

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P(C) Nos.17268 of 2018, 4914,6355 & 18563 of 2022

In the matter of an application under Section 19
of the Administrative Tribunals' Act, 1985.

.....

**Sushil Kumar Nayak &
Others**

....

Petitioners

-versus-

State of Odisha & Others

....

Opposite Parties

For Petitioners

:M/s. G. Mukherji,
Sr. Advocate,

M/s. Nirmal Ch. Mohanty,
Advocate
(In W.P.(C) No.4914 of 2022)

For Opp. Parties

:M/s. B.P. Tripathy,
Advocate

PRESENT:

THE HONBLE JUSTICE BIRAJA PRASANNA SATAPATHY

Date of Hearing: 20.10.2022 & Date of Judgment: 18.11.2022

Biraja Prasanna Satapathy, J.

1. Heard Mr. G. Mukherjee, learned Senior counsel appearing for the petitioners in W.P.(C) Nos.17268 of 2018 6355 of 2022 and 18563 of 2022 and Mr. Nirmal Chandra Mohanty, learned counsel appearing for the petitioner in

W.P.(C) No.4914 of 2022. In all these cases, Opp. Party- Odisha Power Transmission Corporation Ltd (In short, "OPTCL") was represented by Mr. B.P. Tripathy, learned counsel.

2. W.P.(C) No.17268 of 2018 was filed with the following prayer.

"It is therefore humbly prayed before this Hon'ble Court that in view of the above mentioned facts and circumstances of the case, this Hon'ble Court may be graciously pleased to issue appropriate Writ/Order(s) /Director(s)/Declaration under Article 226 of the Constitution of India and more particularly:

- (i) Quash the advertisement no.MPP&R-01/2018 dtd.25.08.2018 floated by the Odisha Power Transmission Corporation Limited for recruitment of Management trainee (electrical) vide Annexure-13.*
- (ii) Direct the opposite parties to conduct a special recruitment test in respect of the petitioners as special case as per the proposal submitted before the Hon'ble Apex Court instead of requiring them to participate with freshers, and for such purpose, carve out such number of posts as required.*
- (iii) Pass such other order/direction/declaration/ writ(s) as this Hon'ble Court may deem proper in the interest of justice.*

W.P.(C) No.6355 of 2022 along with the other two writ petitions in W.P.(C) Nos.18563 of 2022 and 4914 of 2022 were filed with the prayer to quash the Advertisement No.MPP & R-08/2022 dated 04.01.2022 (Annexure-10) floated by the Odisha Power Transmission

Corporation Limited for recruitment of Junior Management Trainee (Electrical) and for other reliefs.

The prayer made in W.P.(C) No.6355 of 2022 is quoted hereunder:-

“It is therefore humbly prayed before this Hon’ble Court may be graciously pleased to issue appropriate Writ(s)/ Order(s)/ Direction(s)/ Declaration under Article 226 of the Constitution of India and more particularly:

- 1. Quash the advertisement no. MPP & R-08/2022 dtd.04.01.2022 (Annexure-10) floated by the Odisha Power Transmission Corporation Limited for recruitment of Junior Management Trainee (electrical).*
- 2. Direct the opposite parties to conduct a special recruitment test in respect of the petitioners as special case as per the proposal submitted before the Hon’ble Apex Court instead of requiring them to participate with freshers, and for such purpose, carve out such number of posts as required.*
- 3. Pass such other order/ direction/ declaration/ Writ9s) as this Hon’ble Court may deem proper in the interest of justice.*

And for the said act of kindness, the petitioner as in duty bound shall ever pray”.

3. Mr. G. Mukherji, learned Senior Counsel appearing for the petitioners submitted that pursuant to the memorandum dated 15.03.2005 issued by the Board of Directors of GRIDCO in terms of their Resolution made in its 92nd Board Meeting, it was resolved that due to ban order imposed by the Government to fill up the vacancies on regular basis and in order to provide uninterrupted

