

HIGH COURT OF ORISSA : CUTTACK

W.P. (C) NOS. 22778, 18654 AND 18473 OF 2012

AND

W.P.(C) NO.16434 OF 2013

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

(In W.P.(C) No.22778 of 2012)

State of Odisha and others

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Petitioners

Versus

Manoj Kumar Panda and others

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Opposite parties

For Petitioner :

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Mr.Ashok Mohanty
Advocate General

For Opp. Parties :

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M/s.D.Sethy & S.C.Dash
(For O.P.40)

M/s.P.K.Mishra, D.C.Naik
& N.Behera
(For O.P.44)

M/s.A.K.Nath, S.K.Rout &
H.P.Mohanty
(For O.Ps.11 & 6)

M/s.A.K.Mohapatra, S.Mishra,
S.K.Barik & T.Dash
(For O.Ps.4 & 43)

M/s.B.C.Ghadei & S.K.Sahoo
(For O.Ps.50 & 54)

M/s.B.P.B.Bahali & A.K.Sahu
(For O.Ps.7,8,9 & 23)

(In W.P.(C) No.18654 of 2012)

Bhaskar Charan Nayak

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Petitioner

Versus

State of Odisha and another

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Opposite parties

For Petitioner :

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Mr.R.K.Rath, Sr. Advocate

For Opp. Parties :

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Mr.Ashok Mohanty
Advocate General
M/s.P.K.Mohanty

(For O.P.2)

(In W.P.(C) No.18473 of 2012)

Bibhuti Kumar Das Petitioner

Versus

State of Odisha and another Opposite parties

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

For Opp. Parties : Mr.Ashok Mohanty
Advocate General
M/s.P.K.Mohanty
(For O.P.2)**(In W.P.(C) No.16434 of 2013)**

Pratap Kumar Dash Petitioner

Versus

State of Odisha and another Opposite parties

For Petitioner : Mr. B.Routray, Sr. Advocate

For Opp. Parties : Mr.Ashok Mohanty
Advocate General
M/s.P.K.Mohanty
(For O.P.2)**PRESENT:****THE HONOURABLE SHRI JUSTICE M.M. DAS
AND
THE HONOURABLE DR.JUSTICE A.K.RATH**

Date of hearing:13.08.2013 : Date of judgment: 30.08.2013

DR. A.K.RATH, J. All the above mentioned writ applications involve common questions of fact and law. Hence, they were heard together and are now disposed of by this common judgment.

2. Facts of the case, in nutshell, are as follows:-

An advertisement was issued by the Odisha Public Service Commission (Advertisement No.05 of 2011-12) inviting applications from the candidates for admission to the Odisha Civil Services Preliminary Examination, 2011 for recruitment to the posts and services coming under the Odisha Civil Services (Category-I & Category-II). Pursuant to the same, the opposite parties in W.P.(C) No.22778 of 2012 and petitioners in other connected writ applications have applied for the said posts. For the purpose of disposal of these cases, they are described as petitioners. Thereafter they have filed Original Applications before the learned Odisha Administrative Tribunal (hereinafter referred to as “Tribunal”) for a declaration that the “Odisha Civil Service (Combined Competitive Recruitment Examination) Amendment Rules, 2011 is ultra vires the Constitution, and further declaration that the age limit provided in Clause-3 of the advertisement i.e. “A candidate shall be under 32 years of age as on 1st January, 2011” as invalid and inoperative in the eye of law and for a direction to allow them to appear in the Combined Competitive Recruitment Examination, 2011 pursuant to the advertisement and to set aside the advertisement providing reservation for more than 50%.

3. The grievance of the petitioners is that though they were eligible to appear in the Combined Competitive Recruitment Examination, 2011 as per the Odisha Civil Service (Combined Competitive Recruitment Examination) Rule, 1991 (hereinafter referred to as “1991 Rules”) till 13.7.2011 but by virtue of the amended Rule i.e. Odisha Civil Service

(Combined Competitive Recruitment Examination) Amendment Rules, 2011 (hereinafter referred to as “2011 Rules”) particularly the amendment brought to Rule 5(ii)(i)(a) of the 1991 Rules they became ineligible to make an application pursuant to advertisement dated 17.11.2011. The further case of the petitioners is that 2011 Rules has made discrimination between the candidates like the petitioners, who have crossed the age as prescribed in the said Rule and the candidates who have not crossed their age limit. In some cases reservation of 27% of the posts for SEBC candidates has been challenged.

