

ORISSA HIGH COURT : CUTTACK

W. P.(C) NOs. 1952, 1986,4355, 5551 AND 5552 OF 2009

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

Dr. Asish Patnaik (WPC No. 1952/09)
Dr. Subhasish Mohapatra (WPC No. 1986/09)
Dr. Gautam Patnaik (WPC No. 4355/09)
Dr. Jayanarayan Padhi (WPC No. 5551/09)
Dr. Susanta Kumar Bhuyan (WPC No. 5552/09)
..... Petitioners

-Versus-

State of Orissa & others (In all) Opp. Parties

For Petitioners : M/s. B. Routray,
D.K.Mohapatra, B.B.Routray,
P.K.Sahoo, S. Das, S.K.Das,
R.N.Mishra,-II, S.K.Mishra,
B.N.Mohapatra,
V. Narasingh, S.K.Senapati &
P.P.K.Pandit.

For Opp. Parties : M/s. Addl. Govt. Advocate.
Mr. R.C.Mohanty
(For M.C.I.)
Mr. R.K.Rath,
(For intervenors.)
(In all)

Decided on 20. 05. 2009.

P R E S E N T :

THE HONOURABLE SHRI JUSTICE M. M. DAS

M.M. Das, J. As common questions of law and facts arise in all the aforesaid writ petitions, they were heard together and are disposed of by this common judgment.

2. Each of the petitioners in the aforesaid writ petitions have prayed for issuance of a direction to the opp. Parties to extend

additional weightage of 10% of the marks secured by the petitioners for computing their ranking in the entrance examination for taking admission to Post Graduate (Medical) Courses, 2009. An additional prayer has been made in W.P. (C) Nos. 1952, 5551 and 5552 of 2009 to issue a further direction to the opp. Party – State to modify the circular dated 3.1.1997 incorporating the P.H. C. Areas as described under the National Health Plan, 1983 and thereby including the PHC areas, where the petitioners in the aforesaid three writ petitions have served, as Tribal areas basing on the percentage of tribal population in the said areas. The concerned P.H.Cs in the aforesaid three writ petitions are P.H.C., Anandapur, P.H.C., Fakirpur and P.H.C., Panasadiha in the district of Keonjhar.

3. In course of argument, it was submitted by Mr. B. Routray, learned counsel for the petitioner in one of the writ petitions that the circular dated 3.1.1997 issued by the Government of Orissa in its Health and Family Welfare Department does not include all the areas which are to be considered as backward/rural/tribal areas, and, therefore, the said circular cannot be taken as a guiding factor for computing as to whether the petitioners have served for three years in KBK/Tribal/Backward areas as per Clause-11.2 of the Information Brochure.

4. Various documents have been annexed to the writ petitions supporting the contention of the petitioners that the list appended to the circular dated 3.1.1997 does not give the correct picture with regard to tribal/backward areas of the State. The petitioners further contended that the Government in its notification

dated 26.3.2004 (Annexure-1 to the W.P. (C) No. 1986 of 2009), which is the order of appointment of the petitioners clearly mentioned in Clause-6 thereof that the Orissa Medical Services Rules require every appointee to serve the initial period of first three years in the tribal/backward areas of the State. Candidates who have not been posted to any medical institution(s) in tribal/backward areas as declared by the Government shall be posted to any such institution(s) at any time. The aforesaid notification made in the year of appointment of the petitioners is in consonance with Rule 10-A (2) and (3) of the Orissa Medical Services Recruitment Rules, 1941, as amended. The said Rule reads as follows:-

“10.A (1) The candidates selected shall, if so required, be liable to serve in any Defence Service or the post connected with the Defence of India for a period of not less than 4 years including the period spent on training, if any, any where in India or abroad:

Provided that (a) he shall not be required to serve as aforesaid after the expiry of 10 years from the date of appointment;

(b) he shall not ordinarily be required to serve as aforesaid after attaining the age of 45 years.

(2) Every candidate selected for appointment to the Orissa Medical Service shall have to serve the initial period of minimum three years in Tribal/Backward areas as declared by the Government from time to time.

(3) Every such candidate after serving three years as under Sub-rule (2) shall serve the next three years in rural areas:

Provided that the candidates who do not join the places of their posting according to Sub-Rules (2) and (3) shall be permanently debarred from joining any medical service under the State Government.”

