

## **THE HIGH COURT OF ORISSA : CUTTACK**

### **W.A. Nos.386 & 389 of 2013**

In the matter of an application under Clause-10 of the Latter Patent read with Chapter-III, Rule-6 of the Rules of the High Court of Orissa

#### **W.A. No.386 of 2013**

Chairman, Odisha Joint Entrance  
Examination Committee. .... Appellant

-Versus-

Rajashree Nayak .... Respondent

For Appellant : M/s. S. Palit, A.K.Mahana,  
A. Mishra, R.Tripathy,  
A. Parija.

For Respondent : M/s. A.Mohapatra(Sr.Advocate).

#### **W.A. No.389 of 2013**

Rajya Sainik Board, Odisha .... Appellant

-Versus-

Rajashree Nayak .... Respondent

For Appellant : M/s. D.K. Sahoo-1 &  
B.K.Behera.

For Respondent : M/s. A.Mohapatra (Sr.Advocate)  
T. Das, S.S.Mohapatra,  
S.K.Mishra, S.K.Barik,  
S.Samal,S.P.Mangaraj &  
S.Nath.

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**P R E S E N T:**

**THE HON'BLE MR. JUSTICE INDRAJIT MAHANTY.**  
**&**  
**THE HON'BLE MR. JUSTICE B.N.MAHAPATRA.**

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Date of hearing: 25.09.2013Date of Judgment: 27.09.2013

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**I. Mahanty, J.** The aforesaid writ appeals have been filed by the Chairman, Orissa Joint Entrance Examination Committee and the Rajya Sainik Board respectively, seeking to challenge the judgment dated 30.11.2012 passed by the learned Single Judge in W.P.(C) No.16218 of 2012, whereby, the learned Single Judge have directed as follows:

**“12.** Accordingly, the writ petition is allowed. The Chairman, Joint Entrance Examination, 2012, Odisha and Director, Medical Education and Training, Odisha-opposite party Nos.2 & 3 respectively are directed to give admission to the petitioner in MBBS course as per her rank under the category of Ex-Serviceman quota seat forthwith.”

**2.** The aforesaid judgment passed by the learned Single Judge have been challenged by the Chairman, OJEE on various grounds, inter alia, that the circular of the Ministry of Defence vide D.O. No.3547 AS(R) 94 dated 03.06.1994 providing for classification of priorities and fixing prioritization is distinct and different from the concept of reservation and consequently the learned Single Judge has erroneously placed reliance on the decision of the apex Court reported in the case of **Sansar Chand Atri v. State of Punjab and Another,**

A.I.R. 2002 S.C. 1618 as well as the decision in the case of Indra Sawhney vs. Union of India, A.I.R. 1993 S.C. 477. It is further contended on behalf of the appellant that the impugned judgment was not in consonance with the latest judgment of the Hon'ble Supreme Court in the case of **Faiza Choudhary v. State of Jammu and Kashmir and Another**, A.I.R. 2013 Supreme Court 1115.

Mr. D.K. Sahoo-1, learned counsel appearing for the Rajya Sainik Board reiterated the arguments advanced on behalf of the Chairman, OJEE.

**3.** Learned counsel for the Respondent, on the other hand, while supporting the judgment passed by the learned Single Judge submitted that the purported prioritization issued by the Government of India in the Ministry of Defence dated 03.06.1994 cannot be held to be a policy decision of the Government of India since the said communication was issued by the Additional Secretary in the Department of Defence since different States were prescribing different preferences for wards of Defence Personnel. In para-2 of the said circular it has been noted that even though the education is a State subject, for the purpose of standardization of prioritization was recommended. It is therefore contended that the said communication was neither a policy decision nor a directive of the Union of India and

at best a recommendation for the purpose of standardization of procedure amongst various States and nothing more.

It was submitted that the Government of Orissa in the Industries Department vide its circular No. 9829 dated 08.07.2009 declared that in pursuance of the provision of the Orissa Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2007 (for short Act 2007), the State Government have reserved..... 03% seats in Government Medical Colleges in MBBS and BDS courses for Children/Widows of Ex-Serviceman, who are native of Orissa. It further stipulates that the prioritization policy adopted for admission to the seats reserved for above categories was placed before the Policy Planning Body (P.P.B) in its meeting held on 01.07.2009 and after detailed deliberation, the Policy Planning Body (P.P.B.) recommended that prioritization prescribed by the Ministry of Defence, Government of India for Ex-Serviceman communicated vide their D.O. No.3547 AS(R) 94 dated 03.06.1994 may be followed. Thereafter, the Government directed that after careful consideration of the aforesaid recommendation of the Policy Planning Body, it is decided that the following prioritization will be followed during the academic session 2009-10 for admission in Government Medical Colleges in MBBS and BDS courses.

The Chart of Prioritization is quoted hereunder:

“Priority-I Children/widows of Ex-Servicemen killed in

	action
Priority-II	Children of Ex-Servicemen disabled in action
Priority-III	Children/widows of Ex-Servicemen who died in peace time with death attributable to military service.
Priority-IV	Children of Ex-Servicemen disabled in peace time with disability attributable to military service.
Priority-V	Children of Ex-Servicemen who are in receipt of Nerve Gallantry Awards.

