

ORISSA HIGH COURT : CUTTACK

**W. P.(C) NOS. 1361, 756, 901, 1133, 1168, 1271, 1295,
1457, 1762, 1907, 2601, 2880 AND 6200 of 2010.**

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

Ajit Kumar Pandey & others (WPC 1361/10)

Nikhila Odisha NCLP Karmachari
Sangha represented by its Secretary. (WPC 756/10)

Adikanda Sahoo and others (WPC 901/10)

Jay Prakash Nayak & others (WPC 1133/10)

Prabhat Kumar Raula & others (WPC 1168/10)

Jayanta Kumar Biswal and others (WPC 1271/10)

Ananda Kumar Mishra and others (WPC 1295/10)

Sangram Kumar Mishra & others (WPC 1457/10)

Padmanava Samal & others (WPC 1762/10)

Rajendra Narayan Nayak & others (WPC 1907/10)

Santosh Kumar Sahoo & others (WPC 2601/10)

Babita Sahu & others (WPC 2880/10)

Sakuntala Sahoo and others (WPC 6200/10)

... **Petitioners**

-Versus-

State of Orissa and others (in all) ... **Opp. Parties**

For Petitioners : M/s. P.K.Rath, P.K. Satpathy,
R.N.Parija, A.K.Rout,
S.K. Patnaik & D.P.Patnaik.

M/s. Bijan Ray, C.Choudhury,
S.Mohanty, N.K.Das,
D.Chhotray & B.Moharana.

M/s. K.K.Jena, A.K.Mohapatr &
S.N.Das.

M/s. S.K.Das, R.N.Mishra-II &
S.K. Mishra.

M/s. Basudev Pujari, B.K.Nayak,
S.K.Pradhan (I) & M.R.Nayak.

M/s. K.P.Mishra, Miss S.Mohapatra,
T.P. Tripathy & L.P.Dwivedy,

M/s. K.K. Swain, P.N.Mohanty &
B.Jena.

M/s. B.Routray, D.K.Mohapatra,
D.Routray, S.Jena, R.P.Dalai &
J.K.Samal.

M/s. S.K. Dalai, T.K.Swain &
N.Mohapatra.

M/s. D.N. Rath, S.N.Rath &
P.K.Rout.

(In all the cases)

For Opp. Parties : Advocate General &
Addl. Standing counsel
(For School & Mass Education Deptt.)
(In all)

Mr. H.K.Mohanty
(For Board in WPC Nos. 1271 & 901/10)

M/s. P.K.Mohanty,
D.N.Mohapatra, J.Mohanty,
P.K.Nayak & S.N.Dash
(For O.P. 4 in WPC 1361/10)

Decided on 29 .06.2010.

P R E S E N T :

THE HONOURABLE SHRI JUSTICE M. M. DAS

M.M. DAS, J.

In all the above writ petitions, the petitioners have
challenged the resolution dated 19.11.2009 of the Government of

2. From the advertisement, it appears that the concerned Zilla Parishad of the respective education districts invited applications for engagement of Sikhya Sahayaks in Primary and Upper Primary schools in the respective education districts stipulating that the candidates may apply in any of the education districts for one such education district and cannot apply for being appointed in more than one education district. The number of Trained Graduate Science posts, Trained Graduate Arts/Commerce posts /+2 Science C.T. Course and H.S.C./+2 C.T. course were indicated in the schedule of the advertisement for different education districts. The said advertisement was consequential to the resolution dated 19.11.2009. The relevant portion of the resolution dated 19.11.2009, the validity of which has been questioned by the petitioners, i.e., Clauses – 4.1 and 4.2, is extracted below:-

4. xx xx xx

4.1. The right of children to free and compulsory Education Act proposes to provide free and compulsory education to every child. The duties and responsibilities of State Government, Local Authorities are to ensure good quality education at elementary level. The SSA guidelines also indicate that for quality education at elementary schools, priority shall be given for engagement of teachers with Science and Mathematics background for every new Upper Primary School having classes VI to VIII. Similarly trained graduate Science teachers are to be recruited for the Upper Primary Schools where class-VIII has been opened or proposed to be opened by way of up-gradation. As per Orissa Elementary (Method of Recruitment and conditions of service of teachers and officers) Rules, 1997 , 40% of vacancies at level-V of the service shall be filled up by the candidates having Bachelor Degree in Arts, Science or Commerce or qualification equivalent thereto with Bachelors Degree in Education.

In order to provide adequate no. of Trained Graduates teachers in the cadre and to ensure quality education at Elementary level, out of 17820 vacant posts of Sikshya Sahayak, 10534 no. of posts shall be filled up by the trained graduates candidates having science background and 1542 no. of posts shall be filled up by the candidates having B.A./B.Com. with B.Ed. qualification as 3rd teacher (Arts) in Upper Primary Schools.

