

A.F.R

ORISSA HIGH COURT : C U T T A C K

WPC(OAC) No.3172 of 2018

*An application under Section 19 of
the Administrative Tribunal's Act, 1985*

Dr. Ambuja Satpathy

: Petitioner

-Versus-

State of Odisha & Anr.

: Opposite Parties

For Petitioner

: M/s. M.Ku. Mishra,
Mr. D.K. Patnaik,
J. Sahoo, S. Das

For Opposite Party No.1

: Mr. S. Mishra,
Addl. Standing Counsel

For Opposite Party No.2

: Mr. S.B. Jena

J U D G M E N T

CORAM :

JUSTICE BISWANATH RATH

Date of hearing: 23.09.2022 :: Date of Judgment : 11.10.2022

1. This application involves the following relief:-

“Relief Sought for:

It is, therefore, humbly prayed that this Hon'ble Tribunal may graciously be pleased to issue notice for show cause and call for the records and on perusal of the causes shown and upon insufficient causes shown be pleased to:

- (i) quash the advertisement dtd.11.10.2018 under annexure-17 so far as filling up the post of Asst. Professor Surgery in Speciality Category is concerned.
- (ii) Direct the respondents to recommend the name of the applicant in pursuance of the Advertisement No.15 of 2015-16 and give the applicant appointment in the post of Asst. Professor Surgery in Speciality Category with all consequential and financial benefits from the date of appointment of others selected candidates in same discipline.
- (iii) and may pass such other order / orders as deemed just and proper.

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

2. The applicant-Petitioner through the above relief in one hand while claiming for quashing of the advertisement dated 11.10.2018 vide Annexure-17 (Advertisement No.12 of 2018-19), also sought for appointment in the post of Asst. Professor, Surgery in Speciality category depending on her result pursuant to the Advertisement No.15 of 2015-16 also in terms of the recommendation made in her favour by the competent authority and further with grant of all consequential and financial benefit from the date of appointment of others in terms of the aforesaid advertisement.

3. Short background involved in this case is that the cause of action in bringing such application appears to be as an outcome through the advertisement dated 11.10.2018 (Annexure-17) while not showing full compliance to the selected candidates for the post of Asst. Professor, Surgery in Group-‘A’ of the Odisha Medical Education Service hereinafter in short be reflected as ‘O.M.E.S’ pursuant to the Advertisement No.15 of 2015-16 read together with the numbers of corrigendum and illegally involving the posts for which the selection is

already made in the next advertisement vide Annexure-1. Such action of the State Authorities is also claimed to be illegal as it was contrary to the direction of the Tribunal in O.A. No.4124(C) of 2016 where by the interim order dated 9.06.2016 involving P.P. No.282(C) of 2016 and O.A. No.2064(C) of 2016 the Tribunal clearly directed for keeping one post of Asst. Professor, Surgery under General Category vacant. Through the pleadings the Applicant-Petitioner discloses that pursuant to the direction of the High Court dated 4.07.2013 in W.P.(C) No.13721 of 2013 the Selection Committee recommended the name of the Applicant-Petitioner along with others for appointment in different disciplines and it is pursuant to which the applicant was appointed as Asst. Professor but on ad.hoc basis in M.K.C.G Medical College and Hospital, Berhampur in the discipline of Surgery and she is continuing as such. Proof of the same is filed herewith at Annexure-1. It is claimed that while the Applicant-Petitioner was continuing as such, the respondents therein issued Advertisement No.15 of 2015-16 inviting applications from eligible candidates for recruitment to the post of Asst. Professor in different disciplines including that of Surgery discipline. The advertisement also made it clear that the selection therein shall be made as per the O.M.E.S (Methods of Recruitment and Condition of Service) Rules, 2009. So far as the discipline of Surgery is concerned; the advertisement contains fifteen numbers of post on that head and out of which three posts were reserved for S.T. (2 Male + 1 Woman), four posts were reserved for S.C. (3 Male + 1 Woman), eight posts were reserved for unreserved category (6 Male + 2 Women). For better appraisal the Applicant-Petitioner includes the advertisement at Annexure-2 requiring submission of application by 23.12.2015. The Applicant-Petitioner finding herself eligible applied for the post of Asst. Professor (Surgery)

specifically meant for women in unreserved category vide Annexure-3. It is needless to mention here that prior to undertaking of the selection process the Odisha Public Service Commission hereinafter in short be reflected as 'O.P.S.C' issued a corrigendum involving Advertisement No.15 of 2015-16 bringing in a restriction to the recruitment to the post of Asst. Professors at S.C.B. Medical College & Hospital, Cuttack, MKCG Medical College & Hospital, Berhampur and S.C.B. Dentistry College, Cuttack. Accordingly a revised vacancy position for the post of Asst. Professors in Group 'A' of O.M.E.S in different disciplines was published. The Applicant-Petitioner specifically pleaded that so far as the vacancies in the discipline of Surgery under specific category were concerned; a total number of eight vacancies were advertised for recruitment in the O.M.E.S site, which indicates out of fifteen number of posts available in the discipline of Surgery only eight vacancies in such discipline were carved out and bifurcating the same the reservation is made as such; two posts for S.T., two posts for S.C. and four posts for unreserved candidates. It was also made clear that the application so submitted pursuant to the Advertisement No.15 of 2015-16 shall also be considered for the above noted vacancies at S.C.B. Medical College & Hospital, Cuttack, M.K.C.G Medical College & Hospital, Berhampur and S.C.B. Dentistry College, Cuttack. This corrigendum is found place at Annexure-4. It appears, simultaneously the OPSE brought out an Advertisement bearing No.17 of 2015-16 for recruitment to the post of Asst. Professor in Super Specialty and Specialty in different disciplines for Veer Surendra Sai Institute of Medical Science and Research hereinafter in short be reflected as 'VIMSAR'. The advertisement inviting further applications is at page 30 of the brief and the internal page 2 of the said advertisement shows, the balance seven vacancies in

