

IN THE HIGH COURT OF ORISSA AT CUTTACK

**W.P.(C) No.15435/2019, W.P.C (OAC) No.922/2019,
W.P.(C) No.16065/2019, W.P.C.(OAC) No.704/2019,
W.P.(C) No.17550/2019 and W.P.(C) No.14777/2019.**

(Applications under Articles 226 and 227 of the Constitution of India)

In W.P.(C) No.15435/2019

Dr.Prajyoti Swain and others ... Petitioners

-versus-

State of Odisha and another ... Opposite Parties

Advocates appeared in the case through hybrid mode:

For Petitioners : Mr.Sameer Kumar Das,
Advocate

-versus-

For Opposite Party No.1 : Mr.N.K.Praharaj, G.A.

For Opposite Party No. 2 : Mr. Sanjib Swain,
Advocate

In W.P.C (OAC) No.922/2019

Dr.Prajyoti Swain and others ... Petitioners

-versus-

State of Odisha and others

... Opposite Parties

Advocates appeared in the case through hybrid mode:

For Petitioners : Mr.Sameer Kumar Das,
Advocate

-versus-

For Opposite Party No.1 : Mr.N.K.Praharaj, G.A.

For Opposite Party No. 2 : Mr. Sanjib Swain,
Advocate

In W.P.(C) No.16065/2019

**Dr.Pradeep Kumar Paikray
and others** ... **Petitioners**

-versus-

State of Odisha and others ... **Opposite Parties**

Advocates appeared in the case through hybrid mode:

For Petitioners : Mr.J.Pattnaik,
Sr.Advocate

Ms. S. Pattnaik,
Advocate

-versus-

For Opposite Party No.1 : Mr.N.K.Praharaj, G.A.

For Opposite Party No. 2 : Mr. Sanjib Swain,
Advocate

In W.P.C(OAC) No.704/2019

Dr.Pradeep Kumar Paikray
... **Petitioner**

-versus-

State of Odisha and others ... **Opposite Parties**

Advocates appeared in the case through hybrid mode:

For Petitioner : Mr.Manmaya Ku.Dash,
Advocate

-versus-

For Opposite Party No.1 : Mr.N.K.Praharaj, G.A.

For Opposite Party No. 2 : Mr. Sanjib Swain,
Advocate

In W.P.(C) No.17550/2019

Dr.Sanjay Kumar Pani
and others ... **Petitioners**

-versus-

OPSC and another ... **Opposite Parties**

Advocates appeared in the case through hybrid mode:

For Petitioners : Mr. Pratik Dash,
Advocate

-versus-

**For Opposite Party No.1 :Mr. P.K.Mohanty,
Senior Advocate.**

For Opposite Party No. 2 : Mr.N.K.Praharaj, G.A

In W.P.(C) No.14777/2019

Dr.Santosh Ranjan Jena

... Petitioner

-versus-

State of Odisha and others ... Opposite Parties

Advocates appeared in the case through hybrid mode:

**For Petitioner : Mr.Gautam Misra,
Senior Advocate**

-versus-

**For Opposite Party No.1 : Mr. Sanjib Swain,
Advocate**

For Opposite Party No. 7 : Mr.N.K.Praharaj, G.A.

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT

14.10.2022.

Sashikanta Mishra,J. All these Writ Petitions involve similar facts and common questions of law. As such, the Writ Petitions were heard together and are being disposed of by this common judgment.

2. Before proceeding to narrate the facts, it would be proper to indicate the reliefs claimed in each of these Writ Petitions, which are enumerated as follows:

In W.P.(C) No.15435/2019

“Under the above circumstances, it is therefore humbly prayed that the Hon’ble Court be graciously pleased to quash the order dated 1st July, 2019 under Annexure-7 and further the Hon’ble Court be pleased to issue a writ in the nature of mandamus or any other appropriate writ/writs, direction/directions, order / orders.”