4. Pursuant to issuance of notice, the State of Odisha, opposite party no.1 entered appearance before the learned Tribunal and filed comprehensive counter affidavit. Case of opposite party no.1 is that 2011 Rules can never be termed as unjust, illegal and unconstitutional, since the amendment is made with a purpose to maintain uniformity of age in entry into the Government service and for allowing young persons to enter into services keeping in view the increased thrust on e-governance and statewide initiatives to computerized offices for greater efficiency. It is further stated that the Government is not bound to adopt 1991 Rules after enactment of the 2011 Rules. Further Odisha Civil Services Examination could not be held from 2007 to 2010 due to pendency of the litigations before the learned Tribunal as well as this Court and due to restructuring of OAS, OPS and OFS cadres and creation of ORS and OT and AS and preparation of new Service Rules in 2010 and 2011. The vacancies from 2007 to 2011 including the vacancies for the year 2011

are consolidated and treated as vacancies for the year 2011 as per Rule 19-A of 1991 Rules and 2011 Rules. The eligibility of the candidates pursuant to the advertisement No.5 of 2011-2012 dated 17.11.2011 made by O.P.S.C. is governed by 2011 Rules. Out of the five services, namely, OAS, OPS, OCS, ORS and OT & AS, the ORS and OT & AS have been constituted in the year 2011. Hence, there were no vacancies in these services in the years 2007, 2008, 2009 and 2010.

5. The learned Tribunal, on a threadbare analysis of the pleadings of the parties and arguments advanced by respective counsel for the parties in an elaborate judgment, came to hold that 2011 Rules can never be termed as unjust, illegal and unconstitutional, since the amendment has been made with a purpose to maintain uniformity in entry into the Government services and for allowing young persons to enter into services for maintaining work culture and for increasing efficiency of the holders of civil posts. The amendment has been made following due procedure of law in exercise of the powers conferred by the proviso to Article 309 of the Constitution. The learned Tribunal further came to hold that there may be thousands other than the petitioners, who have not submitted their applications, since upper age limit has been fixed at 32 as on 1.1.2011. All such aspirants will not be benefited in any manner if the relief as has been sought for by the petitioners is allowed and it will be a hostile discrimination and violation of Articles 14 and 16 of the Constitution of India.

So far as percentage of reservation is concerned, the learned Tribunal came to hold that since the petitioners have not challenged the Odisha Reservation of Posts and Services (for Socially and Educationally Backward Classes) Act, 2008 (hereinafter referred to as “Act, 2008”) which provides 27% reservation for SEBC candidates, there is no scope for the Tribunal to observe anything regarding irregularity or illegality in the advertisement providing reservation of 27% in favour of SEBC candidates. The said judgment has been challenged by the State of Odisha as well as the writ petitioners, who are applicants before the Tribunal.

6. Be it noted that the State of Odisha has challenged the impugned judgment on the ground, inter alia, that the observation made in paragraph-14 of the judgment observing that the State authorities are at liberty to move the Central Government for inclusion of the Act, 2008 in the 9th Schedule of the Constitution as early as practicable to avoid future complications on the ground, inter alia, that the learned Tribunal, having refused to entertain the petition on merit, lacks jurisdiction to issue any direction.

7. We have heard Shri B. Routray, learned Senior Counsel, Shri R.K.Rath, learned Senior Counsel, Shri J. Pattnaik, learned Senior Counsel and Shri B.P.B.Bahali, learned counsel appearing for the petitioners and learned Advocate General for the State.

