IN THE HIGH COURT OF ORISSA AT CUTTACK

WPC (OAC) No. 3375 of 2015,
WPC(OAC) No. 2373 of 2014,
WPC(OAC) No. 2887 of 2015,
WPC(OAC) No. 2219 of 2015,
WPC(OAC) No. 2220 of 2015,
WPC(OAC) No. 2221 of 2015,
WPC(OAC) No. 2222 of 2015,
WPC(OAC) No. 2223 of 2015,
WPC(OAC) No. 2224 of 2015 &
WPC(OAC) No. 2225 of 2015

Applications under Articles 226 & 227 of Constitution of India.

AFR **WPC (OAC) No. 3375 of 2015**

Anita Mohapatra .... **Petitioner**

-versus-

State of Odisha and Others .... **Opp. Parties**

WPC(OAC) No. 2373 of 2014

Bijaya Kumar Parida .... **Petitioner**

-versus-

State of Odisha and Others .... **Opp. Parties**

WPC(OAC) No. 2887 of 2015

Suvashish Mohanty .... **Petitioner**

-versus-

State of Odisha and Others .... **Opp.Parties**

WPC(OAC) No. 2219 of 2015

Laxmi Prasad Mohapatra .... **Petitioner**

-versus-

State of Odisha and Others .... **Opp. Parties**

WPC(OAC) No. 2220 of 2015

Jyotsnamayee Behera .... **Petitioner**

-versus-

State of Odisha and Others .... **Opp. Parties**

WPC(OAC) No. 2221 of 2015

Chitta Ranjan Sethi .... **Petitioner**

-versus-

State of Odisha and Others .... **Opp. Parties**

WPC(OAC) No. 2222 of 2015

Suchismita Mohapatra .... **Petitioner**

-versus-

State of Odisha and Others .... **Opp. Parties**

WPC(OAC) No. 2223 of 2015

Sasmita Nayak .... **Petitioner**

-versus-

State of Odisha and Others .... **Opp. Parties**

WPC(OAC) No. 2224 of 2015

Purna Chandra Nayak .... **Petitioner**

-versus-

State of Odisha and Others .... **Opp. Parties**

WPC(OAC) No. 2225 of 2015

Priyabrata Ray .... **Petitioner**

-versus-

State of Odisha and Others .... **Opp. Parties**

HIGH COURT ORISSA

Advocate(s) appeared in this case:-

For Petitioners	:	M/s. Dr. J.K. Lenka & P.K. Behera, Advocates. [in **WPC (OAC) No. 3375 of 2015**] M/s. Sameer Kumar Das, P.K. Behera & N. Jena, G.R. Sethi, Advocates. [in **WPC (OAC) No. 2373 of 2014**] [M/s. G.R. Sethi, J.K. Digal & B.K. Pattnaik, Advocates. [in **WPC (OAC) No. 2887 of 2015]** Mr. Budhadev Routray, Sr. Advocate with M/s. M.K. Pati, B.P. Satpathy, H.S. Dalai, R. Mohapatra & S. Das, Advocates [in **WPC(OAC) Nos.2219, 2220, 2221, 2222, 2223,2224,2225 of 2015]**
For Opp. Parties	:	Mr. N.K. Praharaj, Govt. Advocate for the State Mr. Biswajit Parida, Advocate, [for Board of Secondary Education] M/s. B.B. Mohanty, B. Tripathy & M.K. Pati, Advocates [for **O.P.4 in WPC (OAC) No. 3375 of 2015**] M/s. G.R. Sethi & J.K. Digal, Advocates. [Intervenor in **WPC(OAC) No. 2219 of 2015**] Mr. Budhadev Routray, Sr. Advocate with Mr. M.K. Pati , Advocate [for private O.Ps in **WPC (OAC) No. 2373 of 2014 and WPC(OAC) No. 3375, & 2887 of 2015**]

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT
7th September, 2022

SASHIKANTA MISHRA, J.

The facts and issues involved in all these writ applications are the same for which they were heard

together and are being disposed of by this common judgment.