power supply and to take up World Bank Funded Scheme, proposal was made to deploy Engineering personnel on contract basis through outsourcing agency on payment of consolidated salary. In terms of the said Resolution issued vide Memorandum dated 15.03.2005, the petitioners in W.P.(C) No.17268 of 2018 being Graduate Engineers in Electrical, they were engaged with consolidated salary for an amount of Rs.5,000/- per month. The said monthly salary was subsequently enhanced from time to time. Subsequently, when the present Management came into picture in the name and style "Orissa Power Transmission Corporation Limited", vide notice dated 02.09.2005, it was indicated that OPTCL would be responsible towards legal and statutory dues including payment of remuneration to the employees. It was also decided that since the Board of Directors of GRIDCO have approved the engagement of the Labour Contractor for the said purpose, the proposal had been accepted by OPTCL also. In terms of such arrangement made by GRIDCO and followed by OPTCL, the petitioners in W.P.(C) No.17268 of 2014 were allowed to continue in service.

4. While so continuing without any break from the year 2005, when OPTCL instead of absorbing the petitioners in W.P.(C) No.17268 of 2018 floated an advertisement on 25.08.2018 to fill up the post of Management Trainees, the said advertisement was challenged in a batch of Writ Petitions in W.P.(C) No.3319 of 2009 and batch. This Court vide order dated 11.05.2011 disposed of the said writ petition with the following direction.

“14. In view of the above finding, we dispose of all the writ applications with the following directions:

(1) That State Government shall take a decision in consultation with the Corporation as to whether these Petitioners can be recruited as Management Trainees or to such posts as they are entitled to according to their qualification under Clause 15 of the Recruitment Policy or not. While taking a decision in this regard, the observation of this court with regard to discrimination may be taken into consideration.

(2) In the event all the posts advertised under Annexure-5 have been filled up in the meantime, the State Government shall consider creation of such number of posts or grant approval for appointment to such number of vacancies so that all the petitioners can be considered for recruitment. This exercise shall be completed within a period of six months from the date of communication of this order. Till a decision is taken in this regard, the Petitioners shall be permitted to continue in their respective posts on contractual basis and on consolidated pay.”

5. Pursuant to the order passed by this Court on 11.05.2011 when the State Government vide its letter dated 14.10.2011 decided not to consider the engagement

of the petitioners, who were engaged through outsourcing agency in OPTCL, the said action of the Government was once again challenged before this Court in W.P.(C) No.28747 of 2011. This Court vide order dated 09.10.2013 disposed of the said writ petition with the following direction.

“13. In view of the same, we have no other option except to quash the order dated 14.10.2011 passed by the Government to take a fresh decision in consultation with the Corporation to consider the case of the Petitioners under Clause-15 of the Recruitment Policy in terms of the earlier judgment dtd.11.05.2011 passed by this court in W.P.(C) NO.3319 of 2009 and other similar batch of writ applications. More particularly, while taking a decision, the observation made in paragraph 14(1) and (2) of the judgment dtd.11.5.2011 passed in W.P.(C) No.3319 of 2009 shall be kept in mind. Since the petitioners are continuing, we direct that their services shall not be terminated till a decision is taken by the Government.

6. Challenging the order passed by this Court on 09.10.2013, OPTCL moved the Hon'ble Apex Court in SLP (Civil) No.11569 of 2014 and the same was subsequently converted as Civil Appeal No.8415 of 2017. It is contended that while the matter was pending before the Hon'ble Apex Court, basing on the proposal submitted by the learned Senior Counsel appearing for OPTCL, the aforesaid Civil Appeal No.8415 of 2017 was disposed of vide order dated 05.07.2017. The relevant extract of the said order is quoted hereunder.

xxx. Mr. P.P. Rao, learned senior counsel for the appellants has placed the following proposal:

“ The respondents will be allowed to continue on provisional basis till the next round of selection process takes place in the respective categories of posts for recruitment. The respondents will be at liberty to participate in such Selection Process. They shall be allowed relaxation of upper age limit to the extent of service rendered by the, provided they satisfy all other eligibility criteria for the posts as laid down in the Recruitment Rules. They shall also be allowed 1% extra marks on the total marks of CBT (Computer Based Test) for each completed year of service subject to a maximum of 15%, which shall be added to the marks secured by them in the CBT. Such of the respondents who get selected will be appointed on regular basis and others who either do not participate in the selection process or are unsuccessful in the selection, their services shall be discontinued. The above concessions will be granted as a special case n having regard to the facts of this case and will not be regarded as a precedent.”