8. Crux of the issue is as to whether the petitioners, who are eligible under the 1991 Rules, which were subsequently amended in 2011, are governed under the 1991 Rules or 2011 Rules. The further question that hinges for consideration is as to whether providing 27% reservation for SEBC candidates, which exceeds 50% of the total vacancies, is unjust, illegal and unconstitutional.

9. For better reference, Rules 4, 5 and 19(A) of the 1991 Rules are quoted hereunder:-

4. Holding of Examination-(1) The concerned Department of Government shall intimate each year the vacancy position to the Commission through the G.A. Department indicating the post reserved for candidates belonging to the categories of Scheduled Cases, Schedule Tribe, Socially and Educationally Backward Classes, Ex-Servicemen Sportsmen and Women.

(2) The Commission shall on receipt of the vacancy position from the G.A. Department announce and invite application from the candidates eligible to appear in the examination.

(3) The Commission shall conduct the combined competitive Examination in the manner prescribed in Schedule II for recruitment to the Services/Posts mentioned in Schedule I by an order to be issued by the Commission on that behalf.

(4) The date on which and the place at which the examination will be held, shall be decided and notified by the Commission.

(5) The candidates shall be examined in any of the subject/subjects specified in Schedule III.

5. Condition of eligibility – In order to be eligible to compete for the examination a candidate must satisfy the following conditions, namely:

(1) Nationality –

(i) He shall be a citizen of India;

(ii) He shall be able to speak, read and write Oriya; and shall have Oriya as the language subject in the H.S.C. Examination or an equivalent examination or has been declared to have passed a test in Oriya language equivalent to the Middle School standard conducted by the Education Department of the Government of Orissa.

(2) Age-

(i) Candidates shall be under thirty two years and over twenty one years of age on the first day of August of the year in which applications are invited

Provided that –

(a) where applications have not been invited by the Commission during any particular year to fill up the vacancies of that year, the applicants who would have been eligible to compete at the examination had the applications been invited by the Commission during that year shall be eligible to compete at the examination held in the subsequent year;

(b) The maximum age-limit in case of candidate belonging to Scheduled Castes or Scheduled Tribes shall be relaxed by five years; and

(b-1) The upper age-limit in case of candidate belonging to Socially and Educationally Backward Classes shall be relaxed by three years.

(c) The upper age-limit in case of candidates, who are ex-servicemen, shall be relaxed in accordance with the Orissa Ex-Servicemen (Recruitment to State Civil Services and Posts) Rules, 1985.

(d) The upper age-limit in case of woman candidates shall be relaxed by five years.

(ii) Evidence of age which shall be accepted by the Commission is that entered the H.S.C. Examination or Matriculation or Secondary School Leaving Certificates

or a Certificate recognised by an Indian University as equivalent thereto.

(3) Educational Qualification-

He must hold a Bachelor's Degree from any University incorporated by an Act of the Central or a State Legislature in India or an Educational Institution established by an Act of Parliament or deemed to be a University under Section 3 of the Universities Grants Commission Act, 1956 or a foreign University approved by the Central Government from time to time.

19-A. Notwithstanding anything contained in these rules and the provisions of the recruitment rules specified in column (3) of Schedule I, -

- (i) where the Commission for any reason could not conduct the examination for one or more years in accordance with rule 4, a single examination may be conducted in the subsequent years for all the vacancies intimated during different years including the current year to the Commission, by treating them as the vacancies of the year in which the said examination is actually conducted and in that case the proviso to clause (i) of sub-rule of rule 5 shall apply; and
- (ii) where a single examination is conducted all the vacancies which are required to be filled up by promotion, selection or transfer, as the case may be, under the relevant recruitment rules, remained unfilled shall be treated as the vacancies of the year in which such examination is conducted.

10. The said Rule was amended and published in the extraordinary Gazette of the State of Odisha on 15.7.2011. In sub-rule (2) clause (i) along with proviso thereunder, the following are substituted:

“(i) Age Limits: A candidate must have attained the age of 21 years and must not be above the age of 32 years on the first day of January of the year in which the advertisement is made:

Provided that the Upper Age limit in respect of reserved categories of candidates shall be relaxed for the respective categories in accordance with the provisions of the Orissa Civil Service (Fixation of upper Age Limit) Rules, 1989”.

