

IN THE HIGH COURT OF ORISSA AT CUTTACK
W.P.(C) No.36126 of 2021

Sujit Kumar Padhy *Petitioner*

-versus-

State of Odisha & Ors. *Opp. Parties*

Advocates appeared in the case:

For Petitioner : *Mr. Gopinath Panda, Adv.*

-versus-

For Opp. Parties : *Mr. B. Mohanty, SC*
(for S & ME Deptt.)
Mr. P.K. Mohanty, Sr. Adv.
(for O.P.3/ OPSC)

CORAM:
DR. JUSTICE S.K. PANIGRAHI

DATE OF HEARING:-27.09.2022

DATE OF JUDGMENT:-23.12.2022

Dr. S.K. Panigrahi, J.

1. The Petitioner through this aforementioned Writ Petition seeks a direction against the Opposite Party to accept his application for candidature for the post of Odisha Education Service Officers in Group-B under School & Mass

Education Department. The petitioner has contended that he is otherwise eligible for the post of Odisha Education Service Officers in Group-B under School & Mass Education Department advertised by O.P. No.3 vide advertisement No. 15 of 2021-22 dated 18.10.2021. However, his online application has not been accepted on the ground of over age by six months.

I. FACTUAL MATRIX OF THE CASE:

2. Shorn of unnecessary details, the factual matrix of the present case is that the petitioner is a retired defence personnel. After serving the Indian Navy for a period about 15 years, the petitioner was released from service on 28.02.2017 with an unblemished service record. After being relieved from the service of the Indian Navy the petitioner while looking for a service under the State of Odisha has come across with an advertisement No.15 of 2021-22 dated 18.10.2021 issued by O.P. No.3. The said advertisement was issued to fill up 160 numbers of posts under Odisha Education Service Officers in Group-B under School & Mass Education Department. (O.P. No.1) in the scale of pay of Rs. 44,900/- in Level-10 and Cell-01 of the Pay Matrix under ORSP Rules, 2017 with usual Dearness and other allowances as prescribed by the Govt. of Odisha from time to time. Since the petitioner has acquired necessary educational qualification prescribed for the said

post in the advertisement, he submitted his candidature. However, his online application was not accepted by O.P No.3 as the petitioner was over aged as per the advertisement No.15 of 2021-22.

3. To put it in simpler, an aspirant for the job advertised shall not be less than 21 years of age and not more than 32 years of age as on 01.01.2021. However, it is further mentioned in the advertisement that upper age shall be relaxed by five years in case of SC/ST, Women, SEBC and Ex-Serviceman As the date of birth of the petitioner is 01.07.1983 as per HSC Certificate, his age as on 01.01.2021 was 37 years and 06 months. Since the petitioner is an Ex-Serviceman, he is over aged by six months on the cutoff date. On being aggrieved by the same, the Petitioner has filed this writ petition.

II. PETITIONER'S SUBMISSIONS:

4. Learned counsel for the Petitioner earnestly made the following submissions in support of his contentions:
5. As per the provision laid down under rule 4(1)(a) of the Recruitment Rule not less than 1/3 of vacancies arising in a year shall be filled up through direct recruitment by means of a competitive examination to be conducted by the Commission as per rule 6. Thus, prior to issuance of advertisement vacancies of each year is to be found out first and thereafter not less than 1/3rd vacancies are to be filled up

through direct recruitment. Therefore, it goes without saying that the recruitment is to be made in each year and which shall not be less than 1/3rd of the vacancies of that year. In this regard, he has submitted that the petitioner that though the Recruitment Rule came into force with effect from 28.05.2019 however, no recruitment process could be started there under due to COVID-19 Pandemic. However, soon after the normalcy returned the O.P. No.1 took a decision to fill up the vacant Group-B posts and accordingly requested O.P No.3 to issue advertisement to that effect. As a result the advertisement was issued. Therefore, though the posts are lying vacant since 2019 but due to reason stated above the process of recruitment could only be started in the year 2021 by clubbing the vacancies of earlier years.

6. Additionally, he has submitted that as per the provision laid down under proviso to rule 2 of the Orissa Civil Service (Fixation of Upper Age Limit) Rules, 1989, if for any reason applications have not been invited by the competitive authority to conduct examination during any particular year to fill up the vacancies of the year, applicants, who would have been eligible if applications, were invited during that year, shall be eligible to compete at the examination held in the subsequent year. Therefore, in view of this provision of law as mentioned above and as the vacancies indicated under

Annexure-3 includes vacancies of earlier year the petitioner is therefore entitled to participate in the recruitment test for which the advertisement has been issued.

