

ORISSA HIGH COURT: CUTTACK

WPC (OAC) NO. 2951 OF 2017

In the matter of an application under Articles 226 and 227 of the Constitution of India.

AFR

Sangeet Kumar Patra

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Petitioner

-Versus-

State of Orissa and others

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Opp. Parties

For Petitioner : Mr. G. Mishra, Sr. Advocate along
with M/s. D.K. Patra & A. Dash,
Advocates

For Opp. Parties : Mr. S. Rath,
Addl. Standing Counsel
(O.Ps.1 & 3)
Mr. C. Sahoo, Advocate
(O.P.2)

P R E S E N T:

THE HONOURABLE DR. JUSTICE B.R.SARANGI

Date of hearing: 05.09.2022 :: Date of judgment : 12.09.2022

DR. B.R. SARANGI, J. The petitioner, by means of this writ petition, seeks to issue direction to the opposite parties to appoint him as Assistant Executive Engineer (Civil), pursuant to

advertisement no.3 of 2015-16 dated 17.04.2015 issued by opposite party no.2-Odisha Public Service Commission (OPSC), after calling him to appear in the interview.

2. The factual matrix of the case, in precise, is that the OPSC issued an advertisement bearing no.3 of 2015-16 dated 17.04.2015 for recruitment to 657 posts of Assistant Executive Engineer (Civil) and 25 posts of Assistant Executive Engineer (Mechanical) in Group-'A' of Odisha Engineering Service under Water Resources Dept., Works Department and H & U.D Department inviting applications through online from the prospective candidates, as per the profoma application available on its website, from 27.04.2015 to 27.05.2015 fixing 29.05.2015 as the last date for payment of application fees for the aforesaid recruitment in the scale of pay of Rs.15,600-39,100/- with Grade Pay of Rs.5,400/- in P.B.-3 with usual dearness allowance and other allowances, as may be sanctioned by the Government of Odisha from time to time. The vacancy position as per requisition filed by different Departments of the Government of Odisha reads as follows:-

“A. Assistant Executive Engineer (Civil)**(i) Under H & U.D. Department:**

Sl. No.	Category	No.of Vacancies	No. of Posted for PwD
1	UR	57(19-w)	(i)O.H.-2 (ii)H.I.-02 Total-04
2	SC	24(08-w)	
3	ST	38(13-w)	
4	SEBC	15(05-w)	
Total		134(45-w)	

(ii) Under W.R Department (Major & Medium Irrigation wing) :

Sl. No.	Category	No.of Vacancies	No. of Posted for PwD
1	UR	147(49-w)	(i)O.H.-05 (ii)H.I.-04 Total-09
2	SC	0	
3	ST	111(37-w)	
4	SEBC	33(11-w)	
Total		291(97-w)	

(iii) Under Works Department

Sl. No.	Category	No.of Vacancies	No. of Posted for PwD
1	UR	109(36-w)	(i)O.H.-04 (ii)H.I.-03 Total-07
2	SC	19(06-w)	
3	ST	78(26-w)	
4	SEBC	26(09-w)	
Total		232(77-w)	

NOTE:- The candidate are required to give their preference/choice of Departments in their online application form for the post of Assistant Executive Engineer (Civil).

B. Assistant Executive Engineer (Mechanical)**(Under Water Resources Dept.)**

Sl. No.	Category	No. of Vacancies	No. of Posted for PwD
1	UR	12(04-w)	<u>O.H/H.I-01</u> Either O.H. or H.I category with higher score and preference to O.H. category when scores are equal.
2	SC	05(02-w)	
3	ST	06(02-w)	
4	SEBC	02	
Total		25(08-w)	

2.1 The educational qualification, as prescribed under Clause-3 of the advertisement, reads as follows:-

“3. EDUCATIONAL QUALIFICATION:

A candidate must hold a Degree in Engineering in Civil/Mechanical or an equivalent qualification from any University or Institution recognized by the Government or he must be an Associated Member of the Institution of Engineers of India in Civil/Mechanical”.

