

ORISSA HIGH COURT: CUTTACK

WPC (OA) No. 684 of 2019

(An application under Article 226 and 227 of the
Constitution of India)

AFR Arati Mallik Petitioner

-Versus-

State of Odisha & another Opp. Parties

Advocate(s) appeared in this case:-

For Petitioner : M/s. S.N. Patnaik, U. Patnaik,
K.C. Panigrahi & S. Mohapatra,
Advocate

For Opp. Parties : Mr. R.N. Acharya,
Standing Counsel for S & ME
Department.

CORAM

JUSTICE SASHIKANTA MISHRA

JUDGMENT

26th April, 2022

SASHIKANTA MISHRA, J. The petitioner in the present writ
petition seeks to challenge the letter dated 25.07.2016
issued by opposite party no.1, whereby her representation

for being considered for appointment as Teacher Educator was rejected.

2. The facts of the case are that the petitioner is an Asst. Teacher working at Padampur Nodal U.P. School under BEO, Balasore. On 08.05.2011, an advertisement was published by opposite party no.2 inviting applications for in service candidates for filling up 116 posts of Teacher Educators in the State. The petitioner applied for such post. A total number of 172 candidates were selected and merit list was prepared in which the petitioner being successful, her name found place at serial no. 151 of the said list. The said select list was published on 22.02.2013. However, no appointment was made till 13.05.2014. When the opposite party no.1 directed the opposite party no.2 to go ahead with the appointment subject to certain stipulations relating to keeping certain posts vacant pursuant to orders passed by this Court and the erstwhile Odisha Administrative Tribunal, 96 in-service candidates joined, while 11 posts were kept vacant being involved in litigation and 5 posts were kept vacant for non-availability

of candidates of S.T. category and thus, 112 posts were filled up in all. The remaining 4 posts were to be filled up from the merit list. Since the petitioner reasonably expected of being absorbed against the vacancies, she submitted a representation on 18.05.2015 to the opposite party no.1, who in turn sought clarification from the opposite party no.2 as to if the 4 posts were included in the fresh advertisement issued in the year 2015. Accordingly, the opposite party no.2 clarified that from the merit list, 4 candidates including the present petitioner being selected to be appointed, their cases were recommended to the Government for allowing them to attend counselling and accordingly sought for instructions of the Government. In response, the opposite party no.1 clarified that no panel or select list is applicable after lapse of one year and that the 4 candidates have neither any claim nor are they part of selection anymore and hence the question of sponsoring them for counselling does not arise. Further the opposite party no.2 was asked to clarify as to how the candidature of the 4 candidates was kept

alive for four years and why were these vacancies not included in the advertisement issued in the year 2015. The opposite party no.2 vide letter dated 20.08.2015 explained the circumstances in which the four posts had been kept vacant and not included in the advertisement made during the year 2015 to the effect that two candidates were appointed but they did not report for duty and two candidates were called for counselling but did not turn up and accordingly necessary permission was sought for from the Government for other four candidates in order of merit to attend counselling and since there was correspondence in this regard with the Government from time to time, the four posts were not included in the advertisement made during the year 2015. The petitioner approached the erstwhile Odisha Administrative Tribunal in O.A. No. 656 of 2016 and by order dated 08.04.2016, the learned Tribunal directed the opposite party no.1 to consider and dispose of the grievance of the petitioner within a period of one month. Pursuant to such order, the opposite party no.1 vide order dated 25.07.2016 enclosed

as Annexure-8 to the writ petition, held that as the candidature of the candidates was recommended after lapse of nine months from the date when the selection process started when steps had already been taken to make appointment against the advertisement made in the year 2015, the proposal for calling the 4 candidates for counselling against the advertisement made in the year 2015 would have created further complicacies in the appointment process and therefore, their candidature was not considered for counselling. It is stated that the opposite party no.2 issued appointment letter to the candidates from 16.06.2014 onwards which continued up to 12.08.2014 and therefore, the select list of 172 candidates ought to have been valid up to 15.06.2015. So, while the ground of lapse of one year was not made applicable in respect of 96 candidates, the same was made applicable in respect of 4 candidates even though their names were recommended within nine months from the date of selection process. Accordingly, the petitioner again approached the erstwhile Tribunal in O.A. No. 684 of 2019

with prayer to quash the order under Annexure-8 and to direct the authorities to appoint the petitioner as Teacher Educator with seniority and other benefits. The said O.A. has since been transferred to this Court and registered as the present writ petition.

3. A counter has been filed by opposite party no.2 stating the relevant facts which are basically matters of record, but it has been clearly stated that due to non-joining of some appointees and non-participation in counselling by some selected candidates, 4 posts were not filled up in 2014. It is also admitted that the names of 4 candidates including the petitioner was recommended for counselling to be appointed as in-service Teacher Educator but as the Government clarified that no panel or select list is applicable after lapse of one year, the 4 candidates including the petitioner have neither any claim nor are they part of selection process anymore and hence, the question of sponsoring them for counselling does not arise. The opposite party no.2 has also filed an affidavit on 21.04.2022 specifically stating that at present four

numbers of Teacher Educator posts are lying vacant in DIET, Odisha and there is a chance to increase the number of vacancy subject to approval of the Government.

