ORISSA HIGH COURT: CUTTACK

W. P.(C) NOs. 12750, 13450 AND 13900 OF 2008

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

In WPC No. 12750/2008
Sasmita Mohanty & another ..... Petitioners

- Versus-

Orissa University of Agriculture and Technology, Bhubaneswar and others ..... Opp. Parties

For Petitioners : M/s. Manmaya Kumar Dash
S.K.Das, P.K. Nanda &
B.K. Sahu.

For Opp. Parties: Addl. Government Advocate.
(for opp. Parties 3 & 4)

M/s. A.Mishra & S.C.Rath
(for O.Ps 1 and 2)

M/s. P. K.Rath, P.K. Satpathy,
R.N.Parija, A.K. Rout &
S.K. Pattnaik.
(for intervenors)

In WPC No. 13450/2008
Sabita Dash and others ..... Petitioners

-Versus-

Orissa University of Agriculture Technology, Bhubaneswar and others. ..... Opp. Parties

For petitioners: M/s. S.K. Das, M.K. Dash,
P.K.Nanda & B.K.Sahu.

For opp. Parties: Mr. Ashok Mishra &
S.C.Rath.
(for O.P.No.1)

M/s. P. Rath, P.K.Satpathy,
R. N. Parija, A.K.Rout &
S.Pattnaik.
(for intervenors)

In WPC No. 13900/08
Debabrata Biswal .... Petitioner

-Versus-

Orissa University of Agriculture and
Technology and others .... Opp. Parties.

For petitioner: M/s. Mahadev Mishra,
M.Mishra & C.Mallick.

For opp. parties: M/s.P. Rath, P.K. Satpathy,
R. N. Parija, A.K.Rout &
S. Pattnaik.
(for intervenors)

Mr. Ashok Mishra &
S.C.Rath.
(for O.P.No.1)

Decided on 28.10. 2009.

P R E S E N T :

THE HONOURABLE SHRI JUSTICE M. M. DAS

M.M. Das, J. The petitioners in the aforesaid three writ petitions challenge the policy decision of the Orissa University of Agriculture and Technology (in short, 'the O.U.A.T.') taken in its Academic Council Resolution in fixing minimum 50% of marks in I.Sc./+2 Science for in-service candidates who are serving as Village Agriculture Worker (VAW) and Lady Village

Agriculture Worker (LVAW) for admission into B.Sc. (Ag.) Course as reflected at Clause – 3.9 of the Prospectus for the session 2008-09. The petitioners are serving as VAWs/LVAWs under the Government and they have been en-cadred in the cadre list/gradation list.

2. The case of the petitioners in nut-shell is that since the post of VAWs/LVAWs are the base level posts, the minimum educational qualification for entry into the said post, prescribed by the Government is I.Sc./+2 Science. The next post to which they can be promoted is the post of Overseer. Such promotional posts being very less, in normal course, a VAW/LVAW may not be able to get promotion in his/her entire service career. The State Government, therefore, has made provision for promotion of such VAWs/LVAWs directly to the next higher post, i.e. Junior Agriculture Officer (J.A.O.) from the VAWs/LVAWs having B.Sc. (Ag.) qualification. In order to create a promotional avenue and to give opportunity to the VAWs/LVAWs, on principle, the Government decided to sponsor them to undergo the B.Sc. (Ag.) Course as in-service candidates from the session 1992-93. Accordingly, some percentage of the total number of seats in the said course under the O.U.A.T. was kept reserved for such departmental/in-service candidates. The State Government in

consultation with the University authorities issued guidelines for admission to the said course as in-service candidates having the following eligibility criteria:-

(a) Candidates must be I. Sc. or with equivalent qualification.
(b) Candidates must have put at least five years in case of VAWs/Grafter/A.S.C.O./Field Technician etc. and 7 years in case of Gardners in Government service.

(c) Should be below 45 years.

(d) Candidates should have clean service.

(e) There should not be any proceedings/vigilance case pending against him.
(f) Selection should be based on seniority-cum-merit.

3. There are 100 (one hundred) seats in total for B.Sc. (Ag..) under the O.U.A.T. But, however, depending upon the decision of the University authorities with due consultation with the Government in each year, some seats are being kept reserved for in-service candidates. For the session 2008-09, 5% of the seats were made available for in-service candidates, i.e., 5 seats. In this background, the petitioners claimed that even those, who have completed more than 17 years of service in their respective cadre, could not get the opportunity to be admitted to the said course and have to wait for their term as per their seniority. But as the cut-off age is fixed to be below 40 years for admission into the course, the petitioners claimed

that they have hardly one or two chances more before reaching the cut-off age.

