reading of 2(i) (as quoted above) indicates that a candidate already employed can apply for a “new discipline.” Further paragraph-6 of the said advertisement provides for Other Eligibility Conditions and paragraph- 6 (iv) thereof, provides as follows :

“6 xxx xxx xxx

(iv) Government servants, whether temporary or permanent, are eligible to apply provided that they possess the requisite qualification and experience. They must inform their respective Heads of Offices/Departments in writing regarding submission of their applications for this recruitment and obtain “No Objection Certificate”

(emphasis supplied)

5. On being asked specifically, (the learned counsel for the Public Service Commission) regarding the contention that there was no provision to reject the candidature of the candidate, if he/she previously got appointed to the said posts by the Government in view of the paragraph-2(i) & paragraph-6(iv) of the advertisement, learned counsel seeks further time to obtain instruction.

6. It is submitted by the learned counsel for the petitioner that since the selected candidate was

already appointed in the cadre of Orissa Medical Education Service working as Assistant Professor pursuant to the order dated 06.11.2018, she was not given appointment for the subsequent selection as per the advertisement no.12 of 2018-19 and she continues to serve the Government in the cadre of OMES as per her earlier appointment. The learned counsel refers to the rejoinder filed by the petitioner dated 18.02.2022 which encloses the notification dated 04.06.2020 (marked as Annexure-A), i.e., the notification issued by the Government of Odisha, Health & Family Welfare Department observing as follows :

“The following regular Assistant Professors are already appointed and working under Odisha Medical Education Service Cadre after duly recruited pursuant to the OPSC advertisement No.10 of 2016/ 17. But their names are, once again recommended by OPSC in the respective discipline pursuant to the advertisement no.12 of 2018/19. Therefore, they are not considered for appointment pursuant to the advertisement no.12 of 2018/ 19.

7. By Memo no.12869 dated 04.06.2020 (Annexure-A to the rejoinder), a request was made by Government to recommend the names of suitable candidates in the respective disciplines as per their merit.

8. Mr. R.N. Mishra, learned Addl. Government Advocate does not dispute that in fact the notification dated 04.06.2020 was issued by

Government of Odisha and communicated to the opposite party no.2-Public Service Commission.

9. Learned counsel for the Public Service Commission seeks further time to obtain instruction on the said aspect.

As prayed for, list this matter on 25.04.2022.

Urgent certified copy of this order be granted on proper application.

Copy of the order be uploaded in the official website immediately.”

10. Thereafter, additional affidavit dated 21.4.2022 by the OPSC (OP No.2) was filed, which was considered by this Court on 25.4.2022. On 25.4.2022 following order was passed :

“1. This matter is taken up by hybrid mode.

2. Learned Sr. Counsel for the O.P.No.2-Odisha Public Service Commission (OPSC) submits that the additional affidavit dated 21.4.2022 on behalf of OPSC has been filed.

3. On perusal of the affidavit dated 21.4.2022 purportedly filed pursuant to the order dated 21.3.2022 it is indicated, said affidavit does not refer to the observations of this Court at paragraphs 3, 5, 6 & 9 of the order dated 21.3.2022.

3. Learned Senior Counsel prays for some further time to obtain instruction and file affidavit. As directed in paragraph-3 of the order dated 21.3.2022, the OPSC shall produce records/select list indicating the merit position of the petitioner qua Dr. Snehalata Mallik who was recommended in ST category as first

candidate while she was continuing as Assistant Professor (O & G) in the cadre of Odisha Medical Education Service after being recommended earlier by the OPSC and appointed by order dated 6.11.2018.

4. Recommendation of Dr. Mallik in terms of advertisement No.12 of 2018/19 dated 11.10.2018 could not have been made in view of specific provision as of 2(i) and 6(iv) of the advertisement as indicated in the order dated 21.3.2022. From the tenor of the affidavit submitted by the OPSC, it is indicated that the OPSC itself was not aware of recommending the candidate as result of an earlier selection.

5. The inter se merit position of the ST candidates records/select list shall be produced by the next date supported by affidavit.