In W.P.C (OAC) No.922/2019

“Under the above circumstances, it is therefore humbly prayed that the Hon’ble Court be graciously pleased to quash the final merit list published by the OPSC on 2.3.2019 under Annexure-4 and the consequential Govt. Notification dated 8.3.2019 under Annexure-5 and to direct the Opposite Parties 1 and 2 to select and appoint the Petitioners as Asst. Surgeon pursuant to the advertisement under Annexure-1 and grant them all consequential service and financial benefits within a stipulated period.”

In W.P.(C) No.16065/2019

“It is therefore prayed that Your Lordship would be graciously pleased to admit this writ petition and issued Rule Nisi calling upon the Opposite Parties as

to why the Selection list dated 2.3.2019 annexed under Annexure-5 issued by the Opposite Party No.1 shall not be quashed/set aside. There shall not be a direction to the Opposite Party No.1 to issue appointment order in favour of Petitioners for the post of Medical Officers (Asst. Surgeons) pursuant to Advertisement dated 5.1.2019 under Annexure-1. The action of Opp. Parties shall not be declared as illegal, arbitrary and in violation of Articles 14 and 16 of the Constitution of India”.

In W.P.C (OAC) No.704/2019

“The Hon’ble Court be pleased to admit the Writ Petition and direct the Opposite Parties to include the name of the Petitioner in the select list at Annexure-5, relaxing the age limit as per Rule-7 of the 2017 Rule and consequently direct the Opposite Party No.1 to issue appointment order in favour of the Petitioner for the post of Medical Officer (Asst. Surgeon pursuant to Advertisement dated 5.1.2019.”

In W.P. (C) No.17550/2019

“It is, therefore, prayed that this Hon’ble Court may be graciously pleased to issue a rule Nisi calling upon the Opp. Parties to show cause as to why the OPSC shall not directed to furnish a fresh list against the 107 vacant posts as per Annexures-7 and 8 and the State Government shall not be directed to make appointment of the Petitioners against the vacant post of Asst. Surgeons, Group-A(Junior Branch) in Odisha Medical Service Cadre.”

In W.P. (C) No.14777/2019

“Under the facts and circumstances as narrated above, this Hon’ble Court may graciously be pleased to issue notice to the Opp. Parties and after hearing the parties be pleased to direct the concerned Opp. Parties to recommend and then give appointment to the Petitioner to the post of Asst. Surgeon in pursuance to the Advertisement No.18 of 2018-10 under Annexure-1 within a stipulated time period as he has secured 103 marks which is 14 marks more than the cut-off marks (89 marks) and further be pleased to pass any other order/orders as deemed fit and proper.”

Thus, the common grievance of the Petitioners in all these Writ Petitions is non-inclusion of their names in the select list for being recommended for appointment as Medical Officers (Asst. Surgeons) pursuant to the advertisement dated 5th January, 2019.

3. For convenience, however, W.P.(C) No.15435/2019 is considered as the lead case as facts of this case are identical to the other Writ Petitions also.

4. An advertisement was published by the Odisha Public Service Commission (OPSC) being advertisement

No.18/2018-19 for recruitment to 1950 posts of Medical Officers (Asst. Surgeons) in Group-A (Junior Branch) of Odisha Medical and Health Services Cadre. The Petitioners, who were appointed as Asst. Surgeons on ad hoc basis by the State Government and were working in different PHCs of the State for 4 to 5 years, submitted their applications. It is stated that the Petitioners had crossed the upper age limit for entry into the service i.e. 32 years, but in view of Clause-3 of the advertisement wherein age relaxation upto the maximum of five years was provided for doctors already in service of the Government contractually or on ad hoc basis, the Petitioners submitted their applications. Out of 1950 posts, 838 posts were unreserved and the rest was reserved for SC and ST categories. There was no post reserved for SEBC category. The Petitioners belong to the SEBC category and as such, claimed age relaxation of 3 years also. The Petitioners appeared in the written examination, the result of which was published on 28th February, 2019 wherein the names of the Petitioners did not find place. On 2nd March, 2019 the final list of 938 candidates, who were selected for appointment, was published and the name of the Petitioners also did not find

place therein. Subsequently, the OPSC published the cut-off mark of different categories and also the marks secured by individual candidates in the written test. From the marks so published, the Petitioners came to know that despite securing more than the cut-off mark i.e. 89 in UR category, they had not been included in the select list. It is the case of the Petitioners that even though they belong to SEBC category they having secured more marks than the cut-off, are entitled to be selected on the basis of their merit under the unreserved category. The Petitioners therefore, approached the State Government against such illegality but without result. Therefore, they moved the State Administrative Tribunal, Cuttack in O.A. No.922(C)/2019 seeking the following reliefs:-