Shri Rao submitted that the proposal is partly based on observation of this Court in Ashok Kumar and Another Vs. State of Bihar and Others, 2017(4) SCC 357 para 22.

We are satisfied that the stand of the appellants is fair. The appellants are at liberty to proceed in accordance with the said proposal.

Accordingly, the appeals are disposed of in terms of the above proposal.

7. It is contended that OPTCL without acting in terms of its proposal which was accepted by the Hon'ble Apex Court in its order dated 05.07.2017, when floated an advertisement on 25.08.2018 under Annexure-13 to the said Writ Petition to conduct a recruitment test for recruitment of Management Trainee(Electrical), the said advertisement was challenged by the Graduate Engineers engaged in the year 2005 on contract basis before this

Court in W.P.(C) No.17268 of 2018. This Court while issuing notice of the matter vide order dated 19.11.2018 passed an interim order with the observation that any action taken pursuant to the advertisement dated 25.08.2018 under Annexure-13 shall abide by the result of the writ petition.

8. During pendency of W.P.(C) No.17268 of 2018, when another advertisement of self-same nature was issued by the Corporation on 04.01.2022 for recruitment of Junior Management Trainee (Electrical), the Diploma Engineers engaged in the year 2005 on contract basis, challenging the said advertisement filed W.P.(C) No.4914 of 2022, 6355 of 2022 and 18563 of 2022 with the prayer as indicated hereinabove.

9. It is the main contention of the learned counsels appearing for the petitioners in all the above writ petitions that the selection process adopted by OPTCL in the advertisement issued on 25.08.2018, which is the subject matter of challenge in W.P.(C) No.17268 of 2018 and the advertisement issued on 04.01.2022, which is the subject matter of challenge in the writ petitions filed in the year 2022 have not been issued in terms of the proposal submitted by the learned Senior Counsel appearing for

OPTCL before the Hon'ble Apex Court in Civil Appeal No.8415 of 2017, which was accepted by the Hon'ble Apex Court while disposing the appeal vide order dated 05.07.2017. It is the main contention of the learned counsels appearing for the petitioners that OPTCL in its proposal submitted before the Hon'ble Apex Court unequivocally agreed that such of the petitioners who get selected will be appointed on regular basis. But the advertisements which are impugned in the aforesaid writ petitions since does not contain such provision for appointment on regular basis on being coming out successful in the selection process, the said advertisements being not in consonance with the proposal accepted by the Hon'ble Apex Court, needs interference of this Court. It is vehemently contended that both the impugned advertisements issued by the Corporation on 25.08.2018 and 04.01.2022 since contain various stipulations, the same cannot be said to have been issued in terms of the proposal duly accepted by the Hon'ble Apex Court in its order dated 05.07.2017.

10. It is also contended that even though as per the proposal accepted by the Hon'ble Apex Court, the petitioner on coming out successful in the selection

process are deemed to be appointed on regular basis, but in the advertisements which are impugned in the writ petitions, there is no such provisions for regular appointment of the petitioner on their coming out successful in the recruitment test. It is contended that as provided in both the advertisements, the selected candidates after coming out successful in the written test, have to undergo training for a period of one year at field units of OPTCL including Induction training at Power Training Centre, Chandaka, Bhubaneswar. Not only that all selected candidates have to undergo not only one year training period but also it is subject to further extension. It is also stipulated that during training period, the trainees can be terminated without any notice or without any reason whatsoever thereof. In both the advertisements, there is also a provision that even after successful completion of the training, there shall be no obligation on the part of the Corporation to offer regular appointment. Accordingly, it is contended that since as per the proposal submitted by the Corporation, such of the petitioners on coming out successful in the selection process are required to be appointed on regular basis, the stipulation contained in both the advertisements being

contrary to the said proposal, the said advertisements have been rightly challenged by the petitioners in the writ petitions in question.

11. It is also contended that while in W.P.(C) No.17268 of 2018, this Court passed an Interim Order that any action taken shall abide by the result of the Writ Petition, but in the Writ Petition filed in the year 2022, this Court has passed interim order restraining OPTCL from filling up required number of posts so advertised in its advertisement dated 04.01.2022.