4. The petitioners have further pleaded that for the session 2008-09, the names of the petitioners were not sponsored for B.Sc. (Ag.) Course by the Department though they are seniors and otherwise eligible since the petitioners themselves could not make applications to the Department for pursuing such course though one of the petitioners made an application, which was not considered. They approached the State Administrative Tribunal in O.A. No. 1543 of 2007 seeking a direction to the departmental authorities to sponsor their names. However, the Tribunal directed the authorities to pass appropriate orders in the matter. Pursuant to the said order, the Government on 16.5.2008 intimated that since the session is over, their claim can only be considered in the next year, i.e., for the session 2008-09 (Annexure-5). While the matter stood thus, the Director in its order dated 12.5.2008 issued a guideline for admission to B.Sc. (Ag.) Course as in-service candidates. In Clause – (vi) of the said letter, it was only stated that candidates belonging to the Scheduled Caste/Scheduled Tribe category should have 40% marks, whereas other categories should have secured 50% marks for being taken into consideration. It was, however, not stated as to in which

examination, such percentage of marks are required to be secured by the candidates. The petitioners claim that in view of this confusion, keeping the earlier guidelines in view and the previous Prospectus issued by the O.U.A.T. authorities, it was concluded by them that such required percentage of marks are to be possessed by a candidate in the H.S.C. Examination.

5. For the session 2008-09, the university authorities published prospectus for common entrance test for admission into B.Sc. (Ag.) Course under graduate programme of the University, in the month of April, 2008. However, since the common entrance test was meant for fresh candidates, the petitioners claim that they did not bother to purchase the Prospectus as they were not required to appear in the said common entrance test. The petitioners, however, applied in the prescribed format and in the prescribed manner for admission into B.Sc. (Ag.) Course to their department. It was, however, told to them by the department that their applications will not be considered for admission as in-service candidates for the stipulation made in the Prospectus in clause 3.9 to the extent that in-service candidates should have minimum 50% marks in the I.Sc./+2 Science Examination, to apply. Only at that stage, the petitioners collected the prospectus to ascertain the correct position.

6. Mr. S.K. Dash, learned counsel for the petitioners urged that it is no doubt true that the reservation of seats for the in-service candidates is a compassionate measure for which such candidates have been exonerated from appearing in the entrance examination and they were also not required to secure a particular percentage of marks. He further submitted that the pattern of examination in I.Sc./+2 Science Examination having undergone a sea-change and at present candidates in such examination are securing high percentage of marks, which was not possible earlier, for which, the petitioners being seniors, who appeared in I.Sc./+2 Science Examination much earlier, cannot be equated with the juniors, who took such examination much thereafter and have obtained higher percentage of marks. The University, therefore, by fixing the cut-off date has, in fact, infringed the right of the senior VAWS/LVAWS from getting opportunity of pursuing the B.Sc. (Ag.) Course as in-service candidates in accordance with their seniority. The net result, therefore, would be that such VAWS/ LVAWS, who are much junior to the petitioners will avail the opportunity of prosecuting B.Sc. (Ag.) Course as in-service candidates and they having long period of service left, in all possibility, will be promoted to the post of J.A.Os, thereby

becoming seniors to the petitioners, who are much above in the cadre list.

Mr. Dash, further submitted that the decision of the University at Annexure-8 fixing such minimum percentage of marks for in-service candidates, is contrary to their earlier decision and is not based on sound reason. Further, such minimum percentage of marks was not fixed by the Government at the entry point for joining in the post of VAWs/ LVAWs and fixing such percentage of marks by the University amounts to depriving the petitioners from being considered for promotion to the post of J.A.O. as the minimum qualification required to hold such promotional post is B.Sc. (Ag.) inasmuch as in view of the age limit of 40 years prescribed, the petitioners will be deprived of such promotion for all times to come.

7. In the counter affidavit filed on behalf of the University in the connected writ petition, being W.P.(C) No. 12750 of 2008, which has been adopted in this case also, it has been averred that as per the decision of the Academic Council of the University, the conditions laid down in Clause– 3.9 of the Prospectus for the session 2008-09 were introduced. Some of the in-service candidates, who have secured 50% of marks in I.Sc./+2 Science Examination have intervened in

W.P. (C) No. 12750 of 2008 and have also filed a counter affidavit, inter alia, stating that the petitioners have no locus standi to challenge the minimum percentage fixed by the Government to be admitted as in-service candidates to B.Sc. (Ag.) for the session 2008-09 as the same falls entirely within the administrative domain of the Government. They have further pleaded that admission to B.Sc. (Ag.) Course is already over for direct candidates, but because of the interim order passed by this Court in different writ petitions, though their names have been sponsored, but they are not being able to get admission into the said course.