2.2 The method of selection, as has been provided under Clause-6 of the advertisement, reads as follows:-

“6. METHOD OF SELECTION: *The selection of candidates for recruitment to the above posts shall be made on the basis of Objective Type Written test and Viva Voce test. The weight-age on objective type written test shall 90 %(ninety per cent) and weight-age on viva test shall be 10 %(ten per cent). The Commission will prepare a common merit lists in respect of Assistant Executive Engineer (Civil) and Assistant Executive Engineer (Mechanical) for allotment to different departments as per their preference and ranking given in their online application/hardcopy.”*

2.3 In addition to the above, other eligibility conditions are prescribed under Clause-9 and other conditions are prescribed under Clause-10 of the advertisement. Sub-clause (vi) of Clause-10, being relevant, is extracted hereunder:-

“Concessions meant for S.C., S.T. & SEBC by Birth are admissible to the Scheduled Caste, Scheduled Tribe and Socially & Educationally Backward Class of Odisha only;”

2.4 Clause-11 of the advertisement refers to “certificates/documents to be attached.” NOTE-1 whereof reads as follows:

“NOTE-1: Candidates claiming to be belonging to S.C/S.T/S.E.B.C category by birth are required to submit copy if the relevant Caste Certificate issued by the competent authority in the prescribed form. Candidates of SEBC category (other than Creamy Layer) must submit copy of Caste Certificate issued by the competent authority within the last three years from the date of advertisement in the prescribed form.”

- (i) Women candidates belonging to S.C./S.T/S.E.B.C are required submit Caste Certificates by birth showing “daughter of” Caste Certificates by virtue of marriage (i.e showing “wife of”) are not acceptable.
- (ii) OBC CERTIFICATES WILL NOT BE ACCEPTED IN LIEU OF SEBC CERTIFICATES AND CANDIDATES SUBMITTING OBC CERTIFICATES WILL BE TREATED AS UN-RESERVED CANDIDATES.
- (iii) Candidate if submits S.E.BC certificate which is more than three years old as on the date of advertisement, will be treated as U.R category.

- (iv) *Community (Caste status) once mentioned by the candidates shall not be changed under any circumstances.*

The competent authorities to issue caste certificates are:- District Magistrate/Collector or Additional District Magistrate or Sub-divisional Magistrate/Sub-Collectors or Executive Magistrates or Revenue Officers, not below the rank of Tahasildar/ Additional Tahasildar or Government of Odisha;”

Similarly, Clause-12 speaks about “how to apply”.

2.5 A corrigendum to advertisement no.3 of 2015-16 was issued granting relaxation to 2nd sub-para of Para-4 thereof and thereby, the last date for submission of online applications was 27.05.2015. Thereafter, a second corrigendum to the said advertisement was issued, consequent upon amendment of Odisha Engineering Service (Methods of Recruitment & Conditions of Service) Rules, 2015 and as per Water Resources Department Notification dated 19.05.2015, 2nd sub-para of Para-4 of the advertisement was also relaxed and further as per Water Resources Department letter dated 22.05.2015, Note (e) of the advertisement no.3 of 2015-16 was inserted after Para-2. Consequentially, the last date for submission of online applications was extended to 15.06.2015 and last date for receipt of print out/hard copy of online application along with copy of specified documents/

certificates was 27.06.2015 and all other terms & conditions of the advertisement remained unchanged.

2.6 Satisfying all the requirements of the advertisement and corrigendum issued by the OPSC, the petitioner submitted his application to appear in the examination of recruitment to the post of Assistant Executive Engineer (Civil). As the same was in order, he was issued with admit card/admission certificate by allotting Roll No.11442 enabling him to appear in the examination to be held on 30.08.2015. The petitioner belonging to SEBC category submitted his certificate in terms of the advertisement issued, which was also acknowledged by the OPSC.

2.7. After examination was conducted, the OPSC vide notice no.5471/P.S.C. dated 01.12.2015 published a list containing the roll numbers of the candidates, who qualified for the Viva-voce Test/Interview, but the roll number of the petitioner was not included in the said list. After conducting interview, the OPSC recommended the names of 675 candidates in order of merit for appointment to the post of Assistant Executive Engineer (Civil-651, Mechanical-24) in

Group-A of Odisha Engineering Service, vide notice no.614/P.S.C. dated 01.02.2016. Subsequently, the OPSC published another list on 26.10.2016 in compliance of the order passed by this Court in W.P.(C) No.8063 of 2016 and batch, vide notice no.6549/P.S.C., wherein the names of four more candidates were recommended for the post of Assistant Executive Engineer (Civil) bringing total number of recommended candidates for the said post to 655. Subsequently, the OPSC posted individual marks of the candidates on its website, which could be assessed by entering the roll number, registration number and date of birth of a candidate. The petitioner checked his marks at the site of OPSC, which revealed that he had scored 224 marks. He came to know that one Basant Kumar Jena, who had secured 222 marks, was called for the interview, whereas even though he had secured higher marks than him he did not receive any call letter for interview and following the interview, Basant Kumar Jena was also given appointment. Subsequently, OPSC posted the entire list of the marks secured by all the candidates appearing in the examination as well as the marks secured by the candidates in the viva-

voce test. On perusal of the same, it revealed that some of the candidates bearing roll nos. 12249, 12479, 13145, 14046, 15850, 18607 and 19713, who had secured less marks than the petitioner, had been called for interview, whereas the petitioner was not called for the interview.