12. It is also submitted that as like the conditions indicated in the first advertisement issued on 25.08.2018, in the second advertisement issued on 04.01.2022, similar stipulations are also there i.e to undergo training for a period of one year and only on successful completion of the training period, a candidate shall be appointed as Junior Manager (Electrical) on contractual basis for a period of five years. It is also provided in the said advertisement that on completion of six years (one year training + 5 year contractual), the candidates may be considered for appointment to the post of Junior Manager (Electrical) on regular establishment. In the said second advertisement, as like the first advertisement, there is

also a condition that during the training period, the trainees may be terminated without any notice or without assigning any reason thereof and even after successful completion of the training, there shall be no obligation on the part of the Corporation to offer contractual appointment.

13. Learned Senior Counsel appearing for the Petitioners further submitted that since in both the advertisements which are impugned in the Writ Petitions, the advertisement in question have been issued without any provision for regular appointment of the petitioners on their coming out successful in the selection process, the said selection process initiated by the Corporation basing on the aforesaid two advertisements cannot be treated to have been initiated in terms of the proposal submitted by the Corporation and accepted by the Hon'ble Apex Court in its order dated 05.07.2017. Accordingly, learned Senior Counsel submitted that the impugned advertisement issued on 25.08.2018 and 04.01.2022 needs to be quashed with a direction on the Opp. Parties to conduct a special recruitment test in respect of the petitioners herein in terms of the proposal submitted before the Hon'ble Apex Court.

14. Mr. B.P. Tripathy, learned counsel appearing for OPTCL on the other hand made his submission basing on the stand taken in the counter affidavit.

15. It is contended that in terms of the decision taken by the Board of Directors of GRIDCO in its 92nd meeting held on 15.03.2005, it was decided to avail the services of Graduates and Diploma Engineering (personnel) on outsourcing basis until permission for regular recruitment from the Government is received. In terms of the said decision, an advertisement was issued in the daily "Samaj" on 16.12.2005 inviting applications from Diploma Engineers in Electrical, Telecom and Civil discipline for temporary engagement on contract basis with consolidated remuneration of Rs.4,000/- per month. The petitioners in the writ petitions filed in the year 2022 were all engaged on such contract basis through outsourcing agency. Similarly in terms of the aforesaid Board Meeting, an advertisement was issued on 01.08.2005 for engagement of Graduate Engineers on contractual basis and the petitioners in W.P.(C) No.17268 of 2018 were engaged on such contract basis through outsourcing agency for a consolidated pay of Rs.5,000/- per month.

16. Mr. Tripathy, learned counsel appearing for OPTCL further contended that while so continuing when the Corporation issued an advertisement on 15.02.2009 to fill up the post with regular recruitment of Management Trainee, the same was challenged before this Court in W.P.(C) No.3319 of 2009 and batch. Pursuant to the order passed by this Court on 11.05.2011, when the State Government after careful consideration of the matter was not pleased to consider the appointment of the petitioners, who were engaged through outsourcing agency through OPTCL, the said action of the Government issued vide letter dated 14.10.2011 was challenged once again in W.P.(C) No.28747 of 2011. This Court vide order dated 09.10.2013 when disposed of the writ petition, the same was challenged by OPTCL before the Hon'ble Apex Court in Civil Appeal No.8415 of 2017. It is contended that the said matter was disposed of by the Hon'ble Supreme Court in terms of the proposal submitted by the learned Senior Counsel appearing for OPTCL vide order dated 05.07.2017. It is accordingly submitted that in terms of the said proposal which was accepted by the Hon'ble Apex Court, both the advertisements which were the subject matter of challenge in the aforesaid writ

petitions were issued by providing opportunities to the petitioners herein to compete along with other candidates. In both the advertisements, OPTCL in terms of its proposal also extended extra mark for each completed year of service subject to a maximum of 15%. The petitioners herein were also allowed the age relaxation in terms of the said proposal and the petitioners not only were extended with the relaxation as accepted by the Hon'ble Apex Court in the above said Civil Appeal, but also the petitioners took part in the said selection process. It is further contended that once the petitioners have taken part in the selection process in terms of the advertisements issued by the Corporation on 25.08.2018 and 04.01.2022, the petitioners cannot come back and challenge the same with a prayer to quash both the advertisements. Since the Corporation as undertaken before the Hon'ble Apex Court has allowed required relaxation to the petitioners enabling them to take the recruitment test, the petitioners having taken part in the said selection process, they are estopped from challenging the same in the present writ petitions. It is also contended that the petitioners since were apprehensive of their qualifying the tests in spite of being extended with the