Further in clause (i), in Rule 19(A), the words “and in that case the proviso to clause (1) of sub-rule (2) of rule 5 shall apply”, were omitted.

11. On a conspectus of Rule 4(1) & (2) of the 1991 Rules, it is evident that the concerned department of Government shall intimate each year the vacancy position to the Commission through the General Administrative Department indicating the post reserved for different categories and the Commission shall on receipt of the vacancy position from the General Administrative Department announce and invite application from the candidates eligible to appear in the examination. Rules 4(3) casts a duty on the Commission to conduct the combined competitive Examination in the manner prescribed in Schedule II for recruitment to the Services/Posts mentioned in the Schedule I by an order to be issued by the Commission on that behalf. ‘Year’ has been defined in Rule 2 as the calendar year. On a conjoint reading of sub-rules (1)(2)(3) of Rules 4 of the 1991 Rules, a conclusion is irresistible that the terms ‘shall’ appearing in the Rule 4(1) 4(2) 4(3) and ‘each year’ appearing in Rule 4(1) cast a statutory duty on the Odisha Public Service Commission (hereinafter referred to as “OPSC”) to conduct the Odisha Civil Services Examination each calendar year. Furthermore, Clause (a) of sub-rule (2) of Rule 5 of the 1991 Rules was brought to the 1991 Rules by

virtue of an amendment of the year 1993. The same provides that where applications have not been invited by the Commission during any particular year to fill up the vacancies of that year, the applicants who would have been eligible to compete at the examination had the applications been invited by the Commission during that year shall be eligible to compete at the examination held in the subsequent year.

12. Furthermore, Rule 19-A of the 1991 Rules was inserted by way of amendment of the year 1996. However, the 1991 Rules was again amended in 2011 and the same was published in the Orissa Gazette making cosmetic changes in clause-(i) of sub-rule (2) of Rule 5 and Rule 19-A. Sub-rule (2) of Rule 5 was amended and substituted providing age limits for the candidates. Clause (a) of sub-rule (2) of Rule 5 providing age relaxation to the candidates was deleted. The words “and in that case the proviso to clause-(i) of sub-rule (2) of Rule 5 shall apply” appearing in Rule 19-A has been omitted.

13. The pivotal issue is when the Commission could not invite applications during the particular year to fill up the vacancies of that year and the candidates who were eligible to compete at the examination, had applications been invited by the Commission during that year and eligible to compete the examination held in the subsequent year, can such candidates be debarred from appearing at the Odisha Civil Services Preliminary Examination, 2011 for recruitment to the post and services coming under the Odisha Civil Services (Category-I & II) pursuant to the

Advertisement No.5 of 2011-2012 issued by the OPSC, after amendment made to Rule 5 and 19-A of the Rules, 1991.

14. In ***Y.V. Rangaiah and others v. J. Sreenivasa Rao and others***, (1983) 3 Supreme Court Cases 284, the question arose as to whether the vacancies which occurred in the post of Lower Division Clerk prior to amendment of the Andhra Pradesh Registration and Subordinate Service Rules would be governed by old rules or the amended rules. In paragraph 9 of the said judgment, their Lordships held as follows:-

“9. Having heard the counsel for the parties, we find no force in either of the two contentions. Under the old rules a panel had to be prepared every year in September. Accordingly, a panel should have been prepared in the year 1976 and transfer or promotion to the post of Sub-Registrar Grade II should have been made out of that panel. In that event the petitioners in the two representation petitions who ranked higher than respondents 3 to 15 would not have been deprived of their right of being considered for promotion. The vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules. It is admitted by counsel for both the parties that henceforth promotion to the post of Sub-Registrar Grade II will be according to the new rules on the zonal basis and not on the State-wide basis and, therefore, there was no question of challenging the new rules. But the question is of filling the vacancies that occurred prior to the amended rules. We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules. ”

15. In ***A.A. Calton V. Director of Education and another***, (1983) 3 Supreme Court Cases 33, the Hon'ble apex Court held that the legislature may pass laws with retrospective effect subject to the

recognised constitutional limitations, but no retrospective effect should be given to any statutory provision so as to impair or take away an existing right, unless the statute either expressly or by necessary implication directs that it should have such retrospective effect.

