

A.F.R.

HIGH COURT OF ORISSA : CUTTACK

W.P.(C) No.17325 of 2020

An application under Articles, 226 and 227 of the Constitution of India.

Dr. Abinashi Sabyasachi Sethy ... Petitioner.

Versus.

State of Odisha and another ... Opp.parties

For petitioner : Mr. Avijit Mishra, Advocate

For opp.parties : Mr. S.K.Samal,
Addl. Govt. Advocate
(For Opposite party no.1)

Mr. P.K. Mohanty, Sr. Advocate
along with Mr. S.N. Das, Advocate
(For opposite party no.2)

PRESENT

THE HON'BLE SHRI JUSTICE MRUGANKA SEKHAR SAHOO

Date of Hearing :28.06.2022 : Date of judgment: 15.07.2022

M.S.SAHOO, J. This matter is taken up through 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 Paediatrics, 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 SC for selection of Asst. Professor of Paediatrics. He was considered and evaluated as per the selection process of O.P.No.2-OPSC. Three candidates were recommended in the SC category (including one woman candidate) as per the advertisement pursuant to the requisition of the State Government and one post for SC

candidate remains unfilled inasmuch as the candidate Dr. Manas Ranjan Mallick (OPSC Roll No.373), was not given appointment.

Dr. Mallick is already working in the cadre of Assistant Professor in the Odisha Medical Education Service (as per Method of Recruitment and Conditions of Service Rules, 2009) after he was selected by O.P. No.2-OPSC, pursuant to the advertisement no.10 of 2016/17, had got appointed earlier by notification No.28408 dated 06.11.2018 (Annexure-4) issued by the Government of Odisha, Health and Family Welfare Department-opposite party no.1.

Dr. Mallick choose to apply second time 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. 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 non recommendation of the petitioner herein by the OPSC, pursuant to the subsequent notification No. 12 of 2018/19 being challenged, is the subject matter for consideration in the present writ petition.

4. In the peculiar facts and circumstances, after Dr. 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 (Marked as Annexure-9 annexed to the rejoinder dated 09.12.2022 filed by petitioner) issued by opposite party no.1-Government of Odisha, Health and Family Welfare Department. 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.”

.....2) Dr. Manas Ranjan Mallick, at present Assistant Professor, Paediatrics, PRM MCH, Baripada.,.....”
(emphasis supplied)

5. The Memo No.12869 dated 04.06.2020 issued by the Govt. in the H&FW Department 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)

The OPSC by letter No. 3630 dated 16.7.2020 has responded to the Memo of the Govt. dated 04.06.2020 in the negative (Annexure-10).

6. The writ petition was presented before this Court on 17.07.2020 after recommendation of the OPSC dated 07.06.2019 (Annexure-7) and also after the OPSC (opp. Party no.2) had responded to the letter No. 3630 dated 16.07.2020 of the Govt. in H&F.W. Deptt. (Annexure-10) to the rejoinder dated 09.12.2021.

7. While issuing notice on 25.08.2020 this Court had passed the following interim order in I.A. No. 8190 of 2020.

“It is directed that any development pursuant to the advertisement vide Annexure-1 shall remain subject to the result of the Writ Petition.

I.A. stands disposed of.”

8. Counter affidavit by opposite party no.2-OPSC sworn to by its Deputy Secretary dated 23.12.2020, has been filed on 24.12.2020 and is part of the record.

9. The petitioner has filed rejoinder dated 09.12.2021 to the counter affidavit dated 23.12.2020. The OPSC has filed the instructions in a sealed cover along with letter dated 27.06.2022 addressed to the learned Senior Counsel appearing for OPSC.

10. 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)

11. 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)

It is not very clear from pleadings whether Dr. Mallick, continuing in OMES cadre as Asst. Professor, had produced “No Objection Certificate” from the appropriate authority when he applied for the selfsame post for the second time. The OPSC in their counter have not clarified the issue or produced any record to indicate that a NOC that was in order was produced.

12. 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, Paediatrics pursuant to the order dated 06.11.2018, he was not given appointment for the subsequent selection as per the advertisement no.12 of 2018-19 and he continues to serve the Government in the cadre of OMES as per his earlier appointment.

The learned counsel refers to the rejoinder filed by the petitioner dated 09.12.2021 which encloses the notification dated 04.06.2020 (marked as Annexure-9), 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.*

.....2) Dr. Manas Ranjan Mallick, at present Assistant Professor, Paediatrics, PRM MCH, Baripada.,.....”

13. By Memo no.12869 dated 04.06.2020 (Annexure-9 to the rejoinder), a request was made by Government to recommend the names of suitable candidates in the respective disciplines as per their merit.