relaxation, the present writ petitions have been filed with the prayers which are not entertainable by this Court. Since the Corporation as undertaken before the Hon'ble Apex Court has allowed the petitioners to take part in the selection process, they cannot be permitted to challenge both the advertisements in question after taking part in the selection process. Mr. Tripathy, learned counsel appearing for OPTCL in support of his submission relied on a decision of the Hon'ble Apex Court relied in the case of ***D. Sarojakumari Vs. R. Helen Thilakom and Others (2017) 9 S.C.C 478***. Hon'ble Apex Court in Para 4 to 12 of the said judgment has held as follows:

4. The main ground urged on behalf of the appellant is that Respondent No.1 having taken part in the selection process could not be permitted to challenge the same after she was unsuccessful in getting selected. The law is well settled that once a person takes part in the process of selection and is not found fit for appointment, the said person is estopped from challenging the process of selection.

5. In Dr. G. Sarna vs. University of Lucknow & Ors.,¹ the petitioner after appearing in the interview for the post of Professor and having not been selected pleaded that the experts were biased. This Court did not permit the petitioner to raise this issue and held as follows :-

"15. We do not, however, consider it necessary in the present case to get into the question of the reasonableness of bias or real likelihood of bias as despite the fact that the appellant knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection (1976) 3 SCC 585 Committee. He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee....."

6. In Madan Lal & Ors. vs. State of J&K & Ors. 2 , the petitioner laid challenge to the manner and method of conducting viva-voce test after they had appeared in the same and were unsuccessful. This Court held as follows :-

“9.....Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or Selection Committee was not properly constituted.....”

7. In Manish Kumar Shahi vs. State of Bihar,³ , this Court held as follows :-

“23.....Surely, if the petitioner’s name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name (1995) 3 SCC 486 (2010) 12 SCC 576 does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition.”

8. In the case of Ramesh Chandra Shah and others vs. Anil Joshi and others 4 the petitioners took part in the process of selection made under the general Rules. Having appeared in the interview and not being successful they challenged the method of recruitment itself. They were not permitted to raise such an objection. This Court held as follows :-

“24. In view of the propositions laid down in the above noted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents.”

9. Same view has been taken in Madras Institute of Development Studies and Another vs. Dr. K. Sivasubramanian and others 5.

(2013) 11 SCC 309 (2016) 1 SCC 454

10. The Kerala High Court did not note the above mentioned judgments and ignored the well settled position of law in rejecting the specific plea raised by the appellant herein that

the appellant could not raise the issue that no direct recruitment should have been conducted once she had applied for and taken part in the selection process by direct recruitment.

11. As far as the present case is concerned an advertisement was issued by Respondent No.6 inviting applications for the post of Music Teacher in Samuel LMS High School. Respondent No.1 did not raise any objection at that stage that the post could not be filled in by direct recruitment and she should be considered for promotion. Not only that, she in fact, applied for the post and took part in the selection process. After having taken part in the selection process and being found lower in merit to the appellant, she cannot at this stage be permitted to turn around and claim that the post could not be filled in by direct recruitment. The reasoning of the learned Single Judge in rejecting the objection is not in consonance with the law laid down by this Court. In view of this we need not go into the other issues raised.

12. We, therefore, allow these appeals and set aside order dated 25.07.2003 of the learned Single Judge and dismiss the writ petition O.P.No.36563 of 2002 as being not maintainable.”

Similarly Mr. Tripathy, learned counsel appearing for the Opp. Parties also relied on another decision of the Hon’ble Apex Court in the case of **Ramesh Chandra Shah & Others V. Anil Joshi & Others (2013) 11 SCC 309**. Hon’ble Apex Court in Para 18 to 24 of the said judgment has held as follows:

“18. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome.