16. In ***State of Rajasthan V. R. Dayal and others***, (1997) 10 Supreme Court Cases 419, again the same view was reiterated. Their Lordships held that the posts which fell vacant prior to the amendment of the rules would be governed by the original rules and not by the amended rules. It was further held that as a necessary corollary, the vacancies that arose subsequent to the amendment of the rules are required to be filled up in accordance with the law existing as on the date when the vacancies arose.

17. In ***B.L. Gupta and another V. M.C.D.***, (1998) 9 Supreme Court Cases 223, the question arose before the Hon'ble apex Court as to whether the vacancies to the posts of Assistant Accountant in Delhi Electric Supply Undertaking, which had arisen prior to the amended Rule, 1995 came into force had to be filled up according to the statutory rules which were framed in the year 1978 or Rules of 1995. In paragraph 9 of the said judgment, their Lordships held as under:-

“9. When the statutory rules had been framed in 1978, the vacancies had to be filled only according to the said Rules. The Rules of 1995 have been held to be prospective by the High Court and in our opinion this was the correct conclusion. This being so, the question which arises is whether the vacancies which had arisen earlier than 1995 can be filled as per the 1995 Rules. Our attention has

been drawn by Mr. Mehta to a decision of this Court in the case of *N.T. Devin Katti v. Karnataka Public Service Commission*. In that case after referring to the earlier decisions in the cases of *Y.V. Rangaiah v. J. Sreenivasa Rao*, *P. Ganeshwar Rao v. State of A.P.* and *A.A. Calton v. Director of Education* it was held by this Court that the vacancies which had occurred prior to the amendment of the Rules would be governed by the old Rules and not by the amended Rules.”

18. The same view has been reiterated by the Hon’ble apex Court in ***A. Manoharan and others V. Union of India and others***, (2008) 3 Supreme Court Cases 641. In paragraph 25 of the said judgment, their Lordships held as under:-

“25. Furthermore, the Regulations have been amended only with effect from 11-8-2004. It would have a prospective effect. It cannot be applied retrospectively. Any vacancy which has arisen prior to coming into force of the said amended Regulations must be filled up in terms of the law as was existing prior thereto. (*State of Rajasthan v. R. Dayal*, SCC para 8).”

19. Again in ***Union of India and others V. Vipinchandra Hiralal Shah***, (1996) 6 Supreme Court Cases 721, their Lordships in paragraph 11 of the said judgment held as follows:-

“11. It must, therefore, be held that in view of the provisions contained in Regulation 5, unless there is a good reason for not doing so, the Selection Committee is required to meet every year for the purpose of making the selection from amongst the State Civil Service officers who fulfil the conditions regarding eligibility on the first day of January of the year in which the Committee meets and fall within the zone of consideration as prescribed in clause (2) of Regulation 5. The failure on the part of the Selection Committee to meet during a particular year would not dispense with the requirement of preparing the Select List for that year. If for any reason the Selection Committee is not able to meet

during a particular year, the Committee when it meets next, should, while making the selection, prepare a separate list for each year keeping in view the number of vacancies in that year after considering the State Civil Service officers who were eligible and fell within the zone of consideration for selection in that year.”

20. Though a stand has been taken by the State of Odisha that Odisha Civil Service Examination could not be held from 2007 to 2010 due to pendency of the cases before the learned Tribunal, High Court and due to restructuring of OAS, OPS and OFS cadre and creation of ORS and OT & AS and preparation of New Service Rule of 2010 and 2011 existing vacancies including the vacancies for the year 2011 are consolidated and treated to be the vacancies of the year 2011 as per Rule 19-A of the 1991 Rules and 2011 rules, but then the petitioners brought to the notice, Annexure-6, i.e. Draft of Approval dated 20.1.2012, the letter sent by the Revenue and Disaster Department to the Under Secretary to Govt. of Odisha, Cooperation Department showing the vacancy position occurred year-wise i.e. from 2007 to 2011. As would be evident from the said Annexure, the number of vacancies in OAS (Junior Branch) were 34, 44, 20, 42, 50 for the years 2007 to 2011 respectively. In view of the same, the submission of learned Advocate General that since the five services, namely, OAS, OPS, OFS, ORS and OT & AS have been constituted in the year 2011 and as such there was no vacancy in those services in the years 2007 to 2011 have no legs to stand.