the Surgery stream has been assigned to VIMSAR. Through this advertisement the reservation was segregated as one post to S.C. category and the balance six posts to unreserved category including three women and the application was required to be submitted by 30.01.2016 as appearing at Annexure-5. Applicant-Petitioner here being aggrieved for not providing reservation to women candidates in un-reserved category from out of four posts meant for Surgery stream in the corrigendum relating to the Advertisement No.15 of 2015-16 filed O.A. No.147(C) of 2016 before the State Administrative Tribunal seeking a direction therein to the Respondent No.2 to provide the reservation of two posts for women candidates in the Un-reserved category in terms of the Women Reservation Rules, 1994. It is claimed that the Tribunal while issuing notice on 19.05.2016, in the interim directed, any appointment in the post of Asst. Professor in the discipline of Surgery will be subject to the result of the O.A. In the meantime the O.P.S.C. issued second corrigendum involving Advertisement No.15 of 2015-16 vide notice No.635 dated 3.02.2016 by modifying the vacancy position in respect of seven disciplines including the discipline of Surgery. It is claimed through this corrigendum that so far as the Surgery discipline is concerned; out of total eight vacancies in Surgery discipline two were reserved for S.C. category, two were reserved for S.T. category and four posts were reserved for Un-reserved category. This time in the Un-reserved category it was segregated to three men and one woman. By this corrigendum the last date for submission of the application in respect of the modified vacancies through Online mode was extended till 17.02.2016. The 2nd corrigendum is filed herewith at Annexure-6. In the meantime there is issuing of 3rd corrigendum involving the Advertisement No.15 of 2015-16 vide notice No.3231 dated 25.05.2016 again carving out the vacancies in

the Surgery stream and out of total eight vacancies two were reserved for S.T., one was reserved for S.C. and out of five un-reserved vacancies two were reserved for women. Here the date of submission of the application was again extended to 25.06.2016 vide Annexure-7 keeping reserve consideration of application already submitted involving the Advertisement No.15 of 2015-16. After all these developments taken place considering the suitability of the Applicant-Petitioner to at least appear in the interview on 22.08.2016 the Applicant-Petitioner was issued with a call letter vide Annexure-8 to remain present at viva-voce test in the Office of the Commission, as she was already provisionally selected to appear in the viva voce test vide Annexure-8. After completion of the viva voce test involving all the selected candidates a list was published by the O.P.S.C in their notice dated 21.09.2016 bringing out two separate select list i.e. one pursuant to the Advertisement No.15 of 2015-16 meant for O.M.E.S and the other one pursuant to the Advertisement No.17 of 2015-16 though exclusively meant for VIMSAR, but inadvertently indicating both for O.M.E.S. The notice dated 21.09.2016 is filed at Annexure-9. It is needless to mention here that though the Advertisement No.17 of 2015-16 was meant for VIMSAR, after publication of the result by the O.P.S.E it appears, the Government in Health and Family Welfare Department brought two separate notifications; one dated 31.10.2016 at Annexure-11 (series) at page 39 of the brief involving the select list of seven candidates in Surgery wing meant for VIMSAR for appointment in the post of Asst. Professor, Surgery also indicating the women candidate Dr. Sucheta Panigrahi at Sl.No.1 and Dr. Ambuja Satapathy the present the Petitioner also in Un-reserved category at Sl.No.3 and the other notification dated 3.11.2016 brought out by the Government in Health & Family Welfare Department under the O.M.E.S appointment was for

M.K.C.G Medical College & Hospital, Berhampur and S.C.B. Medical College & Hospital, Cuttack, where Dr. Sucheta Panigrahi again shown to be the only woman candidate under the Un-reserved category at Sl.No.4 was directed to be posted in M.K.C.G. Medical College & Hospital, Berhampur under O.M.E.S. recruitment. The notification dated 31.10.2016 had no conditional attachment about pendency of any case, whereas in the notification dated 3.11.2016 at page 42 of the brief the appointment was directed to be made subject to the outcome in pending P.P. No.282(C) of 2016 filed by Dr. Swarupa Nanda Mallick & Anr. and O.A. No.2064(C) of 2016 filed by Dr. Amar Kumar Behera. It appears, in the meantime the present Applicant-Petitioner filed O.A. No.4124(C) of 2016 challenging non-consideration of her case for appointment in S.C.B. Medical College & Hospital, Cuttack, which could not be taken up on account of interim order passed in O.A. No.2064(C) of 2016 and P.P. No.282(C) of 2016, there the Tribunal appears to have passed the order on 11.11.2016 thereby directing for maintenance of status quo in respect of the position of the applicant as on 11.11.2016. In the meantime in another development through W.P.(C) No.5525 of 2016 this High Court by the order dated 18.04.2016 as an interim measure directed, the Applicant-Petitioner therein Dr. Amar Kumar Behera shall continue in the post of Asst. Professor (Adhoc.) in the Department of Surgery in VIMSAR till the next date. In the meantime the Applicant-Petitioner who was found to be selected pursuant to the Advertisement No.17 of 2015-16, while foregoing her appointment in VIMSAR, was constrained to bring this litigation with specific plea that Dr. Sucheta Panigrahi though selected under both the notifications dated 31.10.2016 & 3.11.2016 for VIMSAR as well as M.K.C.G, opted to continue as per the notification dated 31.10.2016 in VIMSAR, thus abandoned her posting pursuant to