6. As prayed for, list on 12.5.2022.

7. Copy of the order be uploaded in the official website.”

11. Though it was specifically directed at paragraph-5 of the order dated 25.4.2022 that inter se merit position of the ST candidates records/select list shall be produced by the next date supported by affidavit, in the affidavit dated 9.5.2022 at paragraph-3 following has been stated :

“3. That it is further humbly submitted that the verified documents i.e., certificate/mark sheets/Experience certificate/NOC are also forwarded to the department at the time of sending recommendation letter. Amongst 5 S.T. candidates recommended, Dr. Snehalata Mallick secured highest mark, as would be evident from the merit list. The petitioner a S.T. candidate is at the bottom of list. In the Govt. notification dtd 04.06.2020 vide Annexure-A to

previous affidavit of OPSC pursuant to order dtd.21.03.2022, candidates in Sl. Nos.1 to 3 are U.R. candidate, Sl. No.4 is Smt. S. Mallick, only S.T. candidate.”

12. Apparently, despite repeated opportunities, as indicated above, the OPSC, somehow has not been able to understand/follow the orders passed by this Court which are very clear and they have opted to file vague affidavits, like affidavit dated 9.5.2022 at paragraph-3 wherein it is stated, “the petitioner a ST candidate is at the bottom of the list”. Nowhere in the said affidavit, the inter se merit position of the ST candidates, has been indicated.

13. In Annexure-D/2 filed by the OPSC annexed to the additional affidavit dated 9.5.2022 the following is provided :

“Odisha Public Service Commission

Recruitment to the Post of Asst. Professor, Pursuant to Advt.No.12 of 2018-19

Discipline- O & G”

Roll number of the petitioner is ‘316’.

Roll number of Dr. Snehalata Mallick is ‘321’.

14. In the said affidavit, the roll no.316 finds place at sl.no.10 and the candidate (though name is not mentioned, at sl.10) as last candidate in the category ST, petitioner has been awarded 57.103 marks.

15. In view of the order No. 12868 dated 4.6.2020 (Annexure-10) issued by the Govt. of Odisha, Health & Family Welfare Department, by order of His Excellency the Governor (as it deals with the appointment to the Assistant Professor in Class-I of OMES) the first candidate Dr. Ms. Snehalata Mallik who after being duly recruited pursuant to

the earlier OPSC advertisement No.10 of 2016/17, was already appointed and working under Odisha Medical Education Service, without leaving/resigning from her post has been once again recommended by the OPSC in the respective discipline (O&G), pursuant to the subsequent advertisement No.12 of 2018/19; was not considered again for appointment pursuant to the advertisement no.12 of 2018/19. The subsequent selection was as per the subsequent requisition of the Government.

16. Reliance is placed by the petitioner on the Rules-11(1) and 11(2) of the Odisha Medical Education Service (Method of Recruitment and Conditions of Service) Rules, 2009. The said Rules are reproduced below:

“11. Consultation with the Commission : (1) The recommendation of the Selection Board shall be referred to the Commission along with a list of all eligible candidates, including those who have not been recommended but considered together, with the service particulars relating to their academic qualification, teaching experience, research and field experience, if any.

(2) The Commission shall consider the list along with the service particulars received under sub-rule (1) and shall furnish its recommendations to the Government.”

(Underlined to supply emphasis)

17. From another angle, the matter also needs to be considered i.e. once Dr. Snehalata Mallik got selected pursuant to the earlier requisition, following which advertisement No.10 of 2016-17 was notified by the OPSC, the said post could not have been shown as vacant and requisitioned again to be filled up through advertisement by OPSC.

If Dr. Mallick would not have joined/resigned from her service, her post could have been treated as vacant and would have been requisitioned to OPSC for selection. If the post occupied by Dr. Mallick is added to the vacancy the total vacancy comes to six and the petitioner could have been recommended being the sixth candidate.

18. In view of the above analysis, it is apparent, as indicated in Annexure-D/2, five ST candidates with Roll Nos. 304, 310, 325, 311 & 316 should have been recommended if the candidature of Dr. Mallick “at the top” could not have been entertained, as she was already continuing in the same cadre and post for which advertisement was issued. The petitioner in the present writ petition has the Roll No. 316.