FACTS

2. An advertisement was published on 19.07.2012 by the Collector, Jagatsinghpur inviting applications from eligible candidates for recruitment to the post of Junior Clerk for the Registration Offices of Jagatsinghpur District under Revenue Administration. Ten posts were so advertised, out of which, three were meant for unreserved (UR) category while seven posts were reserved for different categories. The written test was fixed to 05.01.2014 as per admit cards issued to the eligible candidates. The result of the written test was published on 18.06.1014 and the successful candidates were called upon to appear in the Computer Practical/Viva Voce test on 30.06.2014. The result was declared on the same day and accordingly, nine candidates were sponsored by the Collector, Jagatsinghpur for issue of appointment orders by the appointing authority, namely, District Sub-Registrar, Jagatsinghpur. Though, appointment order was issued to nine candidates, eight joined and one candidate resigned. On 24.03.2015, some

unsuccessful candidates submitted written complaint before the Collector, Jagatsinghpur alleging that the OMR valuation and result sheets of the candidates had not been properly evaluated as per the answer keys provided by the Board of Secondary Education (BSE), Odisha, which they had obtained through the RTI Act. Subsequently, by a letter dated 04.05.2015 the Secretary, BSE, Odisha, Cuttack wrote to the Collector informing that due to inadvertent mistake the three sets of question papers, i.e., B, C & D were not jumbled in respect of paper-1 and accordingly the result was revised and handed over to the authorized officer. The Collector convened an urgent meeting of the selection committee on the same day and it was found that out of four sets of question papers in respect of General Knowledge and English, namely, Set-A, Set-B, Set-C & Set-D, the answers in respect of Set-A question paper was correctly depicted, whereas the answers for Set-B, Set-C and Set-D were found to be defective, though the questions and sequence was the same in all the four sets. Since the question sets are identical, the answers should also have been identical and therefore, it was held that there was a

serious lapse in preparation of the question papers as well as the answer keys by the BSE. Accordingly, the Collector sought for necessary clarification from the Government in Revenue and DM Department on the following points:

> *(i) if the previous result list communicated by the Board of Secondary Education will be declared void and the candidates already appointed will be removed from service as their appointment becomes illegal and fresh appointment order to be issued as per fresh result list communicated by Board of Secondary Education;*
>
> *(ii) whether we may go for fresh recruitment process after cancellation of the previous recruitment process;*
>
> *(iii) what steps will be taken in respect of those employees regarding receipt of their salary.*

In response, the Government in Revenue and DM Department vide letter dated 20.06.2015, informed that the views of the Law Department were sought for in the matter and the views given are as follows:

> *(i) The selection process is completely illegal and the list of successful candidates prepared by the Board of Secondary Education should not be given effect.*
>
> *(ii) the candidates who have already joined in the post of a junior clerk are to be terminated as the basis of their appointment is completely wrong.*
>
> *(iii) the recruitment process is to be cancelled and fresh recruitment may be conducted.*
>
> *(iv) the damages claimed by any candidate should be realized from the Board of Secondary Education, Odisha as the process of recruitment has been dealt in a most irrational manner.*

It was however stated that the above views are subject to the outcome of the order of the Hon'ble Odisha Administrative Tribunal in O.A. No. 2373(C) of 2014 (subsequently renumbered as WPC(OAC) No. 2373 of 2014 after its transfer to this Court).

Pursuant to such instructions of the Government in its letter dated 20.06.2015, the Collector requested the Sub-Registrar to terminate the junior clerks who were finally selected and sponsored by his office and had joined in the post of Junior Clerk subject to outcome of the order in the aforementioned case. Further, by notice dated 29.06.2015, the Collector cancelled the recruitment process held as per the advertisement dated 19.07.2012 and the names of the candidates finally selected in the above recruitment process and sponsored to the District Sub-Registrar, Jagatsinghpur for their posting. However because of prohibitory order passed by the erstwhile Odisha Administrative Tribunal in the connected Original Applications, the said order has not been given effect to and the seven candidates are still continuing in service.

3. Coming to the individual grievances, it is to be noted that the petitioners in WPC(OAC) No.3375 of 2015 (Anita Mohapatra), WPC(OAC) No.2373 of 2014 (Bijaya Kumar Parida) and WPC(OAC) No. 2887 of 2015 (Suvashish Mohanty) are candidates who were not selected for appointment and have challenged the select list. On the other hand, the petitioners in WPC(OAC) No.2219 of 2015 (Laxmi Prasad Mohapatra), WPC(OAC) No.2220 of 2015 (Jyotsnamayee Behera), WPC(OAC) No.2221 of 2015 (Chitta Ranjan Sethi), WPC(OAC) No.2222 of 2015 (Suchismita Mohapatra), WPC(OAC) No.2223 of 2015 (Sasmita Nayak), WPC(OAC) No.2224 of 2015 (Purna Chandra Nayak) and WPC(OAC) No.2225 of 2015 (Priyabrata Ray) are the seven selected candidates who were appointed as Junior Clerks and are presently continuing in service. These petitioners have challenged the order dated 20.06.2015 passed by the Government in directing the Collector, Jagatsinghpur to cancel the recruitment process and to conduct fresh recruitment and the consequential order dated 29.06.2015 passed by the Collector, Jagatsinghpur in directing the District Registrar, Jagatsinghpur to terminate their service.