the appointment notification dated 3.11.2016 in M.K.C.G Medical College & Hospital, Berhampur. The Applicant-Petitioner thus claimed that since the O.M.E.S advertisement continued through the Advertisement No.15 of 2015-16 read together with the 2nd & 3rd corrigendum clearly making two reservation for women out of five in Un-reserved category, once Dr. Sucheta Panigrahi the only women candidate selected in the Un-reserved category in the Surgery stream and the Applicant-Petitioner Dr. Ambuja Satapathy having stood in number one in the wait list in Surgery stream, she automatically deserves to be posted at M.K.C.G Medical College & Hospital, Berhampur. Applicant-Petitioner further pleaded that in the meantime during pendency of O.A. No.4124(C) of 2016 the Government in Health & Family Welfare Department under the premises of large number of vacancies requested the O.P.S.C to recommend the names of eligible wait listed candidates on the basis of the Advertisement No.15 of 2015-16 for being appointed in the S.C.B. Medical College & Hospital, Cuttack and M.K.C.G Medical College & Hospital, Berhampur in order of their merit. The same is at Annexure-13(series) more particularly at page 44 of the brief. Pursuant to the above request, it appears, the O.P.S.C. vide its notice No.6047 dated 17.10.2017 recommended the names of 11 candidates in order of merit for their appointment against the post of Asst. Professor in all the seven disciplines and the list contains the name of the present Applicant-Petitioner at Sl. No.7 a candidate in Surgery stream under Un-reserved female category and one Dr. Sworupa Nanda Mallick a S.C. candidate but selected under Un-reserved. Applicant-Petitioner has the further pleading that while the matter stood thus one Dr. Uma Prasad Padhy moved O.A. No.1796(C) of 2016 a candidate in Neurology stream again involving the Advertisement No.15 of 2015-16 for not being appointed against such

vacancies in spite of foregoing to such posts by the selected candidates. This O.A. is finally disposed of by the order vide Annexure-14 thereby directing for engagement of Dr. Uma Prasad Padhy as against the vacancies under Neurology stream pursuant to the Advertisement No.15 of 2015-16. For such direction of the Tribunal the O.P.S.C recommended the name of Dr. Uma Prasad Padhy to have been recruited as against the post of Asst. Professor, Neurology in Group 'A' of O.M.E.S pursuant to the Advertisement No.15 of 2015-16 vide Annexure-15. In the meantime there has been circulation of a communication dated 6th September, 2017 clearly communicating therein that there has been declining by Dr. Sucheta Panigrahi to join at M.K.C.G Medical College & Hospital, Berhampur as against her selection as Asst. Professor on regular basis in Surgery stream involving the Advertisement No.15 of 2015-16 as appearing at Annexure-16. While the matter stood thus the Applicant-Petitioner here claims that for Dr. Amar Kumar Behera filed O.A. No.2064 (C) of 2016 & W.P.(C) No.5525 of 2016 joining as Asst. Professor, Surgery at M.K.C.G Medical College & Hospital, Berhampur, there has been two clear vacancies in the post of Asst. Professor, Surgery in Un-reserved category. Applicant-Petitioner while claiming that Dr. Amar Kumar Behera since is a male candidate, he cannot be considered in female candidate vacancy in Un-reserved category, thus claims that there is no reason for not providing appointment to her as she remains to be the only women candidate and not only selected in the selection process but also secured the position next to the eight selected candidates and the only women selected candidate in Surgery stream. For there are two clear vacancies in the eight vacancies in the Surgery stream, the Applicant-Petitioner claims that looking to her position in the select list there should have been automatic positioning of her pursuant to the

Advertisement No.15 of 2015-16. Applicant-Petitioner alleges that even after the requisition of the State Government for sending the name of the next selected candidates in the waitlist and even after sending of her name by the O.P.S.C vide Notice No.6047 dated 10.10.2017 at page 45 and for no posting of her, there is great level of injustice created to the Applicant-Petitioner.

4. The Applicant-Petitioner next pleaded that instead of working out on the restructuring of the select list looking to the allotment of seats taken together with the Advertisement No.15 of 2015-16 read with 2nd & 3rd corrigendum respectively, there was requirement of only repositioning of the candidates in the event some candidates in the select list choose not to join even after selection. The Applicant-Petitioner also pleaded that instead of working-out in terms of the condition in the Advertisement No.15 of 2015-16 the authority went on for another advertisement dated 11.10.2018 under the pretext of merger of vacancies after completion of the process initiated through the Advertisement No.15 of 2015-16 & Advertisement No.17 of 2015-16. The Applicant-Petitioner here claims that there is already involvement of a clear vacancy and undisputedly for Dr. Sucheta Panigrahi did not join in M.K.C.G Medical College & Hospital, Berhampur and not only that depending on above non-joining there has even been recommendation of the name of the Applicant-Petitioner in the Surgery stream. The Applicant-Petitioner thus claims that the Advertisement dated 11.10.2018 should not have included the vacancies considered in the process of Advertisement No.15 of 2015-16 and Advertisement No.17 of 2015-16 and so long as the process involving the above advertisements are fully completed, there should not have been any further advertisement.