21. Relying on the decisions of the Hon'ble apex Court, in the case of **Government of Orissa v. Haraprasad Das**, (1998) 1 SCC 487

and in ***State of Orissa v. Bhikari Charan Khuntia***, (2003) 10 SCC 144, learned Advocate General submitted that merely because the vacancies are notified, the State is not obliged to fill up all the vacancies and that to fill up or not to fill up a post being a policy decision, unless it is infected with arbitrariness, there is no scope for interference in judicial review. There is no quarrel over the said proposition of law.

22. Rule 4 of the 1991 Rules provides that the Commission shall, on receipt of the vacancy position from the G.A. Department, announce and invite applications from the candidates eligible to appear in the examination. It is the statutory duty of the Commission to hold examination after the concerned Department of the Government intimates the vacancy position to the Commission through G.A. Department indicating the post reserved for candidates each year. The word “shall” occurring in sub-rule (1)(2)(3) of Rule 4 of 1991 Rules, more particularly, ‘each year’ appearing in sub-rule(1) cast a statutory duty on the OPSC to hold Odisha Civil Services Examination each year. It is incumbent upon the OPSC to carry out the mandate of the Rule and to see that examination is held in each year. The amendment brought in 2011 to the 1991 Rules would have prospective effect. In view of the authoritative pronouncements of the Hon’ble apex Court in the decisions cited supra, the conclusion is irresistible that the posts which fell vacant prior to the amendment of the 1991 Rules would be governed by the original rules and not by the 2011 Rules. As a necessary corollary, the vacancies that arose subsequent to the amendment of the rules are required to be filled

up in accordance with the law existing as on the date when the vacancies arose.

23. In view of analysis made in the preceding paragraphs, we hold that the candidates, who were eligible prior to amendment of the rules came into force i.e. 2011 Rules, are eligible to appear at the examination. A large number of candidates could not have applied to the posts in view of the amending Rules. For the said purpose, we direct that the OPSC may issue corrigendum in all the newspapers making it clear that the candidates, who are otherwise eligible before the amending rules came into force, can apply to appear at the Odisha Civil Services Preliminary Examination, 2011 for recruitment to the Posts and Services coming under the Odisha Civil Services (Category-I and Category-II).

24. The next question, which survives for our reconsideration, is as to whether providing 27% reservation for SEBC candidates, which exceeds 50% of the total vacancies, is constitutionally valid. None of the candidates before the learned Tribunal have challenged the Act, 2008 which provides 27% reservation for SEBC candidates. Except making submission that reservation cannot exceed 50%, as has been rightly observed by the learned Tribunal, there is no scope to observe anything relating to irregularity or illegality in the impugned advertisement relating to reservation of 27% in favour of the SEBC candidates. The State of Odisha enacted the Act, 2008 to provide 27% reservation for the SEBC candidates. The OPSC has issued an advertisement providing 27%

reservation in accordance with the said Act. Since the constitutionality of the Act, 2008 is not questioned by any of the petitioners, the OPSC is justified in issuing advertisement. However, the observations of the learned Tribunal that the State authorities are at liberty to move the Central Government for inclusion of the Act, 2008 in the 9th Schedule of the Constitution as early as practicable to avoid future complications or continue with the reservation within 50%, is neither desirable nor warranted. The said observation made in paragraph-14 of the judgment is hereby quashed.

25. The writ applications are accordingly allowed to the extent indicated above. There shall be no order as to costs.

M.M.DAS, J. I agree.

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DR. A.K.RATH, J.

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M.M.DAS, J.