Out of remaining 5744 vacant posts of Sikshya Sahayak 2931 no. of posts shall be filled up by the C.T. candidates having +2 Sc. Background and 2813 no. of posts shall be filled up by the candidates having Matric/+2 with C.T. qualification from recognized Board/University or examination equivalent thereto.

If trained +2 Science candidates are not available, in such case, untrained +2 Science candidates may be considered for engagement on merit with condition that such untrained candidates shall acquire required training qualification at their own cost within a period of 5 years from the time of their recruitment.

In case two or more candidates secure the same marks, the candidate older in age and if ages are same, the candidates passing matriculation examination earlier will be placed above the other in the select list. In case of S.C.S.T. and PH categories, in case C.T. trained candidates are not available, untrained +2 Science/+2 Arts candidates against C.T. posts and untrained B.A./B.Sc./B.Com. candidates against B.Ed. posts of that category can only be engaged. But against S.C. and ST quota, non S.C./S.T. candidates shall not be engaged.

From the number of Science Trained Graduate teachers and Arts Trained Graduate teachers to be engaged, as indicated above, it shows the proportion to be 7: 1. The rest of the posts have been reserved to be filled up by C.T. candidates having +2 Science

background and matric/+2 with C.T. qualification. The number of trained and untrained teachers, if calculated, comes to 76: 24. It is also indicated in the resolution that if trained +2 Science candidates are not available, in such circumstance, untrained +2 Science candidates may be appointed and similar is the case with regard to Trained Graduate teachers in Science.

3. Mr. Routray, learned senior counsel appearing for the petitioners in W.P. (C) No. 1762 of 2010 urged that Orissa Education (Establishment, Recognition and Management of Private Upper Primary School) Rules, 1991 provides the yardstick for Upper Primary schools as one Trained Graduate Headmaster, one I.A./I.Sc. with C.T. training. Apart from this, the Orissa Subordinate Education (Method of Recruitment and Condition of Services) Rules, 1993 which came into force on 17.12.1993 provides the condition of eligibility of teachers in Upper Primary Schools as well as in the Government High Schools. In Rule 8 (1) (d), the eligibility criteria for direct recruitment is provided that the candidates must have obtained bachelor degree in Arts, Science and Commerce with a degree of bachelor of education from a recognized University. Mr. Routray further submitted that apart from the above statutory rules, when Trained Graduate teachers in Arts, i.e., B.A. B.Ed. and Matric C.T. candidates are available, there is no reason to engage untrained teachers with

science background against vacant post for Trained Graduates. The Orissa Elementary (Method of Recruitment and Conditions of Service of Teachers and Officers) Rules, 1997, which has been referred to in paragraph-4.1 of the resolution under Annexure-4 itself prescribes the ratio between C.T. and B.Ed. teachers to be 60:40 and, therefore, the posts mentioned to be filled up by Trained Graduate and C.T. candidates, on the face of it, are contrary to the said rules.

4. A counter affidavit has been filed by the State wherein it has been stated that the Government decided to engage 10,534 numbers of Sikhya Sahayaks having science background with B.Ed. (mandatory in sixth to eighth class school). Even though, such a plea has been taken, no such mandatory provision has been brought to the notice of this Court during the hearing of the case nor has been mentioned in the counter affidavit. The percentage of total number of posts to be filled up by science graduate teachers has not been justified in the counter affidavit. Learned Advocate General, who appeared on behalf of the State, vehemently urged that it has become incumbent upon the Government to engage such teachers in view of coming into operation of the Right to Free and Compulsory Education Act, 2009 (for short, 'the Act, 2009') .

5. The question for consideration in these writ petitions as to whether the resolution dated 19.11.2009 under Annexure-4 and the consequential advertisement under Annexure-5 (in W.P. (C) No. 1762 of 2010) referred to above is irrational and unreasonable resulting in arbitrariness.

6. To consider the above questions, the connected records were called for from the Government. On perusal of the same, it appears that prior to the Act, 2009, which came into force with effect from 1.4.2010, the note sheet reflects in the connected record that on 23.7.2009, a note was prepared with regard to taking a resolution for recruitment of sanctioned posts by Sikhya Sahayaks to function as teachers in the Primary and Upper Primary schools being appointed and engaged by Zilla Parishads. The Additional Secretary to the Government made a note in the file on 7.11.2009 indicating that the Finance Department made concurrence for engagement of 17,820 Sikhya Sahayaks during the year 2009-2010 with stipulation that Sikhya Sahayaks shall be engaged in due observance of the procedures as per the governing rules, norms and guidelines in this connection and only after completion of school building and arrangement of necessary infrastructure so as to prevent idle engagement of Sikhya Sahayaks. The said note was approved by the Principal Secretary of the Department and other officials