5. The Applicant-Petitioner in the above background of the matter claims that the case involves working out of an existing right of a selected candidate and the role of the competent authority is in clear violation of Article 14 & 16 of the Constitution of India.

6. In the above background of the matter Mr. Mishra, learned Senior Advocate appearing on behalf of the Petitioner claimed that this Court ought to interfere in the Advertisement No.12 of 2018-19 and again for the whole background of the matter there should be a mandamus directing the competent authority to appoint the present Applicant-Petitioner as a selected candidate in women category in Surgery Speciality Stream pursuant to the Advertisement No.15 of 2015-16 and also by providing consequential benefits.

7. Mr. Mishra, learned senior Advocate appearing on behalf of the Petitioner on the basis of the above plea also attempted to take support of decision of this Court as well as the Hon'ble Apex Court such as in the case of ***Sarojkanta Mohapatra and Ors. Vrs. State of Orissa and Ors.*** as reported in 2015 (II) OLR, 367 and in the case of ***Gujarat State Dy. Executive Engineers' Association Vrs. State of Gujarat and Others*** as reported in 1994 Supp. (2) SCC 591.

8. In his opposition Mr. S. Mishra, learned State Counsel for the Opposite Party No.1 taking this Court to the counter plea of Opposite Party No.1 while not disputing the facts and the intention borne through the Advertisement No.15 of 2015-16 as well as the Advertisement No.17 of 2015-16 and development through the 1st, 2nd & 3rd corrigendum, contended that for the interim direction issued by the Tribunal in O.A. No.2064(C) of 2016 thereby directing for keeping one post of Asst. Professor, Surgery under general category vacant, one post in Un-reserved category has not been recommended by the O.P.S.C. Thus Mr.

S. Mishra, learned State Counsel contended that there is a justified reason in not recommending the name of Dr. Ambuja Satapathy by the O.P.S.C. involving the Advertisement No.15 of 2015-16, resulting no possibility of issuing an appointment order in her favour either at S.C.B. Medical College & Hospital, Cuttack or M.K.C.G Medical College and Hospital, Berhampur. It is further contended by Mr. S. Mishra, learned State Counsel that in the meantime on requisitioning of the State Government, the O.P.S.C, however, recommended the names of the 11 waitlisted candidates in seven different disciplines including the name of the Petitioner in Surgery Specialty stream. However for the subsequent development in response to the communication of the Health & Family Welfare Department dated 12.09.2017, the O.P.S.C was requested to recommend the names of eligible waitlisted candidates on the basis of the Advertisement No.15 of 2015-16 for S.C.B. Medical College & Hospital, Cuttack and M.K.C.G Medical College and Hospital, Berhampur and accordingly the O.P.S.C. by its Notice No.6047/P.S.C. dated 17.10.2017 recommended the names of 11 waitlisted candidates in seven streams including that of the Petitioner, but in further development vide its letter dated 12.01.2018 the O.P.S.C. withdrew its Notice No.6047/P.S.C dated 17.10.2017 involving recommendation of Petitioner automatically got dropped. Mr. S. Mishra, learned State Counsel thus contended that since the letter withdrawing the recommendation of the O.P.S.C. dated 17.10.2017 has not been challenged any further, the recommendation through the letter dated 12.01.2018 has attended its finality and therefore there cannot be revisiting to the earlier situation.

9. Mr. S. Mishra, learned State Counsel further on the premises that in the meantime there has already been a fresh Advertisement bearing No.12 of 2018-19 (Annexure-17), submitted that for the development already

taken place through such advertisement there is no possibility of reopening of the selection file pursuant to the Advertisement No.15 of 2015-16. Mr. S. Mishra, learned State Counsel apart from agitating all the grounds raised in the counter affidavit of the Opposite Party No.1 also took this Court to the following decisions to satisfy the case of the State involved herein:-

(1) In the case of ***Dr. M.C. Bindal Vrs. R.C. Singh and Ors.*** : (1989) 1 SCC 136 (2) In the case of ***Vinodan T. and Ors. Vrs. University of Calicut and Ors.*** : (2002) 4 SCC 726 (3) In the case of ***H.S. Vankani and Ors. Vrs. State of Gujarat and Ors.*** : (2010) 4 SCC 301 (4) In the case of ***Mohd. Rashid Vrs. Director, Local Bodies, New Secretariat and Ors.*** : (2020) 2 SCC 582.