“Under the above circumstances, it is therefore humbly prayed that the Hon’ble Court be graciously pleased to quash the final merit list published by the OPSC on 2.3.2019 under Annexure-4 and the consequential Govt. Notification dated 8.3.2019 under Annexure-5 and to direct the Opposite Parties 1 and 2 to select and appoint the Petitioners as Asst. Surgeon pursuant to the advertisement under Annexure-1 and grant them all consequential service and financial benefits within a stipulated period.”

In the mean time the Tribunal was abolished and the said O.A. has been transferred to this Court and registered as W.P.C (OAC) No.922/2019. Since all the vacant posts were about to be filled up, the Petitioners approached this Court in the present writ applications seeking the relief as already indicated under paragraph-2 of this judgment.

5. Counter affidavit has been filed on behalf of the State Government (Opposite Party No.1). It is stated that out of 1950 posts of Asst. Surgeons, a list of 938 selected candidates was received from the OPSC. Out of such 938 candidates, 107 candidates belonging to different categories did not join. Since the State is running with acute shortage of doctors and the Government is taking additional measures to fill up the vacant posts of doctors in all peripheral Hospitals of the State, the OPSC was requested by letter dated 6th April, 2019 to provide a list of 107 selected candidates. In response, the OPSC in its letter dated 29th April, 2019 refused to provide the same. Subsequently, the Government again requested the OPSC vide letter dated 1st July, 2019 (Annexure-7 to the Writ Petition) to provide a list of 107 selected candidates. It is further stated

that recruitment process of Asst. Surgeon has been continuing every year. In view of the recruitment held for the previous years, it was found that the total sanctioned posts of SEBC category being 414 against the total sanctioned strength of 3683 posts of Asst. Surgeons, 452 Medical Officers belonging to the SEBC category were in position. Thus, 38 doctors belonging to the SEBC category were in position more than the sanctioned strength. For such reason, the position of SEBC category was shown as zero and the vacancy of UR category was shown as 838 deducting the 38 SEBC posts from 876 posts of UR category. It is further stated that there was no upper age relaxation for SEBC category in Advertisement No.18 of 2018-19 issued by the OPSC. It is further stated that the impugned order under Annexure-7 is not in force in view of refusal by the OPSC to provide the list of 107 selected candidates and the said 107 vacancies have already been included in the requisition of 3278 vacancies decided by the Government for recruitment. Therefore, the prayer of the Petitioners for quashment of Annexure-7 has become infructuous.

6. Counter affidavit has also been filed by the OPSC. While reiterating the undisputed facts relating to the recruitment process such as number of vacancies belonging to each category etc. it is stated that the Petitioners had submitted their online applications within the stipulated period clearly indicating therein that their candidatures are to be considered under SEBC category and that they had also indicated with regard to their past service as Medical Officers under the State Government to their credit in order to get preference with regard to relaxation of age. Rule 7 of the Odisha Medical and Health Services (Method of Recruitment and Conditions of Service) Rules, 2017(for short, “2017 Rules”) and Clause-3 of the advertisement have also been referred to. It is admitted that the Petitioners have secured more than the cut-off marks of 89, but were not selected as they had applied as SEBC category for which no vacancy exists. Hence, their candidature was rejected and written scores were not taken into account. It is also stated that in view of the procedure adopted by the UPSC, OPSC issued a notice dated 19th January, 2018 to the effect that a reserved category candidate availing relaxation in age is to be considered only for the

reserved posts and that reserved category candidate, who has not availed any relaxation and also qualifies as per general standard is to be considered for the open category post as a meritorious reserved category candidate. Therefore, the names of the Petitioners could not have been recommended to the State Government.