19. One of the earliest judgments on the subject is [Manak Lal v. Dr. Prem Chand](#) AIR 1957 SC 425. In that case, this Court considered the question whether the decision taken by the High Court on the allegation of professional misconduct leveled against the appellant was vitiated due to bias of the Chairman of the Tribunal constituted for holding inquiry into the allegation. The appellant alleged that the Chairman had appeared for

the complainant in an earlier proceeding and, thus, he was disqualified to judge his conduct. This Court held that by not having taken any objection against the participation of the Chairman of the Tribunal in the inquiry held against him, the appellant will be deemed to have waived his objection. Some of the observations made in the judgment are extracted below:

“.....If, in the present case, it appears that the appellant knew all the facts about the alleged disability of Shri Chhangani and was also aware that he could effectively request the learned Chief Justice to nominate some other member instead of Shri Chhangani and yet did not adopt that course, it may well be that he deliberately took a chance to obtain a report in his favour from the Tribunal and when he came to know that the report had gone against him he thought better of his rights and raised this point before the High Court for the first time.

From the record it is clear that the appellant never raised this point before the Tribunal and the manner in which this point was raised by him even before the High Court is somewhat significant. The first ground of objection filed by the appellant against the Tribunal's report was that Shri Chhangani had pecuniary and personal interest in the complainant Dr Prem Chand. The learned Judges of the High Court have found that the allegations about the pecuniary interest of Shri Chhangani in the present proceedings are wholly unfounded and this finding has not been challenged before us by Shri Daphtary. The learned Judges of the High Court have also found that the objection was raised by the appellant before them only to obtain an order for a fresh enquiry and thus gain time.....

.....Since we have no doubt that the appellant knew the material facts and must be deemed to have been conscious of his legal rights in that matter, his failure to take the present plea at the earlier stage of the proceedings creates an effective bar of waiver against him. It seems clear that the appellant wanted to take a chance to secure a favourable report from the Tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point.”

20. In Dr. G. Sarna v. University of Lucknow (1976) 3 SCC 585, this Court held that the appellant who knew about the composition of the Selection Committee and took a chance to be selected cannot, thereafter, question the constitution of the Committee.

21. In Om Prakash Shukla v. Akhilesh Kumar Shukla (1986) Supp. SCC 285, a three-Judge Bench ruled that when the petitioner appeared in the examination without protest, he was not entitled to challenge the result of the examination. The same view was reiterated in Madan Lal v. State of J & K (1995) 3 SCC 486 in the following words:

“The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of Om Prakash Shukla v. Akhilesh Kumar Shukla it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.”

22. In Manish Kumar Shahi v. State of Bihar (2010) 12 SCC 576, this Court reiterated the principle laid down in the earlier judgments and observed:

“We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition.”

23. The doctrine of waiver was also invoked in *Vijendra Kumar Verma v. Public Service Commission, Uttarakhand and others* (2011) 1 SCC 150 and it was held:

“When the list of successful candidates in the written examination was published in such notification itself, it was also made clear that the knowledge of the candidates with regard to basic knowledge of computer operation would be tested at the time of interview for which knowledge of Microsoft Operating System and Microsoft Office operation would be essential. In the call letter also which was sent to the appellant at the time of calling him for interview, the aforesaid criteria was reiterated and spelt out. Therefore, no minimum benchmark or a new procedure was ever introduced during the midstream of the selection process. All the candidates knew the requirements of the selection process and were also fully aware that they must possess the basic knowledge of computer operation meaning thereby Microsoft Operating System and Microsoft Office operation. Knowing the said criteria, the appellant also appeared in the interview, faced the questions from the expert of computer application and has taken a chance and opportunity therein without any protest at any stage and now cannot turn back to state that the aforesaid procedure adopted was wrong and without jurisdiction.”

24. In view of the propositions laid down in the above noted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents.”

Mr. Tripathy, learned counsel appearing for the Opp.

Parties also relied on another decision of the Hon’ble Apex

Court reported in the case of **Ramjit Singh Kardam and**

Others V. Sanjeev Kumar and others (2020) 20 SCC

209.