2.8 On enquiry being caused, the petitioner ascertained that the candidates belonging to unreserved category securing less marks than him had been called for interview, whereas the petitioner belonging to SEBC category and securing higher marks was not called for interview. Thereby, OPSC acted arbitrarily and unreasonably. Hence this writ petition.

3. Mr. G. Mishra, learned Senior Counsel appearing along with Mr. A. Dash, learned counsel for the petitioner vehemently contended that the action of opposite party no.2-OPSC in not calling the petitioner for interview having secured even higher marks than the candidates belonging to unreserved category is extremely arbitrary and unreasonable and such action of the OPSC, being violative of Article-14 of the Constitution of India, is liable to be

interfered with by this Court. It is further contended that despite fulfilling requisite qualification for being called for interview, no opportunity was given to the petitioner and no explanation was also given by the OPSC to justify such action and there can be no reasonable classification in the matter. As a consequence thereof, the action of the OPSC called for interference of this Court and the petitioner is entitled to be called for an interview for appointment to the post of Assistant Executive Engineer (Civil). It is further contended that the OPSC, being the State instrumentality, has a responsibility to exercise a higher degree of diligence and to act as a model employer, a part of which includes the duty to exercise utmost care and caution to avoid any kind of arbitrariness and unreasonableness from corrupting the process of evaluation and recruitment. Therefore, the OPSC has failed to exercise the requisite degree of care and diligence and the petitioner has been made a victim of such arbitrariness for no fault of his own. Thereby, the petitioner should be given opportunity to appear in the interview for appointment to the post of Assistant Executive Engineer (Civil). It is further contended that the action of OPSC in not

inviting the petitioner for interview is not only violative of fundamental rights as enunciated in the Constitution, but also contrary to the principles and employment and service law. To substantiate his contentions, he has relied upon the judgments of the apex Court in **Saurav Yadav v. State of Uttar Pradesh**, (2021) 4 SCC 542 and **Bhaat Sanchar Nigam Limited v. Sandeep Choudhary**, 2022 SCC Online Sc 524.

4. Mr. S. Rath, learned Additional Standing Counsel appearing for the State-opposite parties contended that since the State-opposite parties wanted to fill up the vacancies by following due procedure of selection, requisition was sent to the OPSC to do the needful. Accordingly, advertisement was issued inviting applications from the eligible candidates, pursuant to which the petitioner submitted his application, which was considered and as a consequence thereof he was allowed to appear in the examination. But, the reasons for not calling the petitioner to appear in the interview are not known to the State-opposite parties.

5. Mr. C. Sahoo, learned counsel appearing on behalf of Mr. S.B. Jena, learned counsel for opposite party no.2-OPSC contended that the allegations made by the petitioner that a candidate possessing less marks than him was called for viva voce test appears to be wrong and, as such, the same is false and fabricated. Furthermore, if contention of the petitioner is accepted, then the writ petition is not maintainable for non-joinder of necessary party, i.e., Basant Kumar Jena. Thereby, it is contended that the writ petition has to be dismissed on that ground.

6. This Court heard Mr. G. Mishra, learned Senior Counsel appearing along with Mr. A. Dash, learned counsel for the petitioner; Mr. S. Rath, learned Addl. Standing Counsel appearing for the State opposite parties; and Mr. C. Sahoo, learned counsel appearing for the OPSC by hybrid mode, and perused the record. Pleadings having been exchanged between the parties and with the consent of the learned counsels, this writ petition is being disposed of finally at the stage of admission.