4. In the first batch of writ applications i.e., in respect of non-selected candidates, it is contended that the advertisement is invalid for non adherence of the principles of reservation inasmuch as more than 50% of the posts advertised had been kept reserved for different categories of candidates. Secondly, the Board of Secondary Education having rectified its mistake and duly informed the Collector about it, the original select list is no longer valid and since these candidates were found to have been selected after revision of answer papers, they should have been given appointment. It is also contended that because of wrong valuation of answer sheets, the petitioners were deprived of appointment and accordingly, it is prayed to direct the concerned authorities to publish the revised marks of OMR answer sheets and to issue order of appointment in their favour.

5. Counter affidavits have been filed by the Collector, Jagatsinghpur as well as the Board of Secondary Education submitting para-wise replies to the averments made in the individual writ petitions. The same are not required to be gone into detail. It would suffice to indicate

that the Collector has basically taken the stand that the action taken by him as per the impugned order dated 29.06.2015 was based on the instructions of the Government in Revenue and DM Department which in turn was based upon the opinion tendered by the Law Department.

6. The Board of Secondary Education has filed counter affidavit in WPC(OAC) No.3375 of 2015 contending that the result was revised and handed over to the authorized officer and further the result was also preserved basing on the scoring keys prepared in respect of the question sets of district no.1 and therefore, there is no discrepancy. It is further stated that it is not possible to revise the mark sheets at this stage.

7. The private opposite parties, i.e., the selected candidates, have also filed their individual counters to these writ petitions, the details of which will be discussed later.

8. The second batch of writ applications, as already stated, has been filed by seven selected candidates. While questioning the locus standi of the non-selected

candidates to challenge the select list, it is stated that having been duly selected and given appointment way back in the year 2014, their appointments cannot be cancelled.

9. Heard Mr. J.K. Lenka, learned counsel for the petitioner in WPC(OAC) No.3375 of 2015; Mr. S.K. Das, learned counsel for the petitioner in WPC(OAC) No.2373 of 2014; Mr. G.R. Sethi, learned counsel for the petitioner in WPC(OAC) No. 2887 of 2015; Mr. B. Routray, learned Senior Counsel appearing along with Mr. M.K. Pati, learned counsel for the petitioners in the remaining seven writ petitions and for the private opposite parties in the writ petitions filed by non-selected candidates; Mr. N.K. Praharaj, learned Government Advocate for the State opposite parties; and Mr. B. Parida, learned counsel appearing for the Board of Secondary Education.

Submissions.

10. Dr. J.K. Lenka, learned counsel appearing for the petitioner in WPC(OAC) No. 3375 of 2015 (Anita Mohapatra) has argued that the original select list cannot be treated as valid because the same was based on wrong answer keys, which is a serious lapse committed by the

Board of Secondary Education. It is further submitted by Dr. Lenka that from the counter filed by the Collector it is revealed that the result had been revised and sent to the Collector but the same was not acted upon. The petitioner secured more marks than opposite party no.4 and hence, she should have been selected. The selection committee having fixed cut-off marks for the computer skill test has acted contrary to the advertisement, which provides that the computer test shall only be qualifying in nature. Since this is a case where the opposite party no. 4, despite not being validly selected was appointed and has continued on the strength of the interim order passed by the Tribunal, he does not acquire any right to the post and therefore his appointment itself is invalid. It is also argued that by exceeding the 50% limit of reservation, the entire process of selection becomes vitiated. Alternatively, it is contended by Dr. Lenka that since a post is still vacant and the petitioner has been found to be qualified as per the revised marks, she should be given appointment.

Mr. B.B. Mohanty, learned counsel appearing for the opposite party no.4 (private opposite party) has

argued that since the petitioner had failed to qualify in the mandatory computer skill test by securing only two marks as against 21 marks secured by the opposite party no. 4, cannot challenge the selection in any manner. Moreover, in the absence of any rule providing for re-valuation in the examination in question, the prayer of the petitioner is devoid of merit. It is also contended by Mr. Mohanty that the original application is barred by limitation under Section 21 of the Administrative Tribunals Act since even on the basis of alleged wrong answer key, she was shortlisted on merit in the written test to appear at the computer skill test. Therefore her prayer for quashing the order of appointment dated 01.07.2014 is beyond the period of limitation. It is also contended that the District Sub-Registrar, being the appointing authority is a necessary party but has not been impleaded in the writ petition.