17. To the submissions made by the learned counsel appearing for OPTCL, Mr. Mukherji, learned Senior Counsel appearing for the petitioners submitted that since both the advertisements issued by the Corporation on 25.08.2018 and 04.01.2022 have not been issued in terms of the proposal accepted by the Hon'ble Apex Court even, if the petitioners under compulsion have taken the test, but the petitioners in spite of taking such test, cannot be debarred from challenging the advertisements in question.

18. Mr. Mukherjee, learned Senior Counsel appearing for the petitioners in support of his aforesaid submission relied on a decision of the Hon'ble Apex Court in the case of ***Meeta Sahai Vs. State of Bihar and Others, 2019(2) SCC 17, decided on 17.12.2019.*** In Para 14 to 18 of the said judgment, Hon'ble Apex Court held as follows:

14. Additionally, the Commission has filed a separate counter affidavit supplementing the stand taken by other respondents with the plea that the Courts ought not to interfere with the selection procedure as stipulated by the employer unless it was found to be patently illegal. It is urged by the Commission that the Division Bench correctly interpreted the meaning and ambit of the term 'Government hospital' in light of Rule 2(a) of the Rules which defines 'Government' as Government of Bihar, and hence ruled that the advertisement is in accordance with the subject Rules.
FINDINGS AND ANALYSIS

15. We may at the outset clarify that question of reconciling the Hindi and English versions does not arise in the present case for both versions of the Rules are similarly worded. We thus proceed under the

assumption that Hindi will prevail over the English version in case of any conflict. Preliminary Issues

16. Furthermore, before beginning analysis of the legal issues involved, it is necessary to first address the preliminary issue. The maintainability of the very challenge by the appellant has been questioned on the ground that she having partaken in the selection process cannot later challenge it due to mere failure in selection. The counsel for respondents relied upon a catena of decisions of this Court to substantiate his objection.

17. It is well settled that the principle of estoppel prevents a candidate from challenging the selection process after having failed in it as iterated by this Court in a plethora of judgements including [Manish Kumar Shahi v. State of Bihar](#)⁴, observing as follows:

“16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the appellant is not entitled to challenge the criteria or process of selection. Surely, if the appellant's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The appellant invoked jurisdiction of the High Court under [Article 226](#) of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the appellant clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition.”⁵ The underlying objective of this principle is to prevent candidates from trying another shot at consideration, and to avoid an impasse wherein every disgruntled candidate, having failed the selection, challenges it in the 4 (2010) 12 SCC 576 5 See also: *Madan Lal v. State of J&K* [(1995) 3 SCC], *Marripati Nagaraja v. State of A.P.* [(2007) 11 SCC 522], *Dhananjay Malik v. State of Uttaranchal* [(2008) 4 SCC 171] and *K.A.*

[Nagamani v. Indian Airlines](#) [(2009) 5 SCC 515] Pagehope of getting a second chance.

18. However, we must differentiate from this principle insofar as the candidate by agreeing to participate in the selection process only accepts the prescribed procedure and not the illegality in it. In a situation where a candidate alleges misconstruction of statutory rules and discriminating consequences arising therefrom, the same cannot be condoned merely because a candidate has partaken in it. The constitutional scheme is sacrosanct and its violation in any manner is impermissible. In fact, a candidate may not have locus to assail the incurable illegality or

derogation of the provisions of the Constitution, unless he/she participates in the selection process.”

Similarly Mr. Mukherji, learned Senior Counsel also relied on another decision of the Hon’ble Apex Court in the case of **Somesh Thapilyal and Ors. Vs. Vice-Chancellor, HNB Garhwal University & Ors.** (2021) 10 SCC page 116. In the aforesaid judgment at para 42 & 43 Hon’ble Apex Court held as follows:

“42. The submissions of the learned counsel for the respondents that the appellants have accepted the terms and conditions contained in the letter of appointment deserves rejection for the reason that it is not open for a person appointed in public employment to ordinary choose the terms and conditions of which he is required to serve. It goes without saying that employer is always in a dominating position and it is open to the employer to dictate the terms of employment. The employee who is at the receiving end can hardly complain of arbitrariness in the terms and conditions of employment. This Court can take judicial notice of the fact that if an employee takes initiation in questioning the terms and conditions of employment, that would cost his/her job itself.