4. Heard Mr. S.K. Pattnaik, learned counsel for the petitioner and Mr. R.N. Acharya, learned Standing Counsel for the School and Mass Education Department.

5. It is contended by Mr. Pattnaik that admittedly the petitioner's name was placed at serial no. 151 out of 172 candidates in the select list. Since the process of selection commenced only after receipt of approval by the Government on 13.05.2014, the said date has to be treated as the commencement of the operation of the selection list. That apart, the select list was actually acted upon on 16.06.2014 when 75 candidates were appointed in the first phase which continued up to 12.08.2014. Therefore, according to Mr. Pattnaik the select list ought to have been treated as valid for one year either from the date of approval of the select list, i.e., 13.05.2014 or at least from the date of commencement of appointment, i.e., 16.06.2014 and hence, till 12.05.2015

or 15.06.2015 as the case may be. He further argues that the advertisement was issued in the year 2011 but the selection process was undertaken in the year 2013 and actual appointments were given only in the year 2014. Further, there was repeated communications between the opposite party no.2 and the Government from 09.03.2015 till 29.07.2015 during which the validity of the select list reckoned from 13.05.2014 or 16.06.2014, as the case may be expired. Therefore, the petitioner could not have been blamed for delay in considering her case. In fact, considering the same, the authorities had not included the four vacancies in the advertisement issued for 51 posts in the year 2015. Since this amounts to discrimination on the part of the Government, the rejection of the claim of the petitioner vide Annexure-8 cannot be sustained in the eye of law. It is further contended that as 4 posts are still lying vacant as admitted by opposite party no.2 in his affidavit filed on 21.04.2022, direction may be issued to appoint the petitioner against one of such posts with retrospective effect.

6. Per contra, Mr. R.N. Acharya contends that the Government issued clear instructions to the effect that no panel or select list is applicable after lapse of one year. That apart, the candidates had though been placed in the select list and sponsored for counselling, did not acquire any vested right for appointment. Since the next selection process had already been initiated, the previous select list, if any, automatically lapsed. Therefore, according to Sri R.N. Acharya, there is no merit in the claim of the petitioner.

7. Before advertng to the merits of the rival contentions advanced by learned counsel for the parties, it would be proper to examine the position of law as regards the scope of inference of the writ Court in the present lis. The Petitioner, as already stated has come up with the present Writ Petition with prayer to quash the letter of rejection of her claim by Opposite Party No.1 under Annexure-8 as also for direction to the Opposite Parties to appoint her as Teacher Educator with seniority and other benefits. The basis of the claim of the Petitioner is

inclusion of her name in the select list. Law is well settled that a person whose name is included in the select list, does not per se acquire any right to be appointed. The Government may decide not to fill up all the vacancies for valid reasons. However, such decision on the part of the Government not to fill up the required/advertised vacancies should not be arbitrary or unreasonable but must be based on sound, rational and conscious application of mind. Once it is found that the decision of the Government is based on some valid reason, the Court would not issue any mandamus to the Government to fill up the vacancies. The above view was taken by the Hon'ble Supreme Court in the case of ***Manoj Manu and another v. Union of India and others***; reported in (2013) 12 SCC 171. In the instant case, the Petitioner's claim for appointment was rejected solely on the ground that the select list in question was no longer valid after expiry of one year and that steps had already been taken to make appointments against the advertisement made for the next recruitment year i.e., 2015. According to the petitioner the

above reasoning is factually incorrect since the date of commencement of the operation of the select list was wrongly reckoned. To appreciate the above contention, this Court has taken note of the fact that while the advertisement was published in the year 2011 and the Petitioner's name was included in the select list of 172 candidates and her testimonials were verified on 22nd February, 2013, yet the said select list was not acted upon. It was only when the Director, T.E. and S.C.E.R.T., Odisha, Bhubaneswar (Opposite Party No.2) sought for instruction from the Government for selection and appointment to the posts that things started moving. A perusal of the letter dated 21st April, 2014 of Opposite Party No.2 reveals that the clarification was sought for because of increase in the number of cases filed by some in-service Teachers before the erstwhile Odisha Administrative Tribunal and this Court. So, basically instruction was sought for keeping in view the pending litigations. The Government issued the go-ahead by letter dated 13th May, 2014, which is enclosed as Annexure-2,

specifically indicating the number of posts to be kept vacant as per order passed by the Tribunal and this Court and the case of one candidate to be kept in sealed cover and finally that all appointments shall be subject to final result of different cases filed before the learned Tribunal. Thus, it can be reasonably held that the select list that had been kept in a case of suspended animation as it were, received due to approval of the Government and thus became operational. The actual appointments begun on 16th June, 2014 when 75 candidates were issued with appointment orders followed by 22 candidates on 15th July, 2014 and finally on 12th August, 2014, 20 candidates were issued appointment orders. Thus, out of 172 candidates in the select list, only 117 candidates were issued with appointment orders. However, out of the said 117 candidates, only 96 in-service candidates joined leaving 11 posts vacant due to pendency of litigation and non-availability of S.T. candidates. Four posts remained to be filled up. At this stage, the Opposite Party No.2 again sought for approval from the Government by letter dated