11. Mr. S.K. Das, learned counsel appearing for the petitioner in WPC (OAC) No.2373 of 2014, has argued that as per information obtained by the petitioner under the RTI Act, which was supplied to him on 04.03.2015, it was found that he had given the correct answers, but because of use of

wrong answer keys he was not awarded any marks. Therefore, on the basis of the complaint lodged by him and other similarly placed candidates, the selection committee met and requested the BSE to verify and re-examine the entire evaluation of General Knowledge and English and accordingly, a revised merit list was prepared, wherein the petitioner was found to have secured 256 marks instead of 212 originally awarded to him. Instead of acting upon the revised marks, the Government instructed for cancellation of the entire list. Mr. Das contends that the petitioner was thus kept out of employment only for the fault of the BSE and not because of any mistake committed by him. On the other hand, the opposite party no.5, despite securing less marks i.e., 222 marks and opposite party no.6, despite securing 214 marks, were included in the select list and were appointed. However, as per the revised result, the petitioner secured 256 marks and placed at serial no.1 in the SEBC category, whereas, opposite parties no. 5 and 6 were not eligible for selection either under SEBC or UR category. On the question of limitation raised by private opposite parties in their counter affidavit, it is argued that

the petitioner had originally approached the Tribunal on 11.08.2014 and when the answer key was supplied on 04.03.2015, he and others brought the same to the notice of the Collector ventilating their grievance. Ultimately, the Government vide order dated 20.06.2015, directed cancellation of the entire selection process, which is therefore a case of continuous cause of action. Similar discrepancy was noticed in the respect of examination held in the district of Ganjam and Kandhamal, wherein on approach by some candidates in O.A. No. 3462(C) of 2014 and batch the learned Tribunal held that the preparation of revised select list cannot be treated as revaluation rather has to be treated as correction of the wrong committed by the authority in order to render justice to the persons who were denied justice for no fault of their own. Accordingly, on the basis of revised select list, the left out candidates of those districts were appointed. According to Mr. Das, the case of the petitioner is squarely covered by the said decision. Mr. Das has further argued that as per the settled position of law, continuance of a person wrongly appointed to a post does not create a right in his favour.

12. Mr. G.R. Sethi, learned counsel appearing for the petitioner in WPC(OAC) No. 2887 of 2015 (Suvashish Mohanty) has argued that pursuant to publication of the result of the written test in which the petitioner is shown to have secured 15 marks in English, 21 marks in GK, 32 marks in Odia and 76 marks in Mathematics and he was directed to appear in the Computer skill test. However his name did not find place in the final merit list. It is argued by Mr. Sethi that had the error in answer key not occurred, he would have secured 267 marks, which is more than the marks secured by opposite party no.5, i.e. 263. On such basis, it is argued that the decision to cancel the entire select list without taking into account the revision of marks is entirely illegal and unjustified. Since the appointment of opposite party no.5 was on the basis of an invalid selection, he does not acquire any right to the post.

On the other hand, Mr. Budhadev Routray, learned Senior Counsel appearing for private opposite party Nos. 5 and 6 has argued that the petitioner has no locus standi to challenge the process of selection since it is settled law that a candidate who has subjected himself to a

particular selection process cannot question it later on. Mr. Routray further argues that the candidates who were selected and appointed cannot be blamed for the wrong committed by the BSE. Moreover, it is not a case where the petitioners are alleged to have practiced fraud or misrepresented facts to get appointment. Therefore having been appointed bonafide and having served the Government satisfactorily for more than seven years, the petitioners cannot be thrown out of employment at this belated stage. It is further argued that the appointing authority is a necessary party, in absence of whom the lis cannot be lawfully adjudicated. In any case, the prayer made by the failed candidates acting as per the revised select list cannot be entertained at this belated stage in view of the specific stand taken by the BSE, i.e., after the preserving period.

Points for consideration.

13. From the rival contentions noted above, it is evident that the following points arise for consideration in this batch of writ petitions

(i) Whether the seven (7) selected/appointed candidates have made out any case for

interference with the impugned order dated 20.06.2015 of the Government in Revenue and DM Department and notice dated 29.06.2015 issued by the Collector, Jagatsinghpur. If so, to what relief they are entitled?

(ii) Whether the three (3) non-selected candidates are entitled to the relief claimed by them. If so, to what extent?

Analysis and Findings

14. Since the facts have been narrated in extenso hereinbefore, the same are not referred to again. It would suffice to only note that the evaluation of the answers by the BSE was seriously flawed to the effect that the question sets being identical, the answer keys also should have been identical for all the four sets of questions. On a complaint being submitted by some candidates before the Collector, Jagatsinghpur and the BSE, the Collector, as per letter dated 17.09.2014 and 26.09.2014, requested the BSE to verify and re-examine the valuation papers and to furnish necessary clarification. As per the counter affidavit filed by the BSE in WPC(OAC) No. 3375 of 2015, the result was