- 1) Param Vir Chakra
- 2) Ashok Chakra
- 3) Sarvottam Yudh Seva Medal
- 4) Maha Vir Chakra
- 5) Kirti Chakra
- 6) Uttam Yudh Seva Medal
- 7) Vir Chakra
- 8) Shaurya Chakra
- 9) Yudh Seva Medal
- 10) Sena, Nau Sena, Vayu Sena Medal
- 11) Mention-in-Des

Priority-VI Children of Ex-Servicemen”

**4.** It would be worthwhile to note herein that whereas the Government of India guidelines referred to hereinabove referred to wards of “Defence Personnel”, the decision of the Government of Orissa dated 08.07.2009 for reasons which left unexplained, limited to the children and widows of “Ex-serviceman” and, in fact, in the said communication omitted priority-VII as suggested by the Ministry of Defence pertaining to the Wards of serving personnel.

**5.** The Act 2007 prescribes that the admission in Professional Educational Institutions shall be as provided under Section 3, which is quoted hereunder:

**“3. Method of admission in professional educational institutions-** Subject to the provisions of this Act, admission of students in all private professional educational institutions, Government institutions and sponsored institutions to all seats including lateral entry seats, shall be made through JEE conducted by the Policy Planning Body followed by centralized counseling in order of merit, in accordance with such procedure as recommended by the said body and approved by the Government.”

**6.** It is admitted by Mr. Palit, learned counsel appearing for the appellant in W.A. No.386 of 2013 that there is no further decision by the Policy Planning Body created under the 2007 Act for any subsequent year beyond the academic year 2009-10 regarding prioritization, but it is asserted that the same practices continued thereafter. It is the admitted fact pleaded by both the counsel for the appellants that OJEE had sent list of candidates, who had applied under the Ex-Serviceman category to the Rajya Sainik Board and the Rajya Sainik Board in turn sent the list of prioritization to the OJEE on 13<sup>th</sup> June, 2013. It would be most relevant herein to take note of a letter of the Rajya Sainik Board to the Secretary, Employment, Technical Education and Training Department, Government of Orissa raising the following query:

**“2.** It is submitted that the above Govt. Order was valid for the academic session 2009-10. But no further Govt. Order notifying the prioritization to be followed from the academic session 2010-11 onwards for admission of the children of Ex-servicemen in Engineering and Govt. Medical Colleges is available in this office. In absence of Govt. Order the same prioritization policy has been followed over the years.

**3.** In view of the above, you are requested to kindly confirm whether the above Govt. Order is still in force or revise Govt. Order notifying the prioritization procedure has been published. If so, a copy of the same may kindly be provided to this office at the earliest which is required to be produced before the Hon'ble High Court, Odisha as one of the Ex-serviceman has filed Writ Petition (W.P.C. 16218/2012) challenging the prioritization policy."

It appears that in response to the aforesaid query, the State of Orissa through its Additional Secretary to Government in the Department of Employment and Technical Education and Training vide its letter dated 23.07.2013 responded as follows:

**"1.** The prioritization prescribed vide order No.9829 dt. 08.07.2009 is being followed since academic session 2009-10 and the said prioritization policy vide above mentioned order is also applicable for this academic session."

**7.** In the light of the aforesaid communication, it would be clear therefrom that there has been no decision by the Policy Planning Body for any prioritization for Ex-Serviceman category beyond the academic year 2009-10. In the present case, it would be even more important to take note of the fact that even the communication by the Additional Secretary of the Department of Employment and Technical Education and Training dated 23.07.2013 while being wholly without jurisdiction/competence and in clear violation of Section 3 of the Act 2007. In fact, the classification was issued post facto i.e. after 13<sup>th</sup> of June, 2007, by which date the Rajya Sainik Board had already sent the prioritization list to the OJEE for the year 2013.

**8.** In the light of the aforesaid facts as noted hereinabove, we are of the considered view that there, in fact, exists no policy decision either by the Policy Planning Body under Section 3 of the Act 2007 or the State of Orissa beyond the academic year 2009-10 and, therefore, giving effect to such prioritization for the year 2013 is wholly without sanction/authority of law.

**9.** We have perused the judgment passed by the learned Single Judge, which is impugned before us. It would be relevant at this point to take note of the fact that although the writ petitioner had appeared in 2012 OJEE and being aggrieved by the prioritization made for the said year had originally filed the writ petition, yet, during pendency of the challenge to the 2012 OJEE and the result thereof, the petitioner appeared at the 2013 OJEE and thereafter had sought for amendment of the prayer in the present writ application covering 2013 admission, which had been allowed.

**10.** The Hon'ble Supreme Court in the case of **Faiza Choudhary** (supra) relied upon by the appellants has laid down that the medical seat of one academic year cannot be carry forward to next academic year. In the case at hand, the learned Single Judge found that the writ petitioner though was eligible for admission into the year 2012 could not be granted during the said year due to the pendency of the proceeding and during the interregnum, the petitioner had also



appeared in the 2013 NEET exam. On consideration of her position in the 2013 examination and the position of the other candidates in the category for “Ex-Servicemen”, directions had been issued on 19.07.2013 by the learned Single Judge to keep one seat vacant in first year MBBS course 2013 in any of the Government medical colleges. Pursuant to such direction, it is stated on behalf of the OJEE that one seat at Burla Medical College has been kept reserved as the cut off date for admission into 2013 i.e. 30.09.2013 was not over.