7. Heard Mr. S.K.Das, Mr. J. Pattnaik, Sr. Advocate, Ms. S. Pattnaik, Advocate, Mr. M.K.Dash, Mr. Pratik Dash and Mr. Gautam Misra, Sr. Advocate, learned counsels appearing for the Petitioners in all the cases, Mr. N.K.Praharaj, learned Government Advocate for the State, and Mr.P.K.Mohanty, Sr. Advocate, Mr. S.B.Jena and Mr. Sanjib Swain, learned counsels appearing for the OPSC.

8. Leading the arguments on behalf of the Petitioners, Ms. S. Pattnaik, would argue that the Petitioners had never claimed to be considered under the SEBC category, but had only indicated the category to which they belong against the appropriate column in the application form. Further, the Petitioners claimed age relaxation as per Rule 7 of the 2017 Rules read with Clause-3 of the advertisement. Since the

Petitioners have admittedly secured more than the cut-off marks they should have been considered under the unreserved category in view of the settled position of law that merit cannot be ignored under any circumstances. As regards the notice dated 19th January, 2018, it is submitted that the same was never a part of the advertisement or ever intimated to the candidates and hence, cannot be taken into consideration. Mr. S.K.Das, while adopting the above contentions argues that even otherwise, it is the settled position of law that age relaxation cannot be a bar for consideration of the candidature of an applicant on merits. Since all the candidates including the Petitioners had appeared in the same written test without lowering of any standard of such examination for the Petitioners, it cannot be said that they having availed age relaxation would not be eligible to be considered. Mr. M.Das also adopts the above contentions and argues that if a candidate secures a position in the select list on the basis of his own merit, he cannot be treated to have been selected as a reserved candidate.

9. Mr. N.K.Praharaj, learned Government Advocate, has contended that the Government had submitted requisition to

fill up 1950 posts, out of which only 938 were selected. 107 candidates did not join, for which the Government requested the OPSC to provide a list of 107 selected candidates for consideration of their appointment, but the OPSC having refused nothing further could have been done by the Government. It is further stated that in W.P.(C) No.15435/2019, out of 6 Petitioners, 4 have already been appointed as Medical Officers vide Notification No.6834 dated 4th June, 2020 and therefore, the Writ Petition has become infructuous in respect of them. It is further stated that the validity of the select list has already expired in view of the fresh round of recruitment conducted by OPSC.

10. Mr. Sanjib Swain, learned counsel appearing for the OPSC referring to the application forms submitted by the Petitioners, contends that they had consciously applied under SEBC category despite the fact that there was no vacancy under the said category and hence, they cannot be treated as UR candidates. Further, they being admittedly over aged, sought age relaxation as SEBC candidate, which was not available to them. Since all the candidates were called to attend the written examination and verification of particulars

takes place only after publication of the result of the written test, the Petitioners being found to be ineligible, their candidature was rightly rejected. Shri P.K.Mohanty, learned Senior counsel, contends that even otherwise, the prayer in some of the Writ Petitions being to quash the requisition of Government asking for 107 names, the same has become infructuous in view of refusal of OPSC to act upon it. It is further contended that though interim order was passed by this Court directing to keep certain posts vacant yet the same was on the notion that the Petitioners had applied as UR candidates. In any case, after submitting recommendation to the Government, the OPSC becomes functus officio and the unfilled vacancies have merged in the fresh recruitment process.

11. The facts of the case as laid in the Writ Petitions are not disputed inasmuch as 1950 posts were required to be filled up out of which, 938 candidates were selected, out of whom, 107 candidates did not join. It is stated that the said 107 vacancies have since been included in the subsequent recruitment process. However, as per order dated 28th August, 2019 passed by this Court in W.P.(C) No.15435/2019, 6 posts

have been kept vacant till date. Similar orders have been passed in the other Writ Petitions. Therefore, at the outset, it must be clarified that the assertion of the State Government that 107 posts have been included in the fresh recruitment and therefore, the Writ Petition has become infructuous is untenable.