10. Reading through all the above decisions and more particularly the decision in the case of ***Dr. M.C. Bindal (supra)*** Mr. S. Mishra, learned State Counsel attempted to submit that the Hon'ble Apex Court in the said decision has already held that the Public Service Commission is competent to cancel the recommendation and there is no scope for the High Court to entertain any such aspect involving such issue. Through the decision in the case of ***Vinodan T. and Others (supra)*** Mr. Mishra, learned State Counsel on the settled position of law therein submitted that the person selected for a post do not thereby acquire a right to be appointed to such posts and also contended that for there is issuance of further advertisement the waitlist has lost its force and thus an attempt is made to take support of the observation of the Hon'ble apex Court in paragraph Nos.12 & 13 therein. Mr. S. Mishra, learned State Counsel next taking this Court to the case of ***H.S. Vankani and Ors. (supra)*** contended that for the Hon'ble apex Court categorically held that once the aspect of seniority is already settled, it is decisive and if unsettled, it is

bound to generate bitterness, resentment and hostility amongst the employees and attempted to take reliance of the observation of the Hon'ble Apex Court through paragraph no.38 therein. Referring to the decision in the case of *Mohd. Rashid (supra)* Mr. S. Mishra, learned State Counsel reiterated that there is a clear judgment of the Hon'ble apex Court observing that mere participation of a candidate in the selection process and even upon being placed in the merit list does not create a right in such candidate.

11. Mr. S.B. Jena, learned counsel for the O.P.S.C-Opposite Party No.2 taking this Court to the counter affidavit of the Opposite Party No.2 attempted to establish the reason of withdrawal of the recommendation based on a direction of the State Government. While not disputing to the fact that since Dr. Sucheta Panigrahi dropped herself, Dr. Ambuja Satapathy was the next immediate candidate available in Surgery stream under Un-reserved women category and there was no difficulty in accommodating her the movement Dr. Sucheta Panigrahi opted not to join as per the O.M.E.S Advertisement No.15 of 2015-16, Mr. S.B. Jena, learned counsel further submitted that it is only after finding that Dr. Sucheta Panigrahi is not willing to join under O.M.E.S advertisement, the O.P.S.C was all through ready to send the name of Dr. Ambuja Satapathy, but it is not known; as to why the Government did not take any step to replace Dr. Sucheta Panigrahi at the relevant point of time. Mr. S.B. Jena, learned counsel also contended that once the select list is drawn in an interview held by the O.P.S.C. the select list is already dispatched to the concerned Department. Mr. Jena, learned counsel in the circumstance contended that it cannot be construed even that the concerned Department was unaware of the next possible selected candidate against the vacancy arose for not joining of Dr. Sucheta

Panigrahi. Mr. S.B. Jena, learned Counsel for the O.P.S.C-Opposite Party No.2 concluded his submission saying that the O.P.S.C. being the examining authority has no role in appointment affairs, which comes under the clear domain of the Health & Family Welfare Department and thus requested this Court for passing direction in according with law.

12. From the factual submission and the counter submission of the parties this Court finds, there is no dispute that the Petitioner was continuing as an Ad.hoc Asst. Professor since 2013. It is at this stage of the matter, it appears, there has been floating of Advertisement No.15 of 2015-16. It appears, through page 22 under the vacancies 'II' the advertisement discloses the following vacancy position :-

Sl. No.	Name of the Discipline	No. of vacancies reserved for			Un-Reserved	Total Vacancies
		S.T.	S.C.	S.E.B.C		
(1)	(2)	(3)	(4)	(5)	(6)	(7)
20	Surgery	3(w-1)	4(w-1)	0	8(w-2)	15(w-4)

13. The first corrigendum vide Annexure-4 was issued bringing down the vacancies position in Surgery wing after bifurcating seven such seats to VIMSAR. The vacancies position under the O.M.E.S as published therein reads as follows:-

Sl. No.	Name of the Discipline	No. of vacancies reserved for			Un-Reserved	Total Vacancies
		S.T.	S.C.	S.E.B.C		
(1)	(2)	(3)	(4)	(5)	(6)	(7)
20	Surgery	2	2	0	4	8

14. It be stated here that the Advertisement No.17 of 2015-16 was specifically meant for VIMSAR and Sl.No.19 therein reflects the vacancy position in the Surgery stream and the requirement was for all total 7, which included one S.C. and out of balance six Un-reserved category three were reserved for women. From the 2nd Corrigendum dated 3.02.2016 vide Annmexure-6 it appears, there has been further

development to the vacancy position in Surgery stream and the vacancy position at Sl.No.6 therein reads as follows:-

Sl. No.	Name of the Discipline	No. of vacancies reserved for			Un-Reserved	Total Vacancies
		S.T.	S.C.	S.E.B.C		
(1)	(2)	(3)	(4)	(5)	(6)	(7)
6	Surgery	2	2	0	4(w-1)	8(w-1)

15. There is also a 3rd corrigendum on the Advertisement No.15 of 2015-16 vide Annexure-7. At this time there was a change in the reservation position in Medicine and Surgery. The vacancy position at Sl.No.2 involving Surgery stream therein reads as follows:-

Sl. No.	Name of the Discipline	No. of vacancies reserved for			Un-Reserved	Total Vacancies
		S.T.	S.C.	S.E.B.C		
(1)	(2)	(3)	(4)	(5)	(6)	(7)
2	Surgery	2	1	0	5(w-2)	8(w-2)

16. It is here taking into consideration the appointment notification dated 3.11.2016 prepared by the Government depending on the select list at Annexure-11 (series), this Court finds, the same runs as follows :-

“Government of Odisha
Health & Family Welfare Department

NOTIFICATION

No.23208/H.,

Dated the 03-11-2016

HFW-MEI-AP-0032-2016

On the recommendation of the Odisha Public Service Commission, the following candidates are appointed temporarily as Assistant Professor in the discipline of **Surgery in the scale of pay of Rs. 15,600/- to 39,100/-** with AGP of Rs.8,000/- per month with other allowances as admissible from time to time on probation for a period of one year from the date of their actual joining the post or until further orders subject to the outcome of PP No-282(C)/2016 filed by Dr. Swarupa Nanda Mallick & another and OA No-2064(C) / 2016 filed by Dr. Amar Kumar Behera before the Hon'ble OAT, Cuttack Bench, Cuttack.