**11.** Therefore, in the facts and circumstances of the present case, we are of the considered view that the principle laid down by the Hon’ble Supreme Court in the Case **Faiza Choudhury** (supra) would not have been any application for the fact situation of the present case, since the writ petitioner was also a candidate for the NEET 2013 and the impugned directions had been issued to admit the respondent in the academic year 2013 itself, therefore, no question of carry over arises.

It would be appropriate at this stage to refer to the judgment of the Hon’ble Supreme Court in the case of **Asha vs. Pt. B.D. Sharma, University of Health Sciences and others**, AIR 2012 SC 3396. The Hon’ble Supreme Court in the case of **Asha** (supra) after taking note of its earlier judgment in the case of **Mriduldhara (minor and another) (supra)** held as under:

“31. There is no doubt that 30<sup>th</sup> September is the cut-off date. The authorities cannot grant admission beyond the cut-off date which is specifically postulated. But where no fault is attributable to a candidate and she is denied admission for arbitrary reasons, should the cut-off date be permitted to operate as a bar to admission to such students particularly when it would result in complete ruining of the professional career of a meritorious candidate, is the question we have to answer. Having recorded that the appellant is not at fault and she pursued her rights and remedies as expeditiously as possible. We are of the considered view that the cut-off date cannot be used as a technical instrument or tool to deny admission to a meritorious students. The rule of merit stands completely defeated in the facts of the present case. The appellant was a candidate placed higher in the merit list. It cannot be disputed that candidates having merit much lower to her have already been given admission in the MBBS course. The appellant had attained 832 marks while the students who had attained 821, 792, 752, 740 and 731 marks have already been given admission in the ESM category in the MBBS course. It is not only unfortunate but apparently unfair that the appellant be denied admission. Though there can be rarest of rare cases or exceptional circumstances where the courts may have to mould the relief and make exception to the cut-off date of 30<sup>th</sup> September, but in those cases, the Court must first return a finding that no fault is attributable to the candidate, the candidate has pursued her rights and legal remedies expeditiously without any delay and that there is fault on the part of the authorities and apparent breach of some rules, regulations and principles in the process of selection and grant of admission. Where denial of admission violates the right to equality and equal treatment of the candidate, it would be completely unjust and unfair to deny such exceptional relief to the candidate. ”

“36. Now, we shall proceed to answer the questions posed by us in the opening part of this judgment.

ANSWERS

(a) The rule of merit for preference of courses and colleges admits no exception. It is an absolute rule and all stakeholders and concerned authorities are required to follow this rule strictly and without demur.

(b) 30<sup>th</sup> September is undoubtedly the last date by which the admitted students should report to their respective colleges without fail. In the normal course, the admissions must close by holding of second counseling by 15<sup>th</sup> September of the relevant academic year (in terms of the decision of this Court in Priya Gupta (supra)). Thereafter, only in very rare and exceptional cases of unequivocal discrimination or arbitrariness or pressing emergency, admission may be permissible but such power may preferably be exercised by the courts. Further, it will be in the rarest of rare cases and where the ends of justice would be subverted or the process of law would stand frustrated that the courts would exercise their extraordinary jurisdiction of admitting candidates to the courses after the deadline of 30<sup>th</sup> September of the current academic year. This, however, can only be done if the conditions stated by this Court in the case of Priya Gupta (supra) and this judgment are found to be unexceptionally satisfied and the reasons therefor are recorded by the court of competent jurisdiction.

(c) & (d) Wherever the court finds that action of the authorities has been arbitrary, contrary to the judgments of this Court and violative of the Rules, regulations and conditions of the prospectus, causing prejudice to the rights of the students, the Court shall award compensation to such students as well as direct initiation of disciplinary action against the erring officers/officials. The court shall also ensure that the proceedings under the Contempt of Courts Act, 1971 are initiated against the erring authorities irrespective of their stature and empowerment.

Where the admissions given by the concerned authorities are found by the courts to be legally unsustainable and where there is no reason to permit the students to continue with the course, the mere fact that such students have put in a year or so into the academic course is not by itself a ground to permit them to continue with the course.”

(underlined for emphasis)

**12.** In the light of the aforesaid discussions and considering the submissions advanced, we find no justifiable ground to interfere with the order impugned, though for additional reasons as noted

hereinabove in support of the conclusion arrived at by the learned Single Judge. Hence, both the writ appeals stand dismissed and consequently, the appellant-OJEE is directed to ensure admission of the respondent in the MBBS course at Burla Medical College in the seat reserved by them pursuant to the interim direction of the learned Single Judge dated 19.07.2013 forthwith since the cut off date for admission for 2013 MBBS course is 30<sup>th</sup> September, 2013.

**B.N. Mahapatra, J.** I agree.

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**I.Mahanty, J.**

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