revised and handed over to the authorized officer and the result was also preserved basing on the scoring keys prepared in respect of question sets of District No.1. By letter dated 04.05.2015, the BSE informed the ADM, Jagatsinghpur that the result of District No.4 (Jagatsinghpur) was revised and sent for examination and necessary action. In the meantime, however, the selection committee met under the Chairmanship of the Collector to examine the veracity of the complaints lodged by different candidates and it was found that the evaluation of the answers had not been correctly made and illegality was committed at the level of BSE. Therefore, by letter dated 06.05.2015, the Collector wrote to the Government in Revenue and DM Department seeking instructions in the matter. Be it noted here that in the meantime, the appointment orders were issued to the selected candidates on 01.07.2014. The above facts imply that the original select list prepared by the BSE, which was based on wrong answer keys, had been duly acted upon by the concerned authorities. But the revised select list, which was also communicated by the BSE to the Collector vide letter dated

04.05.2015, was not acted upon. The Collector instead sought instructions from the Government two days later, i.e., on 06.05.2015. Though the mistake was pointed out by the Collector and the BSE was blamed for the glaring mistake in evaluation of the answers, no mention was made of the fact that the BSE had subsequently revised the select list by utilizing the correct answer keys. Be that as it may, the Government in Revenue and DM Department sought for opinion from the Law Department and basing on the opinion tendered by the said Department, the Government decided as follows:

> *" I am directed to invite a reference to your letter No.84/Estt. Dated 06.05.2015 on the above noted subject and to say that views of Law Department was sought for in the maths and their views reproduced as follows:*
> *1. The selection process is completely illegal and the list of successful candidates prepared by the Board of Secondary Education should not be given effect to.*
> *2. The Candidates who have already joined in the post of Jr. Clerk are to be terminated as the basis of their appointment is completely wrong.*
> *3. The recruitment process is to be cancelled and fresh recruitment may be conducted.*
> *4. The damages claimed by any candidate should be realized from the Board of Secondary Education, Odisha as the process of recruitment has been dealt in a most irrational manner.*
> *However, the above narrated views are subject to the outcome of the order of Hon'ble O.A.T. in O.A. No. 2373 (C) of 2014.*

You are therefore requested to take further necessary action on the matter immediately as advised above."

Basing on such instructions, the Collector requested the District Registrar, Jagatsinghpur to terminate the Junior Clerks already appointed and also issued the impugned notice on 29.06.2015 in canceling the entire recruitment process.

15. In course of arguments, Mr. N.K. Praharaj, learned Government Advocate appearing for the State has pointed out that the decision was taken by the Government entirely on the basis of the opinion tendered by the Law Department. This Court after perusing the concerned file of the Revenue and DM Department produced by learned Government Advocate observes that the fact that the select list had been revised by the Board and duly communicated to the Collector had not been intimated to the Law Department. Even otherwise, after such decision, the file was referred to the Law Department on as many as four occasions raising different queries. Significantly, in its opinion tendered on 23.02.2021, the Law Department stated that *"after calculation of marks in the answer sheets if*

there is any error, a fresh merit list may be prepared. If the petitioner (Bijay Kumar Parida) is in the revised merit list, then he may be given appointment and the representation of the petitioner may be disposed of accordingly". Again on reference being made by the Administrative Department on the following queries:

> *"1. It is not made clear as to whether the 7 Jr. Clerks who are continuing at present as Sr. Clerk by virtue of Tribunal order, will be allowed to continue after recasting of the merit list irrespective of their position in the revised merit list or it will be decided as per the revised merit list?*
> *2. Whether rejection of their cases will not amount to contempt of Court?*
> *3. Whether after revision of the list, another case will be filed in the Hon'ble Court against the order of the Hon'ble Tribunal?*
> *4. Whether it will be entertained at this belated stage?"*

Law Department's opinion was as under:

> *"The revision of the merit list will depend on the final order of these OAs by the Hon'ble High Court. The A/D is also required to file an application for revision of the order of the Hon'ble High Court dtd.18.12.2020 in WP(C) No. 35311/2020 with prayer for hearing of the revision petition as well as the above OAs analogously to avoid any conflict of orders. After final disposal of these OAs, revision of the merit list may be taken up as per order of the Hon'ble High Court and there would be no apprehension of Contempt of Court. If the A/D propose to take action as per the above views of this Department, they may resubmit the file for orders of the Government."*

16. Thus, it is seen that the Law Department has not given a clear cut opinion to set the matter at rest finally.

Nevertheless, in view of the subsequent opinion tendered by the Law Department, the impugned order dated 29.06.2015, which was based on the earlier opinion of the Law Department, obviously cannot be treated as final. What has happened in the process is, no further decision has been taken by the Government in this regard on the ruse of the pendency of the writ petitions (O.As.).

