

**HIGH COURT OF ORISSA: CUTTACK****W.P.(C) No.10660 of 2011**

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

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Jadhunath Pradhan,  
S/o- Gokula Chandra Pradhan  
Vill: Jhadapada, P.S. Ranapur,  
Dist- Nayagarh, at present LB-372,  
Bhimatangi Housing Board Colony, BBSR,  
Phase-2, P.S. Airfield, Dist: Khurda.

... Petitioner

-Versus-

State of Odisha &amp; another

... Opp. Parties

For Petitioner : M/s. B. Mohapatra &  
S.K. Acharya.

For Opp. Parties : Mr. R.K.Mohapatra,  
Govt. Advocate.

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P R E S E N T:

**THE HONOURABLE THE CHIEF JUSTICE SHRI.V.GOPALA GOWDA  
AND  
THE HONOURABLE SHRI JUSTICE B.N.MAHAPATRA**

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Date of Judgment: 29.06.2012

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**B.N. Mahapatra, J.** This writ petition has been filed with a prayer to issue a writ/direction declaring Rule 9(c) of Orissa Superior Judicial Service and Orissa Judicial Service Rules, 2007 (for short, "Rules, 2007") ultra vires and inoperative as it runs contrary to Section 6 of the Orissa Reservation of Posts and Services (For Socially and Educationally Backward Classes) Act, 2008 (for short, "the Act, 2008"). Further prayer of the petitioner is for a direction to the opposite parties to fix the cut off date as 1<sup>st</sup> January, 2011 for determination of the age of the petitioner instead of 1<sup>st</sup> August, 2011 under the enabling

provision, i.e. Rule 47 of the Rules, 2007 and to allow the petitioner to appear in the competitive examination which was to be held pursuant to advertisement under Annexure-3 by giving 5 years upper age relaxation as per the provision of Section 6 of the Act, 2008.

2. Petitioner in the present case, who is a practising Advocate at Bhubaneswar Bar, challenges the provision of Rule 9 of the Rules, 2007 on the ground of not providing relaxation of age for Socially and Educationally Backward Classes (for short, "SEBC") and other reserved categories and also in fixing 1<sup>st</sup> day of August, 2011 as the cut off date for calculation of age of the candidates, who intended to appear in the written examination and test for the post of District Judge pursuant to advertisement No.1 of 2011 dated 15.4.2011 published in the English Daily "The New Indian Express" by this Court.

3. Mr. B. Mohapatra, learned counsel appearing for the petitioner submitted that the petitioner has been enrolled as an Advocate vide Orissa Bar Council Enrolment No.0-46/1993. His date of birth is 15<sup>th</sup> June 1966 and he has been practising as an Advocate at Bhubaneswar Bar since 1993 and he is a member of the Bhubaneswar Bar Association. The petitioner belongs to SEBC category as defined under clause (a) of Section 2 of the Orissa State Commission for Backward Classes Act, 1993 and included in the list of Backward Class at serial No.138 as 'Khandayat' by caste. The petitioner is interested to appear in the written examination and test for the post of District Judge through direct recruitment as advertised by this Court under Advertisement dated 15.4.2011 (Annexure-3). Because of the stipulations made in para-3 under the heading 'Eligibility' in the said advertisement, the

petitioner is not eligible to appear in the examination in question as he is over aged by one month sixteen days as on 1<sup>st</sup> August, 2011. Though the cut off date 1<sup>st</sup> August, 2011 fixed in the advertisement is in consonance with Rule 9(c) of the Rules, 2007, inclusion of such provision has no nexus with the aims and objectives for recruitment of District Judge through direct recruitment because many experienced Advocates like the petitioner, who were born between 1<sup>st</sup> January and 1<sup>st</sup> August, 2011, have become over-aged. As per general service rule and practice, 1<sup>st</sup> January of a particular year in which recruitment and selection test are held is always fixed as the cut off date for determining the age of a candidate for such selection. But the provision of Rule 9 (c) is a clear-cut deviation from the general practice and does not disclose any objective which sought to be achieved by inclusion of such a cut-off date. If the cut off date would have been fixed to 1<sup>st</sup> January, 2011 instead of 1<sup>st</sup> August, 2011, the petitioner would have become eligible to appear for selection to the post in question as his date of birth is 15.6.1966. Since the advertisement was issued on 15.4.2011, fixing of cut off date to 1.8.2011, would not have been permissible under general recruitment rule. Therefore, Rule 9 ( c) of the Rules, 2007 in which 1<sup>st</sup> August of the year has been fixed as cut off date is contrary to general recruitment rule and also violative of the provision of Articles 14 and 16 of the Constitution of India. In States like Rajasthan, West-Bengal, Delhi and Madhya Pradesh the cut off date has been fixed to 1<sup>st</sup> January of a particular year in which the recruitment notified is to be made for the post of District Judge. Hence, when other States have accepted 1<sup>st</sup> January of a particular year as the cut off date for determination of the age of the candidates for the purpose of selection to

the post of District Judge through direct recruitment fixing of cut-off date to 1<sup>st</sup> August by the State of Odisha is arbitrary and unreasonable.