Mr. S.K.Samal, learned AGA 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.

The OPSC by letter No. 3630 dated 16.7.2020 has responded to the Memo of the Govt. dated 04.06.2020 in the negative (Annexure-10 to the rejoinder).

Thereafter, the instruction with letter dated 27.6.2022 by the OPSC (OP No.2) is filed, in Court on 28.06.2022.

14. From the factual report filed by the OPSC annexed to the letter dated 27.06.2022, the following is revealed :

*“Odisha Public Service Commission
Recruitment to the Post of Asst. Professor, Pursuant to Advt.No.12
of 2018-19
Discipline- Paediatrics”*

Roll number of the petitioner Dr. A.S.Sethy is ‘352’.

Roll number of Dr. Manas Ranjan Mallick is ‘373’ (SC category).

15. In the Merit list dated 07.06.2019, the petitioner having Roll No.352 finds place at sl.no.9 and the candidate though name is not mentioned, sl. No.6 Roll No. 367 is the last candidate in the category SC, recommended by the OPSC has secured 76.232 marks, petitioner has been awarded 70.141 marks and would be the next candidate in SC (Male) in the order of merit.

16. As per 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. Manas Ranjan Mallick (Roll No. 373) (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 his post has been once again recommended by the OPSC in the respective discipline (Paediatrics), 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.” (Annexure-9, Notification by Govt. of Odisha, H & F.W. Department).

The subsequent selection by OPSC was as per the subsequent requisition of the Government.

17. 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)

The learned counsel for petitioner in support of his contentions relies on a recent decision rendered by this Bench dated 12.5.2022 that allowed W.P.(C) No. 16984 of 2020 (Dr. Rabindra Naik v. State of Odisha and another). It is submitted that the facts of the present case are identical to that of the said writ petition and contended that in view of the proposition laid down in the said decision, the OPSC

after evaluating and determining the merit of the petitioner in the selection process of Asst. Professor cannot hold back the inter se merit position qua the other candidates and the letter No. 3630 dated 16.07.2020 (Annexure-10).

Learned Senior Counsel for OPSC as well as the learned AGA fairly agree to the contention that facts of the writ petition allowed earlier, are identical to the present case.

18. From another perspective, the matter also needs to be considered i.e. once Dr. Manas Ranjan Mallik got selected pursuant to the earlier requisition of the Govt., 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 his service, his 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 four and the petitioner could have been recommended being the fourth candidate (1 woman + 3 Men).

19. In view of the above analysis, it is apparent, as indicated in Merit List dated 07.06.2019 produced by OPSC, three SC candidates with Roll Nos. 367, 352 and 372 (woman) should have been recommended if the candidature of Dr. Mallik “at the top” could not have been entertained, as he 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. 352.

For reference the Merit List dated 07.06.2019 as enclosed to the letter of OPSC dated 27.06.2022 for SC candidates, is reproduced herein :

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

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
5	373	M44	SC	M	66.309	10	76.309	SC
6	367	M91	SC	M	67.232	9	76.232	SC
7	372	M47	SC	F	66.998	8	74.998	SC(W)
9	352	M45	SC	M	59.141	11	70.141	

Prepared By

Sd/illegible

Dt.illegible

Checked by-

Dt.illegible

Verified by-

Sd/illegible

07.06.2019

It has to be noted that the photo copy of the “merit list” produced does not indicate all the signatures and the date put by persons for reasons best known to the OPSC. The OPSC has chosen not to produce the records indicating that NOC was produced by Dr. Mallick as required by the advertisement.

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

“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.

Xx

xx

xx

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. It has to be noted 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.

Once the OPSC has taken into account academic career and performance of the petitioner in the Viva Voce test, as recorded in Merit List dated 07.06.2019, quoted in paragraph-19 above), the OPSC cannot go back not to disclose merit position of a particular candidate as per method of selection advertised by OPSC itself.

Accordingly, the letter No. 3630 dated 16.07.2020, issued by OPSC to the Govt. in H&FW Department is set aside being irrational, based on irrelevant considerations as well as being based on considerations not germane to the issue.

21. 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.9, Roll No.352, in their recommendation to the Govt. for appointment as Asst. Professor in the discipline of Paediatrics in the OMES cadre. The OPSC shall forward their recommendation forthwith to the Government.

22. It is also clarified that in view of the letter No. 12868 dated 4.6.2020 (Annexure-9) 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.

23. 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 Assistant Professor, Paediatrics in OMES cadre, as per the inter se merit of the petitioner i.e. being the

last amongst the candidates of SC (Men) category in the discipline of Paediatrics.

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M.S.Sahoo,J.

Orissa High Court, Cuttack
The 15th July,2022/dutta