

IN THE HIGH COURT OF ORISSA AT CUTTACK**W.P.(C) (OAC) No.1417 of 2018**

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

.....

Diptimayee Pradhan

....

Petitioner

-versus-

State of Odisha & Others

....

Opposite Parties

For Petitioner : M/s.N.K.Sahu, B.Swain & P.Swain.

For Opp. Parties : Addl. Government Advocate
Mr. R.N.Mishra.

PRESENT:**THE HONBLE JUSTICE BIRAJA PRASANNA SATAPATHY**

Date of Hearing:07.09.2022 and Date of Judgment:13.09.2022

Biraja Prasanna Satapathy, J.

1. This matter is taken up through Hybrid Mode.
2. Heard Mr. N.K. Sahu, learned counsel for the Petitioner and Mr. R.N.Mishra, learned Addl. Government Advocate for the State-Opposite Parties.
3. The present Writ Petition has been filed by the Petitioner *inter alia* with the following relief:-

“(i) The rejection of the application of the applicant to the post of Asst. Professor, Anesthesiology vide communication dtd. 23.05.2018 under Annexure-7, by the Respondent No.2

& 3 be declared as illegal and not sustainable in the eye of law and accordingly the same be quashed.

And pass any other order / orders as would be deem fit and proper in the interest of justice.

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

4. Mr. N.K.Sahu, learned counsel for the Petitioner submitted that pursuant to the advertisement issued on 06.02.2018 and the corrigendum issued on 19.02.2018 as well as on 28.02.2018 under Annexure-1-Series, the Petitioner made her application for the post of Asst. Professor in Anesthesiology in V.S.S. Medical College, Burla.

5. Learned counsel for the Petitioner submitted that in the advertisement issued under Annexure-1, the essential qualification and teaching experience as prescribed in Clause-8 is as follows:-

“8. A candidate must have a recognized MD/MS degree (or equivalent) in the concerned board specify with three years of teaching experience as Tutor / Senior Resident in the specialty from a MCI Recognized Medical Institution”.

6. Mr. Sahu, learned counsel for the Petitioner submitted that even though the Petitioner at the time of making the application was having the requisite qualification and experience, when her candidature was rejected after verification of the document on 02.06.2018, on the ground that the Petitioner does not have the three years teaching experience as a Tutor / Senior Resident, the Present Writ Petition was filed.

7. Mr. Sahu, learned counsel for the Petitioner submitted that learned Tribunal while issuing notice of the matter vide order dated 01.06.2018 passed the following interim order:-

“So far as prayer for interim order is concerned, the applicant be allowed to participate in the examination but her result shall not be published without leave of this Tribunal”.

8. It is accordingly submitted that pursuant to the said interim order, the Petitioner was allowed to take part in the selection process but her result has not been published in view of the order passed by the learned Tribunal.

9. It is submitted that the Petitioner after completing her P.G. in Anesthesiology from V.S.S., Medical College, Burla, she joined as a Senior Resident in the department of Anesthesiology in V.S.S., Medical College, Burla on 19.11.2017. Therefore, the Petitioner as on the date of making her application pursuant to the corrigendum issued on 28.02.2018 under Annexure-1-Series had the required three years teaching experience as a Senior Resident. But it is submitted that since the Petitioner while prosecuting her Senior Residency remained on maternity leave from 5.9.2015 to 29.02.2016 and she was allowed to repeat the said period from 19.11.2017 to 15.5.2018 to compensate / adjust the said maternity leave period, the authorities held otherwise by holding that by 29.11.2017, even by 15.3.2018 i.e. last date for submission of her application, the Petitioner does not have the requisite three years teaching experience as the Petitioner completed the said course only on 15.05.2018.

10. Mr. Sahu, learned counsel for the Petitioner submitted that the period the Petitioner remained on

maternity leave from 05.09.2015 to 29.02.2016 was required to be treated as the residency period in order to calculate the period of three years from 19.11.2014.

11. It is submitted that Government in the Health and Family Welfare Department in its resolution issued on 03.02.2014 under Annexure-5 had prescribed the guidelines for engagement of Senior Residency/Tutor in Government Medical /Dental Colleges in the State of Odisha. As provided under Clause-8.6 of the said guidelines, it is provided that teaching experience of the Senior Resident / Tutor shall be reckoned from the date of joining in such post.