On such appointment, they are posted to the Medical Institutions as mentioned below against the vacant posts of Assistant Professor in the discipline of Surgery.

Sl. No.	Name of the Doctor	Category	Correspondence Address	Name of the Medical College to which posted
1	2	3	4	5
1	Dr. Subhabrata Das	UR	S/o.-Purusottam Das,	MKCG Medical

			Vijay Vihar 4 th Lane, Berhampur, Ganjam, Odisha-760004	College, Berhampur
2	Dr. Sarada Prasanna Sahoo	UR	Plot No-4773/9, Chakeisiani, Rasulgarh, Bhubaneswar, Khurda, Odisha-751010	SCB Medical College, Cuttack
3	Dr. Niranjana Sahoo	UR	Qr. No-3R/15, MKCG Medical Campus, Berhampur, Ganjam, Odisha-760004	MKCG Medical College, Berhampur
4	Dr. Sucheta Panigrahi	UR	Qr.No-D14, Doctors Colony, Burla, P.O-Burla, Sambalpur, Odisha-768017	MKCG Medical College, Berhampur
5	Dr. Haladhar Naik	ST	Kathagola Sahi, Near Good Luck Hospital, Mangalabag, Cuttack, Odisha-753001	SCB Medical College, Cuttack
6	Dr. Dhirendra Nath Soren	ST	Qr.No-3R/39, Doctors Colony, VSS Medical College, Burla, Sambalpur, Odisha-768017	MKCG Medical College, Berhampur. He is deployed to work at VIMSAR, Burla
7	Dr. Amar Kumar Behera	SC	Krishna Kunj Apartment, Flt No-204, Bhoi Nagar, Road-8, Unit-9, Bhubaneswar, Khurda, Odisha-751022	MKCG Medical College, Berhampur. He is deployed to work at VIMSAR, Burla

This Court here finds surprise in the preparation of such list as after the 3rd corrigendum. The select list should have contained in the minimum two women candidates, whereas this list contained one woman candidate in Un-reserved category at Sl.No.4. Otherwise also if Dr. Sucheta Panigrahi at Sl.No.4 did not join, this position at Sl.No.4 should have been taken over by Dr. Ambuja Satapathy-the present Petitioner being the next eligible women candidate already available.

17. Undisputedly the Advertisement No.15 of 2015-16 after introduction of 3rd corrigendum, total seat in Surgery Speciality stream remained at 8 including 5 Un-reserved with 2 women.

Considering the rival contentions of the parties, this Court here finds, as per the notification dated 3.11.2016 at page 42 of the brief Dr. Sucheta Panigrahi was the only women candidate in the select list in the

discipline of Surgery and for Dr. Sucheta Panigrahi having dropped herself and declined to join under the O.M.E.S appointment, there is clear vacancy in Surgery Speciality stream under the O.M.E.S recruitment. This Court thus observes, Dr. Sucheta Panigrahi admittedly having joined at VIMSAR pursuant to the Notification dated 31.10.2016 in the same recruitment process, was not available to be appointed under the O.M.E.S recruitment and for there is clear vacancy in the women Un-reserved category Dr. Ambuja Satapathy being the next immediate women candidate in the Un-reserved category in Surgery Speciality stream is found to have already been selected, there was no room for keeping Dr. Ambuja Satapathy away from being appointed. On Dr. Sucheta Panigrahi declining to join under the O.M.E.S., there should have been automatic induction of the Petitioner considering that she was the only woman selected candidate in line of selection. This Court finds, the action of the public authority in the above contingency not only appears to be arbitrary but also unconstitutional.

18. In the above circumstance, this Court finds, vacancy being created pursuant to non-joining of Dr. Sucheta Panigrahi should not have been included in the Advertisement bearing No.12 of 2018-19. This Court here finds, in entertaining the matter involved herein the Tribunal vide its order dated 20.12.2018 had passed the following interim direction

“List this matter after six weeks.

Learned Standing Counsel is directed to obtain instruction regarding action taken in pursuance to notification as at Annexure-13 series. Till instruction is received one post of Asst. Professor in Speciality category of Surgery as advertised at Annexure- 17 at Sl.No. 19 shall not be filled up without leave of the Tribunal.”

It appears, the above interim order is operating till now leaving no impediment in accommodating the present Petitioner in such vacancy.