7. He has further submitted that some candidates had approached this Court in W.P.(C) No.28289 of 2021 challenging non acceptance of their candidature for the post of contractual teacher as they were over aged on the cutoff date fixed by the advertisement. This Court vide order dated 14.09.2021 while admitting that writ petition had granted protection to the petitioners therein by observing as follows:

“As the finality of the proceeding may take some time, this court is of the opinion that unless interim protection granted, the matter will become academic. This Court, therefore, permits the petitioners to apply in terms of the advertisement vide Annexure-4. Considering that the petitioners do not fulfil the required criteria made in the advertisement vide Annexure-4 and as the date of online registration pursuant to the advertisement vide Annexure-4 is going to be expired on 14th September, 2021, this Court permits the petitioners to submit the applications pursuant to the advertisement vide Annexure-4 by way of offline mode through hard copy. It is further directed that if the petitioners do so by the last date, their applications shall be accepted and they will be permitted to appear in the interview process, but their result shall not be declared without leave of the court.”

8. He has further submitted that the case of the petitioner needs to be considered sympathetically by condoning the over aged

period keeping in mind that no recruitment in the previous year could be taken place due to COVID-19 Pandemic though posts are lying vacant.

9. Additionally, he has submitted that pursuant to the provision of the Orissa Civil Service (Fixation of Upper Age Limit) Rules, 1989, the petitioner is entitled to age relaxation. In addition to relaxation provided in the advertisement for the category of Ex-Servicemen.

III. SUBMISSIONS BY OPPOSITE PARTY NO.1:

10. Per *contra*, learned counsel for the Opp. party intently made the following submissions:
11. Learned Counsel has submitted that the very writ petition filed at the instance of the petitioner is thoroughly misconceived and the same is liable to be dismissed being devoid of merit.
12. The sole grievance of the petitioner in the present writ application is that to condone the period of over age, so as to enable him to participate in the recruitment process for the post of Odisha Education Service Officers in 'Group-B' under School and Mass Education Department as per the advertisement No. 15 of 2021-22 issued by the Odisha Public Service Commission under Annexure-3. It is also a fact that the petitioner himself mentioned in the cause title of the writ petition, that his age is 38 years and he is coming under Ex-

service man category being retired defence personnel from Indian Navy.

13. The advertisement issued by the Opp. Party No.3 under Annexure-3 has been issued pursuant to a recruitment Rules called as Odisha Education Service (School Branch, Method of Recruitment and Conditions of Service) Rules, 2019 and the said Rules came into force by virtue of Government Notification dated 28th May 2019. Para-2 of the aforesaid Rules deals with method of recruitment, whereas Rule-5 specifically provided that reservation of vacancies and as per Rule 5(b), it has been clearly stipulated that notwithstanding anything contained in these rules reservation of vacancies or posts, as the case may be for candidates belonging to SEBC, Women, Sportsmen, Persons with disabilities and Ex-servicemen shall be made in accordance with provisions made under such Acts and rules framed. Further, orders or instructions issued in this behalf by the Government from time to time. Similarly, Para-6 of the aforesaid Rules deals with direct recruitment and Rule-6 provides that direct recruitment to OES (School Branch) Group-B where a detail procedure has been provided with regard to direct recruitment to OES Group-B cadre.
14. Additionally, he has submitted that as can be seen from proviso to sub-rule 3 of 6 of the aforesaid Rule 2019, where it has been clearly provided that the upper age limit in respect

of reserved categories of candidates referred to rule 5 shall be relaxed in accordance with the provisions of the Act, rules, orders or instructions, for the time being in force, for the respective categories or such other categories to such extent as Government may by general or special order specify from time to time. In respect of Ex-servicemen category, there is a statutory rule governing the field which is called as Odisha Ex-Servicemen (Recruitment to State Civil Services and Posts) Rules, 1985. Rule-5 of the aforesaid rule 1985, deals with special provisions regarding age limit. Sub-rule 2 of Rule 5 clearly provides for appointment to any vacancy in Class-I or Class-II in State Civil Services or Posts filled by direct recruitment through the Orissa Public Service Commission, Ex-servicemen and Commissioned Officers including Emergency Commissioned Officers and Short Service Commissioned Officers who satisfy the conditions prescribed in sub-clauses (i) to (iii) of clause(b) of rule 2 shall be allowed maximum relaxation of five years in the upper age limit.