12. It is also submitted that the Government in the Department of Finance, while issuing office Memorandum on 10.08.2016 under Annexure-6, issued clarification on the question of maternity leave availed by female contractual employees engaged in different Departments of Government. In the said memorandum, it was indicated that the female contractual employee will be entitled to avail maternity leave up to 180 days as extended to the regular female Government servants irrespective of their contractual period and there will be no interruption of service. It is accordingly submitted that basing on the guidelines issued under Annexures-5 & 6 and the fact that the Petitioner got herself admitted to undergo Senior Resident course on 19.11.2014, the Petitioner had the three years teaching experience by the time she made her application pursuant to Annexure-1-Series.

13. Mr. Sahu, learned counsel for the Petitioner submitted that by the time she made her application pursuant to Annexure-1, she had already completed three

years residency period and her application should not have rejected on the ground that she does not have the required teaching experience.

14. Mr. Sahu, in support of the aforesaid submission relied on various decision of the Hon'ble Apex Court as well as the decision rendered by the Gujarat High Court as well as Rajasthan High Court. The Hon'ble Apex Court in the reported decision in **AIR 2000 SC 1274**, in para-10 of the judgment held as follows:-

“10. Since Article 42 specifically speaks of “just and humane conditions of work” and “maternity relief”, the validity of an executive or administrative action in denying maternity benefit has to be examined on the anvil of Article 42 which, though not enforceable at law, is nevertheless available for determining the legal efficacy of the action complained of.

Similarly, the Hon'ble Gujarat High Court in the case of **Monaben Rajendrakumar Mehta vs. State of Gujarat & 2 others**, (Special Civil Application No.1674 of 2017) in Para-7 of the said judgment held as follows:-

“7. As it is quite apparent from the record that the Petitioner has already served for five years and in the calculation of these five years if the period of maternity leave from 02.02.2011 to 02.06.2011 is disregarded, she would not fall within the criteria emphasized, therefore, the say of the State that she cannot be considered for the post of Head Teacher examinations. It is now the question of her being appointed as a head teacher. Nowhere it is mentioned in the order or elsewhere that maternity leaves if granted to the employee such period shall be excluded which calculating period of five years. The maternity leave is given with a very laudable objective, which in the present case is not being allowed to the petitioner in the calculation of her required period of five years with deduction of her salary also. Since there is no claim with regard to the salary, this Court is not to deal with those aspects. The fact remains that in all other respects, the petitioner is qualified to compete in the examination of the Head Teacher. The petitioner has already cleared the HTAT in September, 2015 with 96 marks. Therefore, the only question now is of her filing the form for the post of the Head Teacher pursuant to

an advertisement. Period of maternity leave granted without pay cannot be excluded for being considered while calculating the total period of five years for the purpose of permitting the person who appeared in the examination for any stretch of reasons”.

Similarly, the Hon’ble Rajasthan High Court in the case of **Shusheela Paliwal vs. State of Rajasthan & Others** in S.B.Civil Writ Petition No.6893 of 2008 has held as follows:-

“This Court in Beeram Ram Choudhary vs. State of Rajasthan & Others, SB Civil Writ Petition No.6273 /2008, decided on 15.10.2008, has taken the view that if a person remained absent from duties or break in service for the reasons beyond his / her control, then that period is required to be considered as a part of teaching experience acquired. The reasons for remaining absent from duties by the petitioner, in the instant matter also appears to be beyond her control. The denial to be considered for appointment as Prabodhak, therefore, on the count of deficiency in experience is not just”.

The petition for writ, therefore, is allowed. The respondents are directed to consider candidature of the petitioner for the purpose of appointment as Prabodhak in District Bhilwara and appointment be accorded to her as Prabodhak, if she is otherwise eligible and stands in select list as per her merit”.

15. Mr. Sahu also relied on the decision of Madras High Court in W.P.(C) No.22994 of 2015, dated 21.12.2015 in the case of **N. Praveena Mary vs. The Secretary to Government & Others**. Hon’ble High Court in Para-3 & 5 of the said order held as follows:-

“3. *It is the case of the petitioner that the period of maternity leave shall be treated as service. Prima facie, I am of the view that the period of maternity leave sanctioned by the Government shall be treated as service for at least including her in the panel for the post of Deputy Tahasildar. If the said service period is added, then, she rendered 5 years, 8 months and 23 days. The required service is 5 years. By excluding the maternity leave, it is stated that the petitioner rendered 4 years, 11 months and 22 days.*

5. *In these circumstances, the second respondent has to get appropriate order in this regard from the first*

respondent to include the name of the petitioner in the panel for promotion to the post of Deputy Tahasildars for the year 2015 by taking into account the period of maternity leave as service or at least to take the E.L. Period in between 18.08.2010 and 28.08.2010, as service”.