4. Mr. Mohapatra further submitted that the petitioner belongs to SEBC category as per the notification issued by the State Government. Therefore, he has a right to get upper age relaxation upto 5 years as provided under Section 6 of the Act, 2008. Provision of the Act, 2008 has been made applicable to all posts which are meant to be filled up through direct recruitment. The said Act extends to whole of Odisha and the same has overriding effect over all other laws of similar nature. In view of such statutory provision, the petitioner who belongs to SEBC category has a right to get 5 years upper age relaxation in the selection of District Judge through direct recruitment in pursuance of the advertisement under Annexure-3. Such relaxation having not been provided under Rule 9 of Rules, 2007, the said Rules cannot be enforced being illegal and inoperative and it needs amendment as per the provision of Section 6 of the Act, 2008. Such 5 years upper age relaxation has been extended by all other States like West Bengal, Rajasthan and Madhya Pradesh in consonance with the provision of recruitment rules of those States. The petitioner and other Advocates of the Bhubaneswar Bar after noticing such discrepancy in the advertisement made for the year 2010 have submitted a representation on 10.3.2010 before opp. party no.1-Secretary, Department of Law, Government of Odisha for amendment of such provision of Rules, 2007 by extending 5 years upper age relaxation for the candidates belonging to SEBC category and fixing 1<sup>st</sup> January of the year as cut off date for calculation of the age of the candidates for selection to the post of District Judge through direct recruitment. The said

representation is still pending before opp. party no.1 for being considered. Rule 47 of the Rules, 2007 provides that the State Government can relax any provision of these Rules in respect of any category of persons or the posts in service.

5. Per contra, Mr. R.K. Mohapatra, learned Government Advocate reiterating the stand taken in the counter affidavit filed by opp. party no.2 submitted that the advertisement under Annexure-3 is in accordance with the provision of Rule 9(c) of the Rules, 2007. There is no scope for the petitioner to assail the same. The Rules, 2007 have been framed in exercise of power conferred under Article 233 of the Constitution of India. The Rules, 2007 being independent of the Act, 2008, the petitioner cannot bank upon the said Act to fortify his contention and establish his claim. The provisions under the Rules, 2007 have been made in consultation with the High Court. Validity of any of the provisions of the Rules, 2007 cannot be questioned on the ground of inconsistency with the Act, 2008. The cut-off date cannot be relaxed to suit the age of the petitioner and to make him eligible. The cut-off date as alleged is not contrary to the general recruitment rules as pleaded by the petitioner. There is no illegality in fixing cut-off date. Since there is no provision under the Rules, 2007 for relaxation of age for any reserved category candidates for recruitment to the post of District Judge, question of relaxation upto 5 years as provided under Section 6 of the Act, 2008 does not arise. When there is no provision of reservation for recruitment to Orissa Superior Judicial Service (District Judge), the provision under Rule 47 of the Rules, 2007 cannot be invoked. The petitioner has failed to show that the provisions of Act, 2008 shall apply to recruitment of Orissa Superior Judicial Service (District Judge).

Hence, challenge to Rule 9(c) of Rules, 2007 on the ground of invalidity merits no consideration.

6. On the rival contentions raised by the parties, the following questions fall for consideration by this Court:

- (i) Whether the provision of Rule 9(c) of the Rules, 2007 needs amendment to deal with relaxation of upper age limit for the candidates belonging to SEBC category in view of Section 6 of the Act, 2008 ?
- (ii) Whether fixing of the cut-off date as 1<sup>st</sup> August, 2011 provided under Rule 9 (c) of Rules, 2007 is just and proper ?

7. Under Clause 3(c) of the Advertisement (Annexure-3) applications were invited from eligible candidates for direct recruitment in the cadre of District Judge from Bar. It provides that a candidate in order to be eligible for direct recruitment to the post of District Judge must not be below 35 years of age and above 45 years as on 1<sup>st</sup> day of August, 2011. The upper age limit provided in clause 3(c) of the Advertisement is in consonance with Rule 9(c) of the Rules, 2007. Petitioner's grievance is that there should be provision for relaxation of upper age limit in case of SEBC category candidates in view of Section 6 of the Act, 2008. For ready reference, Section 6 of the Act, 2008 is reproduced herein below :

“6. For appointment of candidates belonging to Socially and Educationally Backward Class –

- (a) the upper age limit prescribed for the recruitment shall be increased by five years; and
- (b) any other relaxation or concession may be allowed by the State Government as may be prescribed.”

The stand of the opp. parties is that the Rules, 2007 have been framed in exercise of powers conferred under Article 309 read with Article 233 of the Constitution of India. The petitioner cannot bank upon the said Act, 2008 claiming relaxation of upper age limit increasing the same by 5 years.

8. Admittedly the Rules, 2007 have been framed, in exercise of power conferred by the proviso to Article 309 read with Articles 233, 234 and 235 of the Constitution of India, by His Excellency the Governor of Orissa, after consultation with the Orissa Public Service Commission and the High Court.