7. The specific stand of the petitioner, as is revealed from the factual matrix, as delineated above, and the contention of learned counsel for the petitioner, as noted above, is that although some of the candidates securing less marks than the petitioner in the written examination were called for to appear in the viva voce test, but the petitioner was not. The petitioner has also placed on record in Annexure-6 to the writ petition the roll nos. of those candidates, as 12249, 12479, 13145, 14046, 15850, 18607 and 19713, who were called for to appear in the viva test. It is also stated that one Basant Kumar Jena belonging to unreserved category, having secured 222 marks in the written examination was called for viva voce test and selected for the post of Assistant Executive Engineer, whereas the petitioner belonging to SEBC category, having secured 224 marks, was not even called for to appear in the viva voce test. The petitioner has taken this averment in paragraphs-6.6 to 6.14 of the writ petition. In rebuttal, the OPSC also has given reply to those paragraphs in paragraph-3 of its counter affidavit, which reads as follows:

“3. That, with regard to the averments made in paragraphs- 6.6 to 6.14 of the O.A., it is humbly submitted that the applicant (Sri Sangeet Kumar Patra) was a candidate belonging to SEBC category (bearing Roll No. 11442) for recruitment to the post of A.E.E (Civil) pursuant to the advertisement No.03 of 2015-16. He had appeared the written examination held on 30.08.2015. He had secured 224 marks in the written examination. The lowest marks secured by the candidates short-listed in the written examination for interview for the aforesaid recruitment in respect of SEBC (Male) category was 230, Whereas the applicant being a S.E.B.C (Male) candidate had secured 224 marks in the written examination, so he could not be shortlisted for interview. Besides this, regarding calling of Sri Basant Kumar Jena (Roll No. 10896 to the interview), it is stated here that Sri Jena had secured 222 marks in the written examination and shortlisted for V.V. test for aforesaid recruitment UR category as he had applied as an UR candidate and the lowest mark secured by the UR (Male) candidate shortlisted for V.V. test was 196. Similarly, the other seven candidates bearing Roll Nos. 12249, 12479, 13145, 14046, 15850, 18607 and 19713 belong to UR category and short listed for interview , as they had secured more marks than the lowest marks secured by the UR (Male) candidate i.e,196.”

8. From the assertions made in the counter affidavit, it is made clear that lowest marks secured by the SEBC (Male) category candidates in the written examination shortlisted for interview was 230, whereas the petitioner, being a SEBC (Male) candidate, had secured 224 marks in the written examination, for which he could not be shortlisted for interview. It is also admitted that one Basant Kumar Jena, who had secured 222 marks in the written examination, was

shortlisted for viva voce test against unreserved category, as because he had applied as an unreserved category candidate and the lowest mark secured by the UR (Male) candidate shortlisted for viva voce test was 196, but the petitioner, who belonged to SEBC category, having secured 224 marks, was denied the opportunity to participate in the viva voce test. In view of such categorical admission made in the counter affidavit filed by OPSC, there is gross violation of Article-14 of the Constitution of India, which enunciates the fundamental right of equal protection of law and as per the said doctrine equal opportunity has to be accorded to all those who are in similar circumstances, and the only available exception to this doctrine is reasonable classification, wherein persons in different circumstances/situations can be treated differently, if the circumstances justify such differential treatment.

9. It is the admitted case of both the parties that the petitioner and one Basant Kumar Jena both appeared in the written examination conducted by OPSC and both were the candidates for the same post, but the petitioner despite securing higher marks than Basant Kumar Jena was not

called for interview, whereas Basant Kumar Jena was called for to appear in the interview and was subsequently awarded the job. Not only Basant Kumar Jena but also other candidates belonging to UR category were called for interview, whereas the petitioner having secured higher marks than them was ignored as because he was belonging to SEBC category.

10. It is not in dispute that the petitioner in the written examination had secured marks above the cutoff mark and was not invited to appear in the interview. Therefore, the OPSC has acted arbitrarily and in gross violation of the provisions contained in Article-14 of the Constitution of India, the reason being despite fulfilling the requisite conditions stipulated in the advertisement, no opportunity was given to him to participate in the interview. As such, no explanation was given by the OPSC to justify such action, save and except what has been mentioned above. If the candidates belonging to UR category having possessed less marks than the petitioner in the written examination were called for interview, there is no valid justifiable reason not to call for the

petitioner for interview even though he belonged to SEBC reserved category. Denying opportunity to the petitioner to participate in the interview, OPSC has acted arbitrarily and unreasonably, which cannot be sustained in the eye of law.