43. The bargaining power is vested with the employer itself and the employee is left with no option but to accept the conditions dictated by the authority. If that being the reason, it is open for the employee to challenge the conditions if it is not being in conformity with the statutory requirement under the law and he is not estopped from questioning at a stage where he finds himself aggrieved.”

19. Mr. Mukherjee, learned Senior Counsel appearing for the petitioners accordingly submitted that not only the advertisements in question have been issued contrary to

the proposal accepted by the Hon'ble Apex Court, but also in view of the decisions reported in the case of **Meeta Sahai & Somesh Thapilyal**, the petitioners are not estopped from challenging the advertisements in spite of their taking part in the selection process. It is also contended that in view of such long continuance of the petitioners for more than 17 years, they have also accrued a right of regularization of their service and they should be allowed to take the tests strictly in accordance with the proposal which was accepted by the Hon'ble Apex Court while disposing Civil Appeal No.8415 of 2017.

20. Heard learned counsel for the parties. Perused the materials available on record.

21. This Court after going through the same finds that even though pursuant to the proposal submitted by the Corporation, which was accepted by the Hon'ble Apex Court while disposing Civil Appeal No.8415 of 2017, the Corporation have issued the two advertisements in question on 25.08.2018 and 04.01.2022, but as per the considered view of this Court, the said advertisements are not in terms of the proposal submitted by the Corporation before the Hon'ble Apex Court. Since the Corporation in its proposal clearly indicated that on coming out

successful in the selection process, the petitioners herein will be engaged on regular basis, this court finds that there is no such stipulation in both the advertisements. This Court finds that in both the advertisements, the successful candidates have to undergo the required training for one year with the rider that during such continuance of the training, the candidate can be terminated without any notice or reason. This Court further finds that in both the advertisements, there is a stipulation that even after completing the training successfully, the Corporation is not bound to provide regular appointment to the candidates/petitioners. Therefore, it is the view of this Court that both the advertisements which are impugned in the writ petitions have not been issued in terms of the proposal submitted by the Corporation in Civil Appeal No.8415 of 2017. With regard to the stand taken by the Corporation that the petitioners since have participated in the selection process, they cannot challenge such advertisement after such participation, it is the view of this Court that since OPTCL has not issued the advertisements, in terms of the proposal submitted before the Hon'ble Apex Court, placing reliance on the decisions cited by Mr. Mukherjee,

learned Senior Counsel, it cannot be held that due to such participation in the selection process, the petitioners are debarred to challenge the advertisement. This Court further finds that when the first advertisement was issued by the Corporation on 25.08.2018, the petitioners in W.P.(C)No.17268 of 2018, though submitted a representation on 03.10.2018 with the prayer not to proceed with the selection process prior to regular appointment in terms of the said proposal, but no decision was taken on such plea of the petitioners and the petitioners though took part in the selection process, but in view of the illegality apparent on the face of such advertisement, the petitioners cannot be debarred from challenging the same. Similar is also the case with regard to the advertisement issued by the Corporation on 04.01.2022. Since the petitioners were appointed on contract basis by facing a selection process in terms of the Boards Resolution dated 15.03.2005 and they are continuing for more than 17 years, the stipulations contained in the advertisement with regard to undergoing the period of one year training with other conditions mentioned in both the advertisements, as per the view of this Court are not in consonance with the proposal

submitted and accepted by the Hon'ble Apex Court. In view of such material irregularity in both the advertisements, this Court is inclined to interfere with the selection process taken up by the Corporation basing on those two advertisements. While interfering with the same, this Court held that the petitioners be given an opportunity to participate in a selection process, strictly in terms of the proposal submitted by OPTCL and accepted by the Hon'ble Apex Court in Civil Appeal No.8415 of 2017. In such recruitment test to be conducted by the Corporation, no such riders be there with regard to undergoing the training and absorption in service after completion of the training. The Corporation is directed to conduct a test strictly in terms of the proposal accepted by the Hon'ble Apex Court.

22. All these writ petitions are disposed of accordingly with the aforesaid observation and direction. There shall be no order as to costs.

23. Photocopy of this order be placed in the connected cases.

(Biraja Prasanna Satapathy)
Judge

Orissa High Court, Cuttack
Dated the 18th November, 2022/sangita