12. On merits, it would be worthwhile to refer to the relevant statutory provision governing the field at the outset. In this regard, reference to Rule 7 of the 2017 Rules would be apposite, which is quoted herein below:-

“7. Eligibility criteria for direct recruitment:- In order to be eligible for direct recruitment to the service, a candidate must;

(a) be a citizen of India

(b) have attained the age of 21 years and must not be above the age of 32 years on the first date of January of the year in which applications are invited by the Commission.

Provided that the upper age limit in respect of reserve categories of candidates refer to in 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.

Provided further that the upper age limit up to 5 years shall be given to the doctors serving of ad hoc or contractual basis under the State Government/State Government undertaking.”

Thus, the Rule provides for relaxation of upper age limit up to 5 years to the doctors serving on ad hoc or contractual basis under the State Government. This is reflected under Clause-3 of the advertisement, which reads as follows:-

“3. Age- A candidate must have attained the age of 21 (twenty one) years and must not be above 32 years (Thirty two) years as on 1st day of January, 2019 i.e. he/she must have been born not earlier than 2nd January, 1987 and not later than 1st January, 1998.

The upper age limit prescribed above shall be relax able by 5 (five) years for candidates belonging to the categories of Scheduled Castes (SC), Scheduled Tribes(ST), Women, Ex-Servicemen and by cumulative 10 years for candidates belonging to Physically Handicapped category, whose permanent disability is 40% and more.

Provided that, a candidate who comes under more than one category mentioned above, he/she will be eligible for only one age relaxation benefit, which shall be considered most beneficial to him/her.

Provided further that person with past service as Medical Officers under the State Government to their credit, shall be given preference and in their case, the period of service so rendered by the last date of submission of applications shall be added to the age limit for entry into the service and it is up to a maximum period of five years.”

13. There is no dispute that the Petitioners have been working on ad hoc basis as Asst. Surgeons in different PHCs. A reference to the Online application of Petitioner No.1 shows that he had completed 4 years 6 months and 5 days of service as a Medical Officer under the State Government. Similarly, Petitioner No.2 had completed three years one month and 29 days of service. Same is the case of other Petitioners also. This has not been refuted in any manner by the State or OPSC. As per the Rules quoted above and the relevant provisions thereof in the advertisement the Petitioners are undoubtedly entitled to relaxation of age on the basis of the period of service rendered by them as Medical Officers under the State Government as on the last date of submission of application. In the counter filed by Opposite Party No.2, it is stated under Paragraph-6 as follows:-

“6. That the petitioners pursuant to the aforesaid advertisement had submitted their Online Application (Annexure-2) within the stipulated period for the post of Medical Officer (Asst. Surgeons) clearly indicating therein that their candidatures are to be considered under SEBC category. They had also indicated with regard to their past service as Medical Officers under the State Government to their credit. In order to get the preference with regard to relaxation of age.

14. There is nothing on record to show that the Petitioners had claimed age relaxation as SEBC category. It is however, a fact that they had mentioned SEBC under the column ‘category’ in the application form. The question is, can mere mentioning of the category as SEBC deprive the Petitioners from being considered on their own merit. Law, in this regard, is fairly well settled. In the case of ***Pradeep Singh Dehal v. State of Himachal Pradesh and others***; reported in (2019) 9 SCC 276, the Apex Court held that every person is first a general category candidate. If a reserved category candidate qualifies on merit, he will occupy general category seat. In the case of ***Jitendra Kumar Singh and another v. State of Uttar Pradesh and others***; reported in (2010) 3 SCC 119, the question of concession given to reserved category candidates and the same being a bar for their consideration for selection

on merit was considered. The following observations of the Apex Court in the said case are relevant:-

“In view of the aforesaid facts, we are of the considered opinion that the submissions of the appellants that relaxation in fee or age would deprive the candidates belonging to the reserved category of an opportunity to compete against the general category candidates is without any foundation. It is to be noticed that the reserved category candidates have not been given any advantage in the selection process. All the candidates had to appear in the same written test and face the same interview. It is therefore quite apparent that the concession in fee and age relaxation only enabled certain candidates belonging to the reserved category to fall within the zone of consideration. The concession in age did not in any manner tilt the balance in favour of the reserved category candidates, in the preparation of final merit/select list.”