9th March, 2015 regarding allowing four candidates including the Petitioner to attend the counselling to be appointed as in-service Teacher Educator, which is enclosed as Annexure-C/2 to the counter filed by Opposite Party No.2. In response, the Opposite Party No.1 sought for certain clarification from Opposite Party No.2 vide letter dated 1st June, 2015, enclosed as Annexure-4. In the letter dated 1st June, 2015, the Government informed that advertisement for filling up of 51 posts had been made during the month of January, 2015 and, therefore, Opposite Party No.2 was asked to clarify whether the advertised vacancies are inclusive of these four posts. Pursuant to such letter, Opposite Party No.2 furnished necessary clarification to the Government by letter dated 14th July, 2015. In the said letter it was indicated that four candidates including the present Petitioner were selected and recommended for allowing them to attend counseling and again sought for instruction whether to fill up the four posts as per advertisement made in the year 2011. In response, the Government by letter dated 29th

July, 2015, enclosed as Annexure-6, held that no panel or select list is applicable after lapse of one year and these four candidates have neither any claim nor are they part of selection process any more.

8. From the above narration, it is evident that if the date of issuance of the first appointment letter is taken as the date of commencement of the validity of the select list, i.e., 16th June, 2014 the same was due to expire on 15th June, 2015 but as it appears, the select list was again kept under suspension as it were, due to the aforementioned back-and-forth correspondence between the Directorate and the Government in between 9th March, 2015 to 29th July, 2015. In the meantime, the one year period expired on 15th June, 2015. Obviously, the period between 9th March, 2015 to 29th July, 2015 cannot be attributed to any fault of the Petitioner. The Hon'ble Supreme Court in the case of **Purushottam v. Chairman, M.S.E.B and others**; reported in (1999) 6 SCC 49 held that the right of a person to be appointed against the post to which he has been selected cannot be taken away on

the pretext that the said panel has in the meantime expired and the post has already been filled up by somebody else. The Petitioner in the instant case stands on even a better footing inasmuch as it is clearly borne out from the counter and affidavit filed by the Opposite Party No.3 that firstly, the four posts of the recruitment held in 2011 were not included in the advertisement issued in the year 2015 and, secondly, the said posts are still lying vacant under administrative control of the Opposite Party No.2. This is, therefore, a case where despite being placed in the select list and recommended for counseling for appointment, the Petitioner was not issued with the appointment order on the ground that the select list is no longer valid after one year. As already stated, the Petitioner can hardly be blamed for being inaction of the authorities in taking appropriate action when the select list was valid. To reiterate, but for the period elapsed in continued correspondence between Opposite Party Nos.1 and 2 the Petitioner could have been given appointment before expiry of the select list.

9. As regards the stand taken by the Opposite Parties particularly, Opposite Party No.1 in the order dated 25th July, 2016 (Annexure-8) that the candidature of the candidate was recommended after a lapse of 9 months from the date when the selection process started and when steps had already been taken to make appointment against the advertisement made in the year 2015, the proposal for calling the four candidates for counseling against the advertisement made in the year 2011 would have created further complicacies in the appointment process and, therefore, the candidature of these four candidates were not considered for counseling, cannot be sustained in the eye of law. When it has been clarified adequately that the advertisement issued in the year 2015 did not include these four posts against which the Petitioner would have been appointed and in fact was recommended for counseling as also the fact that all the four posts are still lying vacant, the aforesaid order passed by Opposite Party No.1 cannot be said to be based on sound, rational and conscious application of mind. In the

case of ***Manoj Manu*** (supra), the Apex Court has held that the decision on the part of the Government not to fill up the required/advertised vacancies should not be arbitrary or unreasonable, but must be based on sound, rational and conscious application of mind. Obviously, Opposite party No.1 lost sight of the fact that because of correspondence between the Directorate and the Government, the validity of the select list had expired.

10. From the foregoing narration, therefore, this Court finds that there is considerable force in the contentions advanced by the Petitioner. This Court is also of the view that despite being duly selected and recommended for counseling for appointment the Petitioner was deprived of being appointed only because of the inaction and erroneous decision of the Opposite Party-authorities. Resultantly, this Court directs that the concerned authorities shall act upon the recommendation of the Opposite Party No.2 vide letter dated 14th July, 2015 and issue necessary order of appointment in favour of the petitioner from the date of last appointment made against

the select list, i.e., 12th August, 2014 with her seniority being placed just below her immediate senior in the said select list. Further, the pay of the Petitioner should be fixed notionally without any arrears of pay and other allowances.

11. The writ petition is disposed of accordingly.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack
The 26th April, 2021/A.K. Rana/A.K. Behera