5. Basing on the advertisement, appointment order and the service rules, the petitioners contended that they presumed that they have been posted in tribal/ backward areas inasmuch as conceding that they have not been posted in such an area, it was beyond the

control of the petitioners to serve in such areas for three years even though they accepted the said condition of service which is also prescribed in the rules. In such event, it was submitted that the petitioners cannot be deprived of the additional weightage as provided under clause 11.2 of the Information Brochure.

6. Be it mentioned here that all the petitioners appeared in the entrance examination for admission to P.G. (Medical) Courses, 2009 as in-service candidates.

7. Clause-11.2 of the Information Brochure reads as follows:-

“ADDITIONAL WEIGHTAGE TO INSERVICE CANDIDATES;

11.2. Those in-service candidates who have completed minimum of three years service in KBK/Tribal/Backward areas and have qualified in the examination shall be awarded an additional weightage of 10% of the marks secured in the P.G. Entrance Examination. Additional weightage of 5% of the marks secured in the P.G. Entrance Examination shall be awarded to the rest of the in-service candidates who have qualified in the examination vide G.O. No. 36644/H. dt. 12.12.2006 (in Form No. Appendix-III (A))”.

8. On the aforesaid basis, the petitioners contended that even though a specific prayer has not been made to declare the circular dated 3.1.1997 and Clause 11.2 of the information brochure as illegal, arbitrary and inoperative, but this Court while exercising its plenary jurisdiction under Article 226 of the Constitution can mould the relief so as to give full redress to the petitioners.

9. Mr. R.K. Rath, learned senior counsel appearing for some of the intervenors vehemently argued that the petitioners have not prayed for quashing the Government notification dated 3.1.1997 and

have also not questioned the legality of Clause 11.2 of the Information Brochure. As both the aforesaid questions were earlier gone into by a Division bench of this Court in the case of ***Dr. Bhupesh Kumar Nayak v. Secretary, Health and Family Welfare Department and others***, 2004 (Supp.) OLR 586 , the said decision being a binding precedent, the question of legality of Clause 11.2 as well as the circular dated 3.1.1997 cannot be questioned by the petitioners. Mr. Rath further relied upon the judgment in the case of ***Dr. Deepak Kumar Singh v. Convenor, P.G. (Medical) Selection Committee, 2007, S.C.B. Medical College Cuttack and others***, 103 (2007) CLT 724 in support of his contention that the petitioners after going through the brochure having applied to appear in the entrance examination and having appeared therein, cannot not fall back and challenge the legality of Clause 11.2 or the Government circular dated 3.1.1997.

10. In the case of Dr. Bhupesh Kumar Nayak (supra), this Court, while dealing with a batch of writ petitions, dealt with Clause 11.2 of the Prospectus for the P.G.(Medical) Courses, 2004, which is in pari materia with Clause 11.2 of the information brochure for the year 2009, now under consideration. The petitioner in W.P. (C) No. 4355 of 2009 was also the petitioner in one of the writ petitions. In the said case, being W.P. (C) No. 3617 of 2004, Clause 11.2 of the Prospectus for the year 2004 under consideration of this Court in the said decision was as under:-

“11.2. Doctors who have completed minimum of three years service in Rural/Tribal/Backward areas shall be awarded additional 5% credit marks over the marks secured by him/her in the Entrance Examination as per G.O. No. 325/H. dated 3rd January, 1997. For this benefit, the

candidates has to produce a "Service Certificate" in the proforma (Appendix III-A) issued by the C.D.M.O.(s)."

11. This Court, dealing with the above point as points "B" and "C", taking into consideration various decisions of this Court and the Apex Court, in the cases of **Sushil Kumar Nayak v. State of Orissa**, 1988 (I) OLR 301, **Dr. Dillip Kumar Das v. State of Orissa and others**, 2002 (II) OLR 25, **Dr. Dinesh Kumar v. Motilal Nehru Medical College, Allahabad and others**, (1986)3 SCC 727, **Dr. Narayan Sharma v. Dr. Pankar Kumar Lehkar**, (2000)1 SCC 267, **Dr. Jagadish Ch. Saran and others V. Union of India and others**, AIR 1984 SC 820, **State of Madhya Pradesh and others v. Gopal D. Tripathy and others**, (2003)7 SCC 83 and **Dr. Snehalata Patnaik v. State of Orissa**, (1992)2 SCC 26 categorically held that the contention raised by the learned counsel for the petitioners that Clause 11.2 of the prospectus of the said year is discriminatory and unconstitutional being violative of Article 14 of the Constitution, cannot be accepted in view of the decision in the case of State of Madhya Pradesh and others (supra). This Court further analyzing and considering the Government circular dated 3.1.1997 in detail, held that the said circular/decision of the Government to provide weightage for rural services is in consonance with the observation of the Apex Court in the case of Dr. Snehalata Patnaik (supra).