15. In view of the law as has been laid down by the Apex Court, it is clear that notwithstanding the fact that the Petitioners belong to the SEBC category their candidature cannot be ignored if they are found eligible on their own merit.

16. Another aspect needs to be considered. Since there were no vacancies under the SEBC category and the Petitioners

were otherwise eligible in view of Rule 7 of the 2017 Rules read with Clause-3 of the advertisement, they can only be treated as belonging to the unreserved category. Merely because they had mentioned SEBC under the heading, 'category' cannot act as an irrevocable bar for consideration of their candidature under the UR category. It is reiterated that UR is not a category in itself and it is open to all the so-called reserved categories. Even an SC/ST candidate can be considered under the unreserved category on his own merit. Such being the position of law there is no way by which the candidature of the Petitioners could have been ignored merely because they belong to the SEBC category.

17. It has been admitted under Paragraph-9 of the counter filed by the OPSC that the Petitioner no.1 secured 103 marks, Petitioner No.2, 94 marks, Petitioner No.3, 106 marks, Petitioner No.4, 119 marks, Petitioner No.5, 108 marks and Petitioner No.6, 100 marks, all of which are above the cut-off mark, 89. In the other Writ Petitions also, the Petitioners are found to have secured equal to or more than the cut-off mark of 89. It implies, the Petitioners were entitled to be selected on their own merit, but were not selected only because of absence

of vacancies under the SEBC category. This Court, therefore, finds that the methodology adopted by the OPSC in finalizing the select list in so far as the same relates to non-inclusion of the Petitioners therein, is entirely wrong and untenable. As regards the notice dated 19th January, 2018 issued by the OPSC, this Court is of the view that the same cannot override the law of the land as laid down by the Apex Court referred to hereinbefore.

18. Now the question is, what relief can be granted to the Petitioners. As already stated, the prayer in W.P.(C) No.15435/2019 is for quashment of Annexure-7. Though it is contended that the same has become infructuous in view of refusal of the OPSC to recommend 107 names from the select list yet, it is to be noted that six posts have been directed to be kept vacant out of the 107 posts as per order passed by this Court. Undoubtedly, issuance of Annexure-7 was the cause of action for the Petitioners to file the present Writ Petitions, but in view of the facts brought on record by the answering Opposite Parties, it is clear that the relief claimed in the Writ Petitions needs to be moulded appropriately to secure the ends of justice. To reiterate, this Court having found that the

Petitioners were wrongly left out from the final select list, the natural corollary would be to direct the OPSC to re-visit the final select list appropriately. It has already been stated that in the mean time, four Petitioners (Petitioner Nos.2,3,5 & 6) out of six have been appointed as Medical Officers pursuant to a fresh recruitment process undertaken. Obviously, they would not be entitled to any relief whatsoever in the present Writ Petitions as despite the interim order operating in their favour, they chose to appear in the subsequent recruitment process without obtaining leave of this Court or without prejudice to their contentions in the present Writ Petition. Though it is argued that apart from being included in the select list, the Petitioners should also be given seniority, this Court is unable to accept the same for the reason that the persons who are already selected securing less marks than they have not been impleaded as parties in the present Writ Petitions. For the same reason also, the select list already published in respect of 938 candidates does not warrant any interference. Therefore, the Petitioners can only claim to be considered for inclusion in the select list in respect of the posts kept vacant as per order of this Court and nothing more.

19. In view of the findings of this Court as indicated hereinbefore, the Writ Petitions are disposed of with direction to OPSC to recommend to the State Government within a period of two months the names of only those Petitioners as have secured more than the cut-off marks of the UR category for their appointment as Medical Officers if they are otherwise found not ineligible. Further, upon receipt of such recommendation by the OPSC, if any, the State Government shall take steps to appoint the concerned candidates within a period of four weeks if there is no other legal impediment. It is made clear that such Petitioners as are found to have already been appointed during pendency of these Writ Petitions shall not be covered by this order.

Ashok Kumar Behera

.....
Sashikanta Mishra,
Judge