For reference the Merit List (Annexure-D/2) as annexed to the affidavit of OPSC dated 09.05.2022 is reproduced herein :

“ODISHA PUBLIC SERVICE COMMISSION
Recruitment to the Post of Asst. Professor, Pursuant to Advt. No.12 of 2018-19

Discipline – O & G

Merit List

Sl. No.	Roll No.	REF No.	CAT	GENDER	TOTAL CAREER MARKS (FM-100)	V.V MARKS (FM-15)	GRAND TOTAL MARKS (FM-115)	SELECT UNDER CATEGORY
1	321	K95	ST	F	65.604	12	77.604	ST
4	304	J35	ST	F	62.404	9	71.404	ST
7	310	J83	ST	F	58.653	9	67.653	ST
8	325	K33	ST	F	56.775	7	63.775	ST
9	311	J12	ST	F	55.735	7	62.735	ST
10	316	K38	ST	M	52.103	5	57.103	

Prepared By
Sd/04.06.19
(A.K.Mohanty)
Sr.Asst.)

Checked by-
Sd- Illegible
04.6.19

Verified by-
Sd/ Illegible
04.6.2019
(Secretary)”

19. Advertisement NO.20 as at Annexure-1 is taken note of and at paragraph-1 it provides method of selection :

“ODISHA PUBLIC SERVICE COMMISSION

ADVERTISEMENT No.12 OF 2018/19

RECRUITMENT TO THE POSTS OF ASSISTANT PROFESSORS IN SUPER SPECIALITY AND SPECIALITY IN DIFFERENT DISCIPLINES OF SCB MEDICAL COLLEGE, CUTTACK & MKCG MEDICAL COLLEGE, BERHAMPUR.

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METHOD OF SELECTION : Selection of candidates shall be made as per the Odisha Medical Education Service (Method of Recruitment and Conditions of Service) Rules, 2009 taking into account the academic career and performance of candidates in the Viva Voce test.

(underlined to supply emphasis)

20. OPSC having considered the petitioner as the 6th candidate (though not recommended in view of the recommendations made in favour of Dr. Mallik.), Letter No.3630 dated 16.7.2020 as at (Annexure-11) issued by the OPSC is out of context and based on irrelevant considerations, for the reasons that as per the advertisement the petitioner was considered, evaluated and placed in the merit list of candidates.

21. It has to be observed that selection of the candidates by the OPSC shall be made taking into consideration academic career and performance of candidates in the Viva Voce test.

22. In view of the above, once the OPSC has taken into account academic career and performance of the petitioner in the Viva Voce test, as recorded in Annexure-D/2 (to the additional affidavit dated 9.5.2022 : quoted in paragraph-18 above), the OPSC cannot go back not to disclose merit position of a particular candidate as per method of selection advertised by OPSC itself.

23. In view of the above analysis, the writ petition is allowed with the following order :

OPSC shall include petitioner, who is the candidate at sl. No.10, Roll No.316, in their recommendation to the Govt., the candidate having secured 6th position among the ST candidates those could have been recommended. The OPSC shall forward their recommendation forthwith to the Government.

24. It is also clarified that in view of the letter No. 12868 dated 4.6.2020 (Annexure-10) issued by the Govt. of Odisha, Health & Family Welfare Department, the Government shall carry out the recommendation of the OPSC to give appointment to the petitioner.

25. Having been deprived earlier of getting appointment without any lawful reason, the petitioner shall be treated at par with the appointees those were appointed as per the recommendation of the OPSC pursuant to the advertisement No.12 of 2018/2019. However, the petitioner shall be given the notional benefit of pay and seniority after he actually joins service, as per the inter se merit of the petitioner i.e.

being the last amongst the candidates of ST category in the discipline of O & G.

Urgent certified copy of the order shall be issued as per Rules.

Copy of the order be uploaded in the official website.

(M.S.Sahoo)
Judge

dutta