17. Having referred to the factual aspect of the lis, it would now be proper to deal with the technical grounds raised by the parties. It has been argued that the writ petition filed by the three non-selected candidates is barred by limitation and bad for non-impletion of necessary parties.

As has already been stated, the non-selected candidates except Bijaya Kumar Parida have approached the Tribunal with prayer, inter alia, to quash the written test result and final select list. It is argued that the select list was published on 01.07.2014, whereas O.A. No. 3375(C) of 2015 was filed on 08.09.2015 and O.A. No.2887 (C) of 2015 was filed on 17.08.2015, i.e. after one year. It is to be noted that at that time, the Board of Secondary Education

had not communicated the revised list to the Collector. After the said revised list was forwarded to the Collector, the matter was referred to the Government which culminated in passing of the impugned order which was made subject to result of the pending O.A. filed by the petitioner. So, the cause of action obviously arose on 20.06.2015. Therefore, the plea of limitation does not appear to be well-founded.

18. It is also argued that the District Sub-Registrar being the appointing authority should have been impleaded as a party and further that the select list being challenged, all persons in the select list should have been impleaded. While it is true that the District Sub-Registrar is the appointing authority, yet the challenge in this writ application is not so much to the order of appointment as it is to the selection and sponsoring of candidates for appointment by the selection committee headed by the Collector. The appointing authority, it is needless to mention, is required to act upon the recommendation made by the selection committee and has no power to act on his own. Therefore, this Court is of the view that the Collector being the Chairman of the selection committee is a

necessary party without whom the lis cannot be properly adjudicated but the same cannot be said of the District Sub-Registrar for the reasons indicated above. As regards non-impletion of all the successful candidates, it is seen that the petitioners have impleaded only such candidates as belong to their respective categories. For instance, Anita Mohapatra (petitioner in WPC(OAC) No.3375 of 2015) being an UR category candidate has impleaded one Suchismita Mohapatra as opposite party no.4, who is also an UR category candidate. Similarly Bijaya Kumar Parida (the petitioner in WPC(OAC) No.2373 of 2014) being SEBC category candidate has impleaded Purna Chandra Nayak and Priyabrata Nayak as opposite party Nos. 5 and 6, both of whom belong to the SEBC category. Similarly, Suvashish Mohanty (petitioner in WPC(OAC) No. 2887 of 2015) being an UR category candidate has impleaded Laxmi Prasad Mohanty and Jagannath Patra as opposite party Nos. 3 and 4 as they all belong to UR category. It is further observed that these petitioners have impleaded such of the candidates who they claim to have secured less mark than

them. Therefore, the contention that the writ petition is bad for non-impletion of necessary parties, cannot be accepted

19. Additionally, it has been argued that the petitioners having failed to qualify have no locus standi to challenge the select list. Law is well-settled that an unqualified candidate is estopped from challenging the process of selection but in the instant case, if the petitioners' contention as putforth in the writ application is found correct it would imply that he/she was qualified but not selected for appointment. There is a sea of difference between two situations for which the objection relating to locus standi is held to be without merit.

20. This leaves the court with two technical grounds raised by one of the non-selected candidate, namely Anita Mohapatra that the process of selection was bad and contrary to process of selection laid down in the advertisement in that cut-off marks were prescribed in the Computer Skill test which ought to have been only qualifying in nature. This is an unacceptable contention because the candidate had wilfully submitted to the process

of recruitment and there is nothing on record to even remotely suggest that she had ever raised any objection or protest in this regard. Such being the case, it is no longer open to her to challenge the process adopted by the selection committee. In any case, the same procedure was followed for all the candidates without the petitioner being singled out or subjected to any kind of discriminatory treatment.

It is further contended that the number of vacancies advertised exceeded the fifty percent ceiling of reservation. The same reasoning as above can be adopted in this regard also inasmuch as the petitioner had never protested or objected to the advertisement much less challenge the same. So, it is no longer open to her to raise such ground at this belated stage. Even otherwise, a reference to the counter filed by the state in her case reveals that the categories of posts advertised was apparently as per the sanctioned strength and not as per the vacancies themselves. In other words, it was post-based and not vacancy-based.