11. In **Saurav Yadav** (supra), the apex Court, after referring to all their earlier judgments in the context, held as follows:

*“The principle that candidates belonging to any of the vertical reservation categories are entitled to be selected in “Open or General Category” is well settled. It is also well accepted that if such candidates belonging to reserved categories are entitled to be selected on the basis of their own merit, their selection cannot be counted against the quota reserved for the categories for vertical reservation that they belong. Apart from the extracts from the decisions of this Court in **Indra Sawhney** and **R.K. Sabharwal** the observation by the Constitution Bench of this Court in **V.V. Giri v. D. Susi Dora**, though in the context of election law, are quite noteworthy: (AIR pp. 1326-27, paras 21-22)*

“21.... In our opinion, the true position is that a member of a Scheduled Caste or Tribe does not forego his right to seek election to the general seat merely because he avails himself of the additional concession of the reserved seat by making the prescribed declaration for that purpose. The claim of eligibility for the reserved seat does not exclude the claim for the general seat; it is an additional claim; and both the claims have to be decided on the basis that there is one election from the double-Member constituency.

22. In this connection we may refer by way of analogy to the provisions made in some

educational institutions and universities whereby in addition to the prizes and scholarships awarded on general competition amongst all the candidates, some prizes and scholarships are reserved for candidates belonging to backward communities. In such cases, though the backward candidates may try for the reserved prizes and scholarships, they are not precluded from claiming the general prizes and scholarships by competition with the rest of the candidates.”

12. In **Sadhana Singh Dangi v. Pinki Asati**, (2022) 1 Scale 534, the apex Court held that the reserved category candidates securing higher marks than the last of the general category candidates are entitled to get seat/post in unreserved categories. It is further observed and held that even while applying horizontal reservation, merit must be given precedence and if the candidates, who belong to SCs, STs and OBCs, have secured higher marks or are more meritorious, they must be considered against the seats meant for unreserved candidates. It is further observed that the candidates belonging to reserved categories can as well stake claim to seats in unreserved categories if their merit and position in the merit list entitles them to do so.

13. In **Bharat Sanchar Nigam Limited** (supra), the apex Court in paragraph-28 of the judgment noted that the

two candidates, namely, Mr. Alok Kumar Yadav and Mr. Dinesh Kumar, belonging to OBC category, were required to be adjusted against the general category as admittedly they were more meritorious than the last of the general category candidates appointed and that their appointments could not have been considered against the seats meant for reserved category. Consequently, after considering their appointments in the general category, the seats meant for reserved category were required to be filled in from and amongst the other remaining reserved category candidates on merit such as respondent no.1 herein.

In paragraph-33 of the said judgment, the apex Court also held as follows:

“In view of the above and for the reasons stated above, the present appeal fails and the same deserves to be dismissed and is accordingly dismissed. The High Court has rightly observed and held that two reserved category candidates, namely, Mr. Alok Kumar Yadav and Mr. Dinesh Kumar having more marks than the general category candidates appointed, were entitled to the appointment in the general category and the seats reserved for OBC category were required to be filled in from and amongst the remaining candidates belonging to the OBC category”.

14. Applying the above principle to the present context and taking into consideration the admitted fact, as pleaded

by the OPSC in the counter affidavit, the petitioner, belonging to reserved category and having secured more marks than the candidates belonging to UR category, who have got appointment pursuant to interview conducted by the OPSC, could not have been denied the opportunity of appearing in the viva voce test. Therefore, even though the petitioner belongs to reserved category, but having secured higher marks than the candidates belonging to UR category, he should have been given opportunity of appearing in the viva voce test so as to compete against UR vacancies along with others, who had secured less marks than him in the written examination. Denial of such opportunity to the petitioner is not only arbitrary, unreasonable and contrary to the provisions of law but also violative of Article-14 of the Constitution of India.

15. In view of such position, this Court directs the OPSC to give an opportunity to the petitioner for appearing in the viva voce test for the post of Assistant Executive Engineer (Civil), pursuant to advertisement no.3 of 2015-16, so as to adjudge his suitability for giving him appointment against

any UR vacancy, even though he has applied for reserved vacancy of SEBC. It is made clear that the OPSC shall conduct the viva voce test for the petitioner within a month from the date of receipt of this judgment. It is, however, clarified that whether any other SEBC candidates, having secured the same marks in the written examination, have been ignored or not, that fact has not been placed before this Court and, as such, the above observation of this Court is confined to the petitioner only as he has approached this Court by filing this writ petition.

16. The writ petition is thus allowed. However, there shall be no order as to costs.

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DR. B.R. SARANGI,
JUDGE

Orissa High Court, Cuttack
The 12th September, 2022, Alok