8. In the rejoinder affidavit filed by the petitioners in the connected writ petition, being W.P. (C) No. 12750 of 2008, the petitioners therein have averred that for the first time, such a stipulation has been made in respect of the in-service candidates and such decision of the University is unreasonable, arbitrary and discriminatory.

9. The moot question, therefore, which arises for determination in the aforesaid two writ petitions, is as to whether fixing of minimum percentage of 50% marks in I.Sc./ +2 Science Examination as qualifying marks for in-service candidates for taking admission to B.Sc. (Ag.) Course for the session 2008-09 is arbitrary and unreasonable and as to

whether the University was empowered to fix such minimum percentage of marks.

10. To examine the above question, reference is required to be made to Clause -3.9 of the prospectus, which is as follows:-

> "3.9. Over and above the intake capacity, 5% seats (excluding cost sharing seats) in Agriculture shall be reserved for State Government sponsored VAW subject to fulfilling the minimum qualification of +2 Science with 40% marks in aggregate (excluding 4th optional) for SC/ST and with 50% marks in aggregate (excluding 4th optional) for candidates of other categories."

The condition of fixing the minimum of 50% marks in the aggregate (excluding 4th optional) in the +2 Science examination is stated to have been fixed pursuant to a resolution adopted by the Academic Council of the University as stated in paragraph-3 of the counter affidavit filed on behalf of the O.U.A.T. It is an admitted case that in the previous years, no such minimum percentage of marks were fixed for in-service candidates to be obtained in the +2 Science Examination. No reason whatsoever has been assigned by the O.U.A. T. for changing the previous practice which was being followed with regard to in-service candidates to be admitted in B.Sc. (Ag. Course). Coupled with the above, it appears from the letter of the Joint Director, Agriculture to the Deputy Director of Agriculture under Annexure-6 to W.P. (C) No. 12750 of 2008 that the criteria and

eligibility of B.Sc. (Ag.) degree course in O.U.A.T. for in-service candidates were laid down as follows:-

"Criteria and Eligibility for B.Sc.(Ag.)degree course in OUAT.

1. Candidate must have passed I.Sc. or +2 Science.
2. Candidate must be rendered at least 5 years in Govt. service continuously in the cadre of V.A.W.
3. Should be below 40 years.
4. Candidate should have clean service records.
5. There should not be any Departmental Proceeding/ Vigilance case against him.
6. 40% marks for candidates belong to SC/ST and with 50% marks for candidates of other categories will have to be taken into account for consideration of election."

11. The condition no. 6 quoted above does not specify as to in relation to which examination, the percentage of marks referred to therein have been mentioned. It was urged on behalf of the O.U.A.T. as well as the learned counsel for the intervenors that the above being a resolution of the Academic Council of the University, the same should not be interfered with and is not amenable to judicial review. It was, however, submitted on behalf of the petitioners that as has been averred in the writ petitions, considering that the candidates are to take admission to B.Sc. (Ag) course, fixing of a cut-off percentage of marks with regard to +2 Science examination is not only unreasonable but also arbitrary and makes an artificial classification between same class of employees under the Government.

12. With regard to the scope of judicial review of the above decision taken by the University, it would be seen that it is a settled legal proposition that a policy decision taken by the State or its authorities/instrumentalities is beyond the purview of judicial review unless the same is found to be arbitrary, unreasonable or in contravention of the statutory provisions or violates the rights of the individual guaranteed under the Statute.

In the case of ***R.K. Garg v. Union of India and others,*** AIR 1981 SC 2138, the Supreme Court while examining the authority of the provisions of the Special Bearer Bonds (Immunities and Exemptions) Ordinance, 1981 and Special Bearer Bonds (Immunities and Exemptions) Act, 1981 held as follows:-

> "It is clear that Article 14 does not forbid reasonable classification of persons, objects and transactions by the legislature for the purpose of attaining specific ends. What is necessary in order to pass the test of permissible classification under Article 14 is that the classification must not be "arbitrary, artificial or evasive" but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislature.....Another rule of equal importance is that <u>laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc</u>. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straight jacket formula and this is particularly true in case of legislation dealing with economic matters, where,

> having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The Court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved……. The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry" that exact wisdom and nice adoption of remedy are not always possible and that "judgment is largely a prophecy based on meager and uninterrupted experience". Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore, it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid…….There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation , because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues. (emphasis supplied)

In the case of ***State of Himachal Pradesh and another v. Padam Dev and others,*** (2002) 4 SCC 510,

the Supreme Court held that unless a policy decision is demonstrably capricious or arbitrary and not informed by any reason or discriminatory or infringing any statute or the constitution, such decision cannot be a subject of a judicial interference under the provisions of Articles 32, 226 and 136 of the Constitution. Similar view has been reiterated in ***State of Rajasthan and others v. Lata Arun***, (2002) 6 SCC 252.