19. This Court here takes into account the fact that O.A. No.147(C) of 2016 was filed by the present Applicant-Petitioner finding no reservation for women in the Un-reserved Surgery stream. The Tribunal by its interim order dated 19.05.2016 directed; any appointment in the post of Asst. Professor in the discipline of Surgery will be subject to the result of the O.A. The second corrigendum brought on 3.02.2016 bearing No.635 vide Annexure-6 indicated four Un-reserved seats including one women. The third corrigendum dated 25.05.2016 bearing No.3231 vide Annexure-7 indicated five Un-reserved seats taking out one post from S.C. category in the Surgery wing and out of five Un-reserved seats two posts were reserved for women making total vacancies in the Surgery stream to 8. Since 3rd corrigendum brought two women posts in Un-reserved category, this appears to have resolved the issue in O.A. No.147(C) of 2016 making the said O.A. infructuous as the issue therein is no more surviving.

20. This Court finds, since there involves a direction for not filling of one post under the Surgery stream for the pendency of some O.As, the appointment finally made only involving seven candidates and in the above appointment list Dr. Sucheta Panigrahi was placed at Sl.No.4 and for her opting to join at VIMSAR pursuant to appointment notification dated 31.10.2016, there remained a clear vacancy in Sl.No.4 in Un-reserved women category for M.K.C.G Medical College & Hospital, Berhampur. This Court here takes into account the position of Dr. Ambuja Satapathy in Un-reserved female category meant for the Surgery stream as per the recommendation dated 17.10.2017 of O.P.S.C. This recommendation makes it clear that Dr. Ambuja Satapathy was the only eligible candidate available in Un-reserved female category meant for Surgery stream. Thus Dr. Sucheta Panigrahi since dropped herself, this position would have been maintained by Dr. Ambuja Satapathy, which is

an automatic process and in the process there was no question of showing name of Dr. Ambuja Satapathy was in waitlist maintained by the O.P.S.C. This Court here finds, there is failure of further exercise by the State as well as by the O.P.S.C in revisiting to the selection position amongst the candidates in Surgery stream after Dr. Sucheta Panigrahi drops herself. This Court at the cost of repetition makes it clear that after Dr. Sucheta Panigrahi dropped herself, there was automatic elevation of Dr. Ambuja Satapathy being the next only selected women candidate.

21. This Court now proceeds to deal with the decisions cited by the respective parties as follows:-

(A) This Court going through the decision in the case of ***Dr. M.C. Bindal (supra)*** finds, this decision involves cancellation / withdrawal of a provisional recommendation on finding some lacunas involving the candidates in the essential qualification. This is not the case at hand. Therefore this decision has no application to the case at hand.

(B) Similarly going through the decision in the case of ***Vinodant T. and Others (supra)***, this Court finds, there is clear difference in the fact position involved therein. Though the Hon'ble Apex Court through the above decision held that the persons merely selected for a post did not thereby acquire a right to be appointed to such post as well, but however, also came to observe in paragraph 14 therein that even if a vacancy exists, it is open to the authority concerned to decide how many appointments should be made and in that peculiar circumstance the Hon'ble Apex Court even went to the extent that the selected candidates have a right to compel such authority to work in a manner. Above decision rather supports the claim of the Applicant-Petitioner.

(C) This Court going through the decision in *Mohd. Rashid (supra)*, finds, through this decision the issue involved therein was taken care of in paragraph no.2 therein, which reads as follows:-

“2. The candidates who were initially appointed as Lower Division Clerks and promoted as Upper Division Clerks / Head Clerks invoked the jurisdiction of the Central Administrative Tribunal (for short, “the Tribunal”) challenging Advertisement No.3 of 2013 dated 12-9-2013 whereby, the respondents set in process to fill up the posts advertised by way of direct recruitment. The argument was that the Recruitment Regulations for the post of Administrative Officer / Assistant Assessors and Collector in North, Sought and East Delhi Municipal Corporations, 2013 (for short, “the Recruitment Rules”) contemplate that the vacancies for the posts in question are to be filled up by promotion failing which by direct recruitment. It was thus alleged that without resorting to promotion by convening meeting of the Departmental Promotion Committee (for short “DPC”), the alternative process of direct recruitment cannot be resorted to.”

Reading the above it appears, there involves an issue of without resorting to women promotion by convening meeting of the Departmental Promotion Committee. The alternative process of direct recruitment cannot be resorted to. In paragraph no.14 therein answering to such issue the Hon’ble apex Court came to observe as follows :-

“14. Since the selection process has not been completed and keeping in view the mandate of statutory rules, we find that the appellants have no right to dispute the action of the municipal bodies to fill up the posts either by way of promotion or by deputation as such posts are being filled up in terms of mandate of the Rules. It is always open to the municipal bodies to fill up the vacant posts by way of direct recruitment after the posts by way of promotion and/or deputation quota are not filled up either on the basis of recruitment process already initiated or to be initiated afresh.”

Reading the issues involved therein and the decision of the Hon'ble apex Court this Court finds, the case involved therein is completely different to the case involved herein. Thus this decision has no application to the case at hand at all.

(D) Keeping in view the submissions and counter submissions of the parties this Court came across a decision in the case of ***Shankarsan Dash V. Union of India***, reported in (1991) 3 SCC 47 and finds, the Constitution Bench of the Hon'ble Apex Court through paragraph no.7 therein came to observe as follows:-

“7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana v. Subash Chander Marwaha*; *Neelima Shangala v. State of Haryana* or *Jatinder Kumar v. State of Punjab*.”