21. Coming to the main grounds of challenge to the impugned order, there can be hardly any doubt that the BSE is primarily responsible for the fiasco. However, it is borne out from the record that on complaint being lodged by some unselected candidates, the BSE rectified its mistake by revising the result but by such time the original selected list had been acted upon. What has happened in the process is, some eligible candidates have been left out while others who are said to be ineligible were given appointment. It has been argued that the revised list cannot be taken into consideration because it would amount to revaluation of the answer scripts, which is not permissible in law. It would be relevant to note here that the discrepancy as arising in the present case was also detected in respect of Ganjan and Kandhamal Districts. In the said districts the revised select list was published and appointment was given for such districts, which was challenged before the Odisha Administrative Tribunal in O.A. No.3462 (C)/2014 and batch on the ground that after completion of the selection process the selection committee had become functus officio and there is no provision under

the statute for revaluation of the answer scripts. The Tribunal in its order dated 20th July, 2017 held that no revaluation had been done but only because of the error due to result processing system the preparation of the merit list had been affected. According to the Tribunal, correction of the error resulting in publication of a revised list does not amount to revaluation of the answer scripts. This Court is in agreement with the reasoning adopted by the Tribunal as the same situation has arisen in the present case. After coming to know of the error in the answer scripts, the BSE corrected the same and prepared a revised list which was forwarded to the authorities. Therefore, the contention that the revised list cannot be acted upon is not acceptable.

22. It has also been argued that the seven Petitioners were appointed bonafide without any fault of their own and there is no allegation of any fraud or misrepresentation of facts committed by them. Therefore, they have acquired a right to continue in their posts. This Court does not agree with such contention for the reason that law requires that a candidate can be appointed only if

he is found to be eligible in the recruitment process. In the instant case, the eligibility of candidate is to be decided on the basis of marks secured by him in the written and viva voce test. If the revised list is taken into account, it would be evident that candidates securing less marks have been appointed leaving out candidates with more marks. This casts a fundamental question as regards the correctness of the appointment. It is settled law that if the very basis of the appointment is bad, any further action cannot validate the same. In the case of ***State of Odisha v. Mamata Mohanty***; reported in 2011 (3) SCC 436, it was held as under:-

> *"It is a settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironic to permit a person to rely upon a law, in violation of which he has obtained the benefits. If an order at the initial stage is bad in law, then all further proceedings consequent thereto will be nonest and have to be necessarily set aside. A right in law exists only and only when it has a lawful origin."*

Thus, if a candidate not securing the required marks has been appointed leaving out eligible candidates, the very appointment is to be treated as a nullity. Such view

was taken by the Apex Court in the case of ***State of Bihar and others v. Devendra Sarma***; reported in 2020 (15) SCC 466.

23. It has been strenuously argued on behalf of these seven Petitioners that they are not to be blamed for the fault committed by the Board and since they have continued bonafide for as long as seven years, it would be inequitable to throw them out of employment at this belated stage thereby affecting their right to livelihood guaranteed under Article 21 of the Constitution of India. The contention as advanced appears to be attractive at the first blush, but on deeper scrutiny is found to be without merit for the reasons stated hereinafter.

24. In the case of ***M.S. Patil v. Gulbarga University***; reported in 2010 (1) SCC 63, the Apex Court held as under:-

> *"15. Once the facts of the case are narrated, there remains hardly anything to adjudicate upon. The facts of the case lead to only one conclusion that the appellant was wrongly appointed to a post that was reserved for 'Group B' category. The High Court has also found that the appellant's selection for appointment to the post was tainted by the participation of the Head of the Department of Kannada, who was related to him, in the selection*

process. In those facts and circumstances, all that is needed is to dismiss the appeal without further ado.

16. But at this stage once again a strong appeal is made to let the appellant continue on the post where he has already worked for over 17 years. Mr. Patil, learned Senior counsel, appearing for the appellant, submitted that throwing him out after more than 17 years would be very hard and unfair to him since now he cannot even go back to the college where he worked as lecturer and from where he had resigned to join to this post.

17. We are unimpressed. In service law there is no place for the concepts of adverse possession or holding over. Helped by some University authorities and the gratuitous circumstances of the interim orders passed by the Court and the delay in final disposal of the matter, the appellant has been occupying the post, for all these years that lawfully belonged to someone else. The equitable considerations are, thus, actually against him rather than in his favour.

18. The matter can also be looked at from a slightly different angle. It is noted above how the appellant was able to secure the appointment and how he managed to continue on the post. By notification dated August 13, 2004, the appellant was discharged from the service of the University on the post of Reader in Kannada but was asked to continue on ad hoc basis until the appointment of the new incumbent to the post. His position is, thus, only ad hoc till the appointment of the new incumbent and in that position he is continuing on the basis of the direction of this Court to maintain status quo. We see no reason to continue this ad hoc arrangement any further and we do not wish to stand any longer in the way of the post being filled up on a regular basis".