In exercise of power of judicial review, the Courts do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on the ground of mala fide, unreasonableness, arbitrariness or unfairness etc. Indeed arbitrariness, irrationality, perversity and mala fide, render the policy unconstitutional. Unless a policy decision is demonstrably capricious or arbitrary and not informed by any reason or discriminatory or infringing any Statute or the Constitution, it cannot be a subject of judicial interference. However, if the policy cannot be touched on any of these grounds, the mere fact that it may affect business interests of a party does not justify invalidating the policy.

In the case ***Union of India and another v. International Trading Company and another,*** (2003) 5 SCC 437, the Supreme Court pointed out that the policy of the Government , even in contractual matters, must satisfy the test

of reasonableness and every State action must be informed by reason. Article 14 of the Constitution applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional.

In the case of Union of India and another (supra), the Supreme Court observed that there is no necessity to multiply decision in this regard as it is now well settled that if the Court finds that a decision of the policy maker is capricious or arbitrary or discriminatory, it will not hesitate to strike down such policy.

13. In the facts of the present case, an upper age limit has been fixed after which the VAWs/LVAWs cannot be recommended to take admission as in-service candidates to B.Sc.(Ag.) Course. The object to be achieved by sending in-service candidates for undertaking such course is to give opportunity to such candidates to be promoted to the post of JAOs. The minimum percentage of marks fixed to have been obtained in +2 Science examination in the instant case has no nexus with the object to be achieved in respect of the in-service candidates. Further, it transpires that by fixing such cut-off percentage, equals have been treated to be un-equals and seniority has been given a go-by. The said action ipso facto is

capricious and applying the ratio of the decision in the case of Union of India and another (supra), it would be clear that the change in such policy has not been made fairly and gives an impression that it was done arbitrarily. Further, as has been held in the said decision, this action of fixing a cut-off mark to have been obtained in +2 Science examination in case of in-service candidates by creating an artificial classification between the equals comes within the wide sweep of Article 14 of the Constitution as the basic requirement of Article 14 is fairness in action by the State and non-arbitrariness, in essence and substance, which is a heart bit of fair-play.

Further, the fixing of the cut-off mark as discussed above amounts to a restriction. Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interests of the general public and not from the standpoint of the interests of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved, the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the

prevailing condition at the relevant time enter into the judicial verdict, the reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country. (See ***Parbhani Transport Coop. Society Ltd. v. RTA*** (AIR 1960 SC 801: (1960) 3 SCR 177), ***Shree Meenakshi Mills Ltd. v. Union of India*** (1974) 1 SCC 468: AIR1974 SC 366), ***Hari Chand Sarda v. Mizo Distt. Council*** (AIR 1967 SC 829: (1967) 1 SCR 1012), ***Krishnan Kakkanth v. Govt. of Kerala*** (1997) 9 SCC 495: AIR 1997 SC 128) and ***Union of India v. International Trading Co***. (2003) 5 SCC 437.

14. The above conclusion is supported by the fact that such minimum percentage of marks was not fixed by the Government at the entry point of joining the post of VAWs/LVAWs and fixing such minimum percentage of marks for taking admission to B.Sc. (Ag.) Course as in-service candidates at such belated stage deprives the petitioners from getting an opportunity to prosecute the said course for being considered for promotion to the post of J.A.Os.

15. In view of the aforesaid reasons, the minimum percentage of marks fixed in Clause -3.9 of the prospectus for being eligible to take admission to B.Sc. (Ag.) Course by the in-service candidates cannot be sustained and the same is accordingly quashed. All the three writ petitions are allowed.

However, as the session for which the petitioners were seeking admission to the B.Sc. (Ag.)Course as in-service candidates is already over, all such VAWs/LVAWs shall be considered to take admission to the said B.Sc.(Ag.) Course without insisting upon such minimum percentage of marks in the ensuing session.

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M.M. Das, J.

Orissa High Court, Cuttack.
October 28th,, 2009/Biswal.