16. Making all such submissions, Mr. Sahu, learned counsel for the Petitioner submitted that since the Petitioner was admitted to prosecute the Senior Residency from 19.11.2014, the 3 years teaching experience as prescribed in the advertisement was completed by her on 19.11.2017, even though she availed maternity leave from 5.9.2015 to 29.2.2016. The said period was compensated by allowing the Petitioner to repeat the period from 19.11.2017 to 15.05.2018. Accordingly, Mr. Sahu submitted that not only the Petitioner's application submitted pursuant to Annexure-1 be entertained but also necessary direction be issued to the Opposite Parties to publish her result as pursuant to the interim order passed by the learned Tribunal, she had taken the examination.

17. Mr. R.N.Mishra, learned Addl. Government Advocate on the other hand made his submission basing on the stand taken in the counter filed by the Opposite Party Nos.2 and 3.

18. It is submitted that as per the resolution issued by the Government in the Health and Family Welfare Department on 11.01.2013, it had been provided in Clause-8.6 of the said resolution that teaching experience of the Senior Resident / Tutor shall be reckoned from the date of joining in such post and the period of leave availed by Senior Resident / Tutor will be compensated by repetition.

19. Mr. Mishra, also submitted that the eligibility criteria for recruitment to the post of Asst. Professor is prescribed under Odisha Medical Education Service (Method of Recruitment of and Conditions of Service) Rules, 2013.

Rule-4(1) of the said Rules provides as follows:-

(1) Selection to the post of Assistant Professor shall be made by way of direct recruitment through the Commission, from amongst the Candidate having P.G. Degree in the concerned specialty with three years experience as Tutor or Sr. Resident from any Medical Institution recognized by the MCI.”

20. Mr. Mishra, accordingly submitted that since the Petitioner remained on maternity leave for the period from 5.9.2015 to 29.02.2016 and she was allowed to repeat the said period from 19.11.2017 to 15.05.2018, it cannot be held that the Petitioner had the requisite three years teaching experience by 19.11.2017, even by 15.3.2018 i.e. last date of making the application.

21. Accordingly, it is submitted that no illegality has been committed by the authority in rejecting the Petitioner's application on the ground that the Petitioner does not have the requisite three years teaching experience as on the date of making the application.

22. Heard learned counsel for the Parties.

23. Perused the materials available on record. This Court after going through the same finds that the Petitioner admittedly took admission to prosecute the Senior Resident on 19.11.2014 in the Department of Anesthesiology and there is no dispute that the Petitioner remained on maternity leave for the period from 5.9.2015 to 29.2.2016. Since the Petitioner remained on maternity leave

for the said period, she was allowed to repeat the said period from 19.11.2017 to 15.5.2018 and the said fact is clearly indicated in the certificate issued by the Dean and Principal of the College under Annexure-4.

24. This Court further finds that the Petitioner entered into the service as an Asst. Surgeon, where he joined on 4.3.2004 and while continuing as such in RGH, Rourkela, she was relieved to prosecute the Senior Resident in V.S.S, Medical College in the Department of Anesthesiology vide order dated 12.11.2014 under Annexure-12-Series. The Petitioner accordingly got herself admitted on 17.11.2014 and in view of the maternity leave allowed in her favour for the period from 5.9.2015 to 29.02.2016, that period in view of the decision relied on Mr. Sahu as cited (supra) as well as the guidelines mentioned at Para-8.8 of the resolution dated 3.2.2014 and the guidelines issued in the Office Memorandum dated 1.8.2016 under Annexures-5 & 6, this Court held that 3 (three) years teaching experience as prescribed in the advertisement was completed by the Petitioner on 19.11.2017. This Court while holding so and in view of the interim order passed on 01.06.2018, directs the Opposite Parties to publish the result of the Petitioner so undertaken by her for the post of Asst. Professor in Anesthesiology under Annexure-1. It is observed that if Petitioner is found to have qualified in the said examination, necessary consequential action be taken in providing the appointment as against the post of Asst. Professor in Anesthesiology. This Court further directs the Opposite Parties to complete the entire exercise within a period of two months from the date of receipt of this order.

25. With the aforesaid observations and directions, the WPC(OAC) stands disposed of. There shall be no order as to costs.

(Biraja Prasanna Satapathy)
Judge

Orissa High Court, Cuttack
Dated the 13th of September, 2022/Subrat