In an earlier decision in the case of ***Channabasavaih v. State of Maysore and others***; reported in AIR 1965 SC 1223, it was held as under:-

"We will accordingly allow these petitions and quash the appointments of the 24 candidates whose name are mentioned in Annexure-C and 16 candidates

> *whose name are mentioned in Annexure-D to the affidavit of public service commission filed on August 4, 1964. Their selection was not proper and must be set aside. It is very unfortunate that these persons should be uprooted after they had been appointed but if equality and equal protection before the law have any meaning and it our public institutions are to inspire that confidence which is expected of them we would be failing in duty if we did not, even at the cost of considerable inconvenience to Govt. and the selected candidates do the right thing. If any blame for the inconvenience is to be placed it certainly cannot be placed upon the petitioners candidates, the candidates whom this order displaced on this Court.*

25. As regards the plea that the Petitioners have continued in service for more than 7 years by now, it is to be noted that such continuance has been on the strength of interim order passed by the Tribunal. It is needless to mention that without the interim order, the petitioners would have been terminated since long. It is settled law that continuance of a person in a post by virtue of an interim order is always subject to outcome of the litigation and no vested right can be said to have accrued in his favour merely because of the length of the service rendered by him. In the case of ***Ranjit Singh Kardam v. Sanjib Kumar***; reported in AIR 2020 SC 2020, it was held as follows:-

> *xxxxxxxxxxx. When the continuance of a person on a post is by virtue of an interim order, the continuance is always subject to outcome of the litigation. The displacement of appellants from their posts is*

inevitable consequence of upholding of the judgment of the High Court."

26. Learned Senior counsel appearing for the seven Petitioners has relied upon a decision of the Apex Court in the case of ***Rajesh Kumar and others v. State of Bihar and others***; reported in (2013) 4 SCC 690, wherein it was held that while allowing a fresh merit list to be drawn up, the candidates already appointed need not be ousted.

27. After going through the said decision carefully, this Court is of the view that the same can be distinguished on facts for the reasons that firstly, two examinations were held to fill up the vacancies and some of the candidates who had failed to qualify in the first examination were found to have qualified in the second examination. Secondly, a concession was made on behalf of the non-selected candidates that they have no objection for continuance of the original selected candidates so long as they were offered with appointments. Be it noted here that such concession was given keeping in view the number of vacancies which was fairly large namely, 2268 posts of Junior Engineers (Civil) out of which 1057 posts were in open merit category. Against such vacancies a select list of only 210 candidates

was drawn. Learned Single Judge of the High Court had directed cancellation of the entire examination as also the appointments made on the basis thereof while the Division Bench modified the order by holding that the entire examination need not be cancelled, but a fresh examination in Civil Engineering paper only was sufficient to rectify the defect. The Division Bench further held that while those appointed on the basis of the impugned selection shall be allowed to continue until publication of the fresh results and that any one of them, who failed to make the grade on the basis of the fresh examination shall be given a chance to appear in another examination. The Apex Court further modified the order of the Division Bench by holding that the revaluation need not lead to ouster of the selected candidates, but only their inter se position may be affected. As already stated, these directions were possible only because of the large number of vacancies. Such is not the position obtaining in the present case inasmuch as only 10 vacancies exist and in the selection process, only 26 persons had been recommended out of whom 9 were offered appointment and 7 were appointed

ultimately. If the ratio of ***Rajesh Kumar and others*** (supra) is to be followed in the present case, it would be unworkable since in the event the 7 petitioners are found to be ineligible for appointment, their places have to be taken by the eligible candidates and there would be no further place for them to be adjusted at the bottom of the list as was directed in the case of ***Rajesh Kumar and others*** (supra).

28. In the ultimate analysis, this Court is of the view that the Government committed an error in not acting upon the revised select list forwarded by the BSE. This Court is also of the view that the defect having been rectified, the entire selection process need not be cancelled. However, for the ends of justice, the revised select list should be acted upon. Any candidate possessing the requisite eligibility with respect to the different categories and posts advertised has to be offered appointment. Consequentially, if any of the seven appointees is found to be without the requisite eligibility, he has to make way for the eligible candidate without claiming any equity.

29. In the result, the Writ Petitions are disposed of in terms of the following directions:-

(i) The impugned order dated 20th June, 2015 and the notice dated 29th June, 2015 are hereby quashed.

(ii) The selection committee headed by the Collector, Jagatsinghpur shall convene a meeting of the committee within two months to consider the revised list submitted by the Board.

(iii) A fresh list in terms of the revised results forwarded by the Board shall be published.

(iv) All persons, who are found eligible as per the revised list shall be offered appointment.

(v) In case any of the original appointees is also found to have qualified in the fresh select list he shall be allowed to continue.

(vi) The inter se position of all the candidates including the original appointees, if any, shall be determined on the basis of their relative position in the order of merit.

(vii) The freshly appointed candidates shall be allowed to count their seniority from the date of appointment of the original appointees if any of them are found eligible as per the revised select list, in the respective categories in accordance with their position in the merit list, but only notionally.

30. The writ petitions are disposed of accordingly.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 7th September, 2022/ A.K. Rana, P.A.