This Court finds, the above decision through (1991) 3 SCC 47 has clear application to the case at hand.

(E) Similarly considering the decisions referred to by Mr. M.Ku. Mishra, learned Senior Advocate appearing on behalf of the Petitioner,

this Court from the decision in the case of ***Sarojkanta Mohapatra & Ors. Vs. State of Orissa & Ors.*** 2015 (II) OLR 367 finds, considering a further advertisement in the valid period of waitlist including clear vacancies of particular advertisement, this Court held, the action of the public authority in the circumstance was arbitrary. This Court in the above decision taken support of through the case of ***R.S. Mittal Vs. Union of India*** 1995 (1) SCC 444 and in the case of ***A.P. Aggarwal V. Government of National Capital Territory of Delhi and Anr.*** as reported in AIR (2000) S.C. 205. Both the decisions deprecate the action of the public authority for ignoring the select list remaining valid and also held, resorting to fresh selection in the above situation as bad. This Court, accordingly, in disposal of the case involving ***Sarojkanta Mohapatra & Ors. (Supra)*** directed the public authority involved therein to provide appointment to the persons already there in the select list against the post already advertised in such selection process.

(F) This Court taking into account another decision in the case of ***Gujarat State Dy. Executive Engineers' Association V. State of Gujarat And Ors.*** as reported in **1994 Supp. (2) SCC 591**, finds, the Hon'ble apex Court through the above decision came to decide the period for which the waiting list can remain operative. In paragraph no.8 therein the Hon'ble Apex Court held as follows :-

“8.Coming to the next issue, the first question is what is a waiting list?; can it be treated as a source of recruitment from which candidates may be drawn as and when necessary?; and lastly how long can it operate? These are some important questions which do arise as a result of direction issued by the High Court. A waiting list prepared in service matters by the competent authority is a list of eligible and qualified candidates who in order of merit are placed below the last selected candidate. How it should operate and what is its nature may be governed by the rules. Usually it is linked with the selection or examination for which it is prepared. For instance, if an

examination is held say for selecting 10 candidates for 1990 and the competent authority prepares a waiting list then it is in respect of those 10 seats only for which selection or competition was held. Reason for it is that whenever selection is held, except where it is for single post, it is normally held by taking into account not only the number of vacancies existing on the date when advertisement is issued or applications are invited but even those which are likely to arise in future within one year or so due to retirement etc. It is more so where selections are held regularly by the Commission. Such lists are prepared either under the rules or even otherwise mainly to ensure that the working in the office does not suffer if the selected candidates do not join for one or the other reason or the next selection or examination is not held soon. A candidate in the waiting list in the order of merit has a right to claim that he may be appointed if one or the other selected candidate does not join. But once the selected candidates join and no vacancy arises due to resignation etc. or for any other reason within the period the list is to operate under the rules or within reasonable period where no specific period is provided then candidate from the waiting list has no right to claim appointment to any future vacancy which may arise unless the selection was held for it. He has no vested right except to the limited extent, indicated above, or when the appointing authority acts arbitrarily and makes appointment from the waiting list by picking and choosing for extraneous reasons.”

Through the above decision of the Hon’ble Apex Court, this Court here observes, when the case taken note hereinabove involves validity of a waiting list, the case at hand involves there should be a desired step, in the event one of the selected candidate in particular stream declines to join and when the next candidate in such stream is also a selected one. This Court here observes, once a selected panel is drawn up for the O.M.E.S., the same should be maintained till expiry of the valid period.

22. In the above background of the matter, this Court in disposal of this application involved while allowing the Petition issues the following directions :- **(1)** For the definite vacancies created in Surgery stream specifically in Un-reserved women category for no showing of interest by Dr. Sucheta Panigrahi, Dr. Ambuja Satapathy being the next selected

women candidate in terms of the Advertisement No.15 of 2015-16 should be treated to have been appointed along with all such appointees in terms of the appointment pursuant to the notification dated 3.11.2016 and necessary formal order of appointment is directed to be issued in favour of Dr. Ambuja Satapathy at least within a period of ten days hence. **(2)** This Court also directs for placing Dr. Ambuja Satapathy in appropriate place along with rest persons appointed vide appointment notification dated 3.11.2016 and her seniority will also be maintained accordingly. **(3)** So far as the financial benefit and fitment of the Applicant-Petitioner is concerned; the same will be made as per the fitment enjoyed by the other persons pursuant to the appointment notification dated 3.11.2016. **(4)** So far as arrear of the Petitioner is concerned; it will be treated notionally. **(5)** Result involving the Advertisement No.12 of 2018-19 in Surgery Speciality Stream, if not declared as yet, the same be declared except in respect of one post in Un-reserved Surgery stream as inclusion of such post in the next advertisement was illegal and directed to be filled up as against the Advertisement No.15 of 2015-16.

23. The WPC(OAC) succeeds. For compelling the Applicant-Petitioner to bring such litigation to get justice and for her suffering all through, this Court quantifies the litigation cost to be paid to the Applicant-Petitioner at Rs.10,000/- (rupees ten thousand) only, which be paid by the Opposite Party No.1 to the Applicant-Petitioner also at least within a period of ten days hence.

(Biswanath Rath)
Judge

Orissa High Court, Cuttack.
The 11th day of October, 2022//
Ayaskanta Jena,
Senior Stenographer