12. In the case of *Dr. Deepak Kumar Singh (supra)*, a Division of this Court relying upon the decisions in the cases of **Madan Lal and others v. State of Jammu and Kashmir and others**, AIR 1995 S.C. 1088, **Chandra Prakash Tiwari and others v. Shakuntala Shukla**

and others, (2002)6 SCC 127 and **K.H. Siraj v. High Court of Kerala & Ors.** AIR 2006 S.C. 2339 declined to interfere in a similar matter. It was, however, contended on behalf of the petitioners that the circular dated 3.1.1997 was not questioned in the case of Dr. Bhupesh Kumar Nayak (supra) and, therefore, any observation made with regard to the said circular should be held as *per incuriam* and the said circular having not taken into consideration, various statistics provided by the State Government itself in its other departments cannot have the overriding factor to determine as to whether a candidate has served for three years in such rural/backward areas or not.

13. It would be worthwhile to mention that the petitioners had ample knowledge with regard to Clause 11.2 of the information brochure. Further, they were required to fill up the application forms of which, Clause 9 and Clause 20 (C) are as follows:-

“9. Total Period of service R/T/B areas: Days Months Years

20 (C) SERVICE ABSTRACT

Up to 31st December 2008	Total Service	From	To
<u>Duration of service (A)</u>			

Total Leave Period (B)

Duration of Service
Excluding Leave (A-B)

Total period of service in
R/T/B areas.

”

They were required to provide their service particulars in Appendix – III (A) from the respective C.D.M.Os./Head of the Office, which reads as follows:-

APPENDIX – III (A)

A. Details of Institution served as per the service record.

Name of the Medical Institution(s)	Block & District.	Nature of Service (Adhoc/Temporary/Contractual/Regular)	Date of joining	Date of relief.	Total Duration of service		
					Y	M	D

Name of the Medical Institution(s)	Block & District	Nature of Service (Adhoc/Temporary/Contractual/Regular)	Date of relief to proceed on leave	Date of joining after availing leave	Total Duration of Service		
					Y	M	D

Signature of the Chief District Medical Officer
(Name)
Seal

Copy to the doctor concerned with reference to his/her application dated.....

Signature of the Chief District Medical Officer
(Name)
Seal".

14. In view of the decision of this Court in the case of Dr. Bhupesh Kumar Nayak (supra) as well as the decisions of the Apex Court as referred to in the said decision as well as in the case of Dr. Deepak Kumar Singh (supra), I am constrained to conclude that the petitioners, under law, cannot challenge the circular of the Government

dated 3.1.1997, which they were aware of, as reference of the said circular has been made in Appendix III (A) quoted above inasmuch as they cannot challenge the legality of Clause 11.2 of the information brochure, they having accepted the terms of the information brochure, filled up the forms and appeared in the examination, even though, no doubt, the circular dated 3.1.1997 of the Government was not under consideration in the decision of this Court in the case of Dr. Bhupesh Kumar Nayak (supra). It is, however, needless to mention that keeping in view Clause - 9 and Clause - 20 (C) of the application form along with Appendix III (A), if any of the petitioners have, in fact, served for three years, in such areas as mentioned in clause 11.2 of the information brochure read with the circular dated 3.1.1997, they will be entitled to the additional weightage as prescribed therein.

15. Mr. R.C. Mohanty, learned counsel for the Medical Council of India, has submitted that the Medical and Dental Courses have been time scheduled by the Medical Council of India which should be adhered to in view of the decision of the Apex Court in the case of ***Medical Council of India v. Madhu Singh***, (2002)7 SCC 258.

16. A perusal of the said schedule shows that the last date by which the students can be admitted to P.G. Courses is 31st May.

17. In view of the discussions made above, this Court is not inclined to interfere in the matter and all the writ petitions are dismissed being devoid of merit. The interim orders passed earlier with regard to stay of Counselling, stands vacated and the opp. Parties are directed to complete the entire exercise so as to admit the students, preferably, within time schedule, latest by 30.6.2009 as the matter has been

delayed due to pendency of these writ petitions. The Medical Council of India shall accord permission for admission accordingly.

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M.M. Das, J.

Orissa High Court, Cuttack.
May , 2009/Biswal.