including the Minister, Finance. Simultaneously, a draft resolution was prepared to be adopted by the Government with regard to engagement of Sikhya Sahayaks in the identified vacant posts which was sent to the Law Department. The Law Department gave some suggestion with regard to the age limits of the candidates which was accordingly adopted and the resolution dated 19.11.2009 was taken. By the time, the said resolution was taken, the Act, 2009 has not come into operation. Hence, the argument advanced by the learned Advocate General that in order to give effect to the Central Act, i.e., the Act, 2009, the above numbers of vacant posts for Science Trained Graduate, Arts Trained Graduates, +2 C.T. and Matric C.T. candidates have been identified is fallacious. The figures arrived at in the resolution do not find any basis as, neither the exact number of schools, which are upgraded to have Class-VIII and the primary schools have been taken into account, nor the exact number of vacancies and the required number of teachers as per the existing rules and regulations have been taken into consideration before passing the impugned resolution.

7. Even considering the Act, 2009 , it appears that in section 35 (1) under Chapter-VII of the said Act, power has been conferred in Central Government to make guidelines for the purpose of implementation of the provisions of the said Act and

no such guideline has been issued. More over, section 23 (1) of the Act, provides that a person possessing the minimum qualification as laid down shall be eligible to be appointed as a teacher and section 23 (2) provides that where a State does not have adequate training institutions in teacher education or teachers possessing minimum qualification are not available in sufficient numbers, the Central Government may, by notification, relax the minimum qualification required for appointment as a teacher.

8. No such notification has been made by the Central Government and it is also not the case of the State Government that teachers possessing minimum qualification are not available. It is also strange to find that even though in the connected file produced before this Court by the State, it appears that it was indicated to take the resolution strictly in accordance with the rules and regulations governing the field, but the rules referred to above in this judgment have not been taken into consideration in arriving at the figures indicated in the resolution which is wholly contrary to the provisions for Trained Graduates and C.T. teachers to be engaged as Primary and Upper Primary Schools as per the rules. However, this Court finds that in view of insertion of Article 21-A introduced into the Constitution of India by its 86th Amendment bringing Right to

Education under the fold of Fundamental Rights within Part-III of the constitution, the attempt of the State Government to provide teachers by up-gradation of Primary schools so that the children from four years to 14 years can avail such right guaranteed under Article 21-A, is praiseworthy. But in the present scenario, to complete the same, requires a yeoman effort.

9. Coming to the question raised by the petitioners, it is trite to state that policy of the State Government is to be reasonable, fair and non-arbitrary and must be based on the real object sought to be achieved and such policy can be declared to be invalid and inoperative if the same is unreasonable and arbitrary. It is well settled that where a particular mode is prescribed for operating an Act, the deviation to act in a different manner which does not disclose any discernible principle, it is not reasonable itself, shall be levelled as arbitrary and every State action must be informed by reason and it follows that an Act uninformed by reasons is per se arbitrary. (See ***Union of India and another v. International Trading Co. and another***, (2003)5 SCC 437 and ***A.K. Bhatnagar and others v. Union of India and others*** (1991) 1 SCC 544). There is no substantial difference between the rules and the regulations inasmuch as both are subordinate legislations under the powers conferred by the Statute. A rule framed under the Statute has statutory force.

Any notification made by the Government contrary to such statutory rules is to be treated as invalid and inoperative, even though such notification is published in the official gazette. In the instant case, it is found that even there is no notification made, but resolution has been adopted by the Government in its School and Mass Education department, as enumerated above. The facts in the instant case reveal that the proportion of Science Trained Graduate and Arts Trained Graduate teachers as well as the T.G. and C.T. teachers in the post to be filled up is contrary to the existing rules governing the field for recruitment of teachers to Primary and Upper Primary Schools.

10. In view of what has been discussed above, the only course open is to quash the resolution dated 19.11.2009 and the consequential advertisement vide Annexures-4 and 5 to W.P. (C) No. 1762 of 2010. Ordered accordingly. The said notification dated 19.11.2009 and the consequential advertisement, which have been annexed to the other writ petitions also stand quashed with the observation that the Government shall take immediate necessary steps for recruitment of such teachers (Sikhya Sahayaks) strictly in accordance with the existing rules after ascertaining the exact number of different types of teachers required to be recruited in

the various schools already existing or to be opened/upgraded,
as proposed.

11. The writ petitions are accordingly disposed of.

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M.M. Das, J.

***Orissa High Court, Cuttack.
June 29th, 2010/Biswal.***