9. Article 233 of the Constitution deals with the provision for appointment of District Judge. The same is extracted below :

**“233. Appointment of district judges.-** (1) Appointments of persons to be, and the posting and promotion of district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.  
(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.”

10. Article 309 of the Constitution of India which contains the provisions for recruitment and conditions of service of persons serving the Union or a State reads as follows:

**“309. Recruitment and conditions of service of persons serving the Union or a State.-** Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of

persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.

11. Article 309 is expressly made that subject to the provisions of the Constitution, Acts of the appropriate Legislature may regulate the recruitment and conditions of service of persons appointed, to Public Service and Posts in connection with the affairs of Union or of any State. Article 233 of the Constitution, deals with appointment of District Judge which is not subject to any other provisions of the Constitution. Therefore, power under Article 309 conferred upon the appropriate Legislature is subject to the provisions under Article 233 of the Constitution. At this juncture, it would be beneficial to refer to the judgment of the Hon'ble Supreme Court in the case of ***State of Bihar and another v. Bal Mukund Sah and others***; AIR 2000 SC 1296 wherein it is held that :

“While Article 309 deals with recruitment and conditions of service of persons serving the Union or the State, a particular category of post forming the judicial wings has been carved out in Chapter VI in Articles 233 to 235 so far as the question of recruitment is concerned. When Article 309 itself uses the expression “subject to the provisions of this Constitution” it necessarily means that if in the Constitution there is any other provision specifically dealing with the topics mentioned in said Article 309, then Article 309 will be subject to those provisions of the Constitution. In other words, so far as recruitment to the judicial services of the State is concerned, the same being

provided for specifically in Chapter VI under Articles 233 to 237, it is those provisions of the Constitution which would override any law made by the appropriate legislature in exercise of power under Article 309 of the Constitution. The State legislature undoubtedly can make law for regulating the conditions of services of the officers belonging to the judicial wing but cannot make law dealing with recruitment to the judicial services since the field of recruitment to the judicial service is carved out in the Constitution itself in Chapter VI under Articles 233 to 236 of the Constitution.

xx xx xx In this regard the scheme of the Constitution and its basic frame work that the Executive has to be separated from the Judiciary has to be kept in view. Hence the general sweep of Article 309 has to be read subject to this complete Code regarding appointment of District Judges and Judges in the Subordinate Judiciary.”

12. At this stage, it would be appropriate to refer to clause (4) of Article 16 of the Constitution of India, which reads thus:

“16. (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.”

13. Article 16 of the Constitution of India provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State and no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. In the case of **Indira Sahani v. Union of India**, AIR 1993 SC 477, the Hon’ble Supreme Court held that Article 16(4) is not an exception to Article 16 but gives a permissible basis.

14. The Act, 2008 was enacted in exercise of power conferred under clause (4) of Article 16 of the Constitution read with relevant entry from List-

II of State List of the VII Schedule. Section 6 of the Act, 2008 provides age relaxation upto 5 years for candidates belonging to SEBC category.

15. In view of the above constitutional and statutory provisions, we do not find any reason as to why the relaxation upto 5 years for the candidates belonging to SEBC so far upper age limit is concerned, as provided under Section 6 of the Act, 2008, shall not be available to the candidates appearing for recruitment to the post of District Judge. Needless to say, the members of judicial service as well as the members of other service under the State represent the same social fabric in the State. Article 14 of the Constitution also mandates that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Therefore, there should not be any inconsistency between the Rules, 2007 and the Act, 2008.

16. In view of the above, the provision contained in Rule 9(c) of Rules, 2007 which was made before enactment of the Act, 2008 needs reconsideration so far 5 years' relaxation of upper age limit of the candidates belonging to SEBC category is concerned, in view of Section 6 of the Act, 2008.

17. However, law is well-settled that the function of the Court is only to expound the law and not to legislate. (***See District Mining Officer & others v. Tata Iron & Steel Co. & another, (2001) 7 SCC 358; Union of India and another v. Deoki Nandan Aggarwal, AIR 1992 SC 96; and also Government of Orissa and another v. Hanichal Roy and another (1998) 6 SCC 626.***)

18. In view of the above settled legal position, we direct the Registrar of this Court to draw the attention of the State Government for consideration of amendment of Rule 9(c) of the Rules, 2007 keeping in view the provision of Section 6 of the Act, 2008 and our observations made above.

19. So far the prayer for fixing the cut-off date as 1<sup>st</sup> January, 2011 instead of 1<sup>st</sup> August, 2011 under Rule 9(c) of the Rules, 2007 is concerned, there is no illegality in fixing the cut-off date as 1<sup>st</sup> August, 2011 for the purpose of determining the upper age limit. Since the recruitment pursuant to Advertisement No.1/2011 under Annexure-3 is already over, there is no need to deal with other contentions of the petitioner with regard to cut off date as the same would be only a futile exercise.

20. In the result, the writ petition is disposed of with the aforesaid observation and direction.

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**B.N. Mahapatra, J.**

**V. Gopala Gowda, C.J**

*I agree*

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**Chief Justice**