15. Therefore, in view of the specific clause in the advertisement that the age limit prescribed can in no case be relaxed. Therefore, the petitioner is not at all eligible to make any application for the post of OES Group-B as per the advertisement. By taking into consideration the 5 years age relaxation as Ex-servicemen category, as per the 1989 rules,

the petitioner is also ineligible to make application as he has crossed more than 37 years by the time of advertisement was published. Therefore, the claim of the petitioner is absolutely misconceived and untenable in the eye of law in as much as the same is contrary to statutory provisions governing the field.

16. He has further submitted that law is well settled that the change in eligible criteria/ educational qualification for the purpose of recruitment has been held by a policy decision of the Government and the same cannot be interfered by the Court. It is always open for the appointing authority to lay down the eligibility criteria for recruitment to any Government service as this pertains to the domain of policy. It is further well settled principle of law that it is for the state to decide eligible criteria and the courts cannot substitute the requirements on their assessment of what the requirements should be. Therefore, in view of the above well settled principle of law, the claim of the petitioner for participating in the recruitment process conducted by the Opp. Party No.3 pursuant to advertisement by condoning the period of over age cannot be permissible under law. Therefore, the writ petition is liable to be dismissed being devoid of merit.

IV. COURT'S REASONING AND ANALYSIS:

17. The Opposite Party No.1 has rightfully contended that the Apex Court in catena of decisions held that the change in eligible criteria/ educational qualification for the purpose of recruitment has been held to be a policy decision of the Government and the same cannot be interfered by the Court. It is always open to the appointing authority to lay down the eligibility criteria for recruitment to any Government service as this pertains to the domain of policy making. It is further well settled principle of law that it is for the state to decide eligible criteria and the courts cannot substitute the requirements on their assessment of what the requirements should be.
18. Normal rule is that when a particular set of employees is given relief by the Court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently.

19. However, this principle is subject to well recognized exceptions in the form of laches and delays as well as acquiescence. Those persons who did not challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay only because of the reason that their counterparts who had approached the Court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons be extended to them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim.
20. The present case has to be taken into consideration with a sympathetic approach considering that the advertisement which was originally intended for the year 2019 had to be postponed owing to the Covid-19 pandemic. It has to be further acknowledged that the present case has to be considered a special case considering that the application of the petitioner could have been accepted if not for the delay in the releasing the advertisement owing to the pandemic. As per the provision laid down under rule 4(1)(a) of the Recruitment Rule not less than 1/3 of vacancies arising in a year shall be filled up through direct recruitment by means of a competitive examination to be conducted by the Commission as per rule 6. Thus, prior to issuance of advertisement vacancies of each year

is to be found out first and thereafter not less than 1/3rd vacancies are to be filled up through direct recruitment. Therefore, it goes without saying that the recruitment is to be made in each year and which shall not be less than 1/3rd of the vacancies of that year. In this regard, he has submitted that the petitioner that though the Recruitment Rule came into force with effect from 28.05.2019 however, no recruitment process could be started there under due to COVID-19 Pandemic.

21. While dealing with a similar case, Justice Dr. Chandrachud in the case of *High Court of Delhi vs Devina Sharma*¹ held that:

“28. During the course of the hearing, this Court has been apprised of the fact that several applicants for the higher judicial service examination would have qualified in terms of the upper age limit of 45 years in 2020 or, as the case may be, 2021. As a matter of fact, Mr A D N Rao indicates that he has instructions to the effect that some of those candidates may already have or would be in the process of moving petitions before the High Court. The reasons which have weighed with this Court in allowing the High Court, as a one-time measure, to permit candidates for the DJS examination who had qualified in terms of the upper age limit of 32 years during the recruitment years 2020 and 2021, should on a parity of reasoning be extended to candidates for the DHJS examination who would have qualified in terms of the upper age limit of 45 years during the recruitment years 2020 and 2021 during which no examinations could take place for the reasons which have been noticed earlier.

¹Civil Appeal No 2016 of 2022 (Arising out of SLP (C) No 4452 of 2022).

29. In order to obviate any further litigation and uncertainty, we permit the High Court as a one-time measure to allow those candidates who were within the age cut-off of 45 years during the recruitment years 2020 and 2021 to participate in the ensuing DHJS examinations."

22. In the aforesaid case, the Supreme Court took a sympathetic approach and allowed those candidates who were within the age cut-off of 45 years during the recruitment years 2020 and 2021 to participate in the ensuing DHJS examinations.
23. In light of the aforesaid discussion and having regard to the present position of law, this Court is of the opinion that the application of the Petitioner should be allowed as a one-time basis.
24. Accordingly, the Writ Petition is disposed of. No order as to cost.

(Dr. S.K. Panigrahi)
Judge

*Orissa High Court, Cuttack,
Dated the 23rd Dec. 2022/B. Jhankar*