

HIGH COURT OF ORISSA**D.D -10-Nov-2023****W.P.(C) No. 27118 of 2023 & W.P.(C) No.23014 of 2023**

Applications under Articles 226 & 227 of Constitution of India.

W.P.(C) No. 27118 of 2023

Dr. Tribikram Debata Petitioner

Versus

State of Odisha and others Opp. Parties

W.P.(C) No. 23014 of 2023

Dr. Nimai Charan Mishra Petitioner

Versus

State of Odisha and others Opp. Parties

Legislation:

Articles 226 & 227 of the Constitution of India

Odisha Medical Education Service (Method of Recruitment and Conditions of Service) Rules, 2013

Odisha Medical Education Service (Method of Recruitment and Conditions of Service) Rules, 2021

Subject: Challenge against the requirement of three years' Senior Resident experience for the eligibility for the post of Assistant Professor in Dentistry as per the Odisha Medical Education Service Rules, 2013.

Headnotes:

Writ Petition – Eligibility for Assistant Professor in Dentistry – Challenge against the requirement of three years’ Senior Resident experience under Odisha Medical Education Service Rules, 2013 – Petitioners’ failure to meet the eligibility criteria on the cut-off date. [Paras 4, 17]

Odisha Medical Education Service Rules – Applicability of 2013 and 2021 Rules – 2021 Rules, eliminating the requirement of three years’ Senior Resident experience, not applicable to the recruitment process initiated under the 2013 Rules – Petitioners ineligible as per 2013 Rules criteria. [Paras 14, 17]

Administrative Law – Principle of Res Judicata – Writ petitions challenging the same selection process as previously adjudicated – Petitioners’ participation in selection process precludes challenge – Writ petitions not maintainable on grounds of res judicata and estoppel. [Paras 7, 10, 14]

Judicial Review – Rejection of Representations – OPSC’s decision to reject petitioners’ candidature based on lack of required experience – Court finds no illegality or arbitrariness in OPSC’s decision. [Paras 15, 17, 20]

Decision – Writ petitions for appointment as Assistant Professor in Dentistry dismissed – Petitioners did not meet the necessary experience criteria on the cut-off date as per 2013 Rules. [Para 21]

Referred Cases:

- Institution of Mechanical Engineers (India) v. State of Punjab, reported in (2019) 16 SCC 95: AIR 2019 SC 3882.
- Dr. (Major) Meeta Sahai v. State of Bihar, reported in (2019) 20 SCC 17.

Representing Advocates:

For Petitioners: Ms. Pami Rath, Sr. Advocate with M/s. S. Gumansingh, P. Mohanty & J. Mohanty, Advocates.

For Opp. Parties: Mr. Saswat Das, Addl. Government Advocate, M/s. S.K. Das, P.K. Behera & N. Jena, Advocates (for O.P. No.4 in W.P.(C) No. 27118 of 2023), Mr. P.K. Mohanty with M/s. P. Mohanty, S.N. Dash, S.K. Sahu & K.T. Mudali, Advocates (for OPSC in W.P.(C) No. 27118 of 2023), Mr. A. Behera,

Advocate (for OPSC in W.P.(C) No. 23014 of 2023), M/s. A. Mishra & S.K. Prajwal, Advocates (for O.P. No.5 in W.P.(C) No. 23014 of 2023).

JUDGMENT

10th November, 2023

SASHIKANTA MISHRA, J.

Both these writ applications involve common questions of fact and law and being heard together, are disposed of by this common judgment.

2. The petitioner in W.P.(C) No. 27118 of 2023 has filed this writ application with the following prayer:

“It is therefore prayed that this Hon'ble Court may graciously be pleased to admit this writ petition and issue Rule NISI calling upon the Opp. Parties to show cause and if they fail to show cause or show insufficient cause, then issue appropriate writ(s), order(s), direction(s) directing the Opp. Parties

- a) To quash the impugned notification No. 6492/PSC dated 16.8.2023 at Annexure-12.*
- b) To quash the impugned notification No. 6494/PSC dated 16.8.2023 at Annexure-13.*
- c) Direct the OPs to consider the Petitioner against Advertisement No. 11 of 2018-19 dated 6.10.2018 at Annexure- 3 in pursuance to judgment dated 23.12.2022 at Annexure-6 and order dated 11.1.2023 at Annexure- 7, and appoint him to the post of Assistant Professor in the Discipline of Dentistry against the post of Oral Pathology and Microbiology. And may pass any other/further order(s), as this Hon'ble Court may deem fit in the interest of justice and equity.”*

The petitioner in W.P.(C) No. 23014 of 2023 has filed this writ application with the following prayer:

“It is therefore prayed that this Hon'ble Court may graciously be pleased to admit this writ petition and issue Rule NISI calling upon the

Opp. Parties to show cause and if they fail to show cause or show insufficient cause, then issue appropriate writ(s), order(s), direction(s) directing the Opp. Parties

- a) *To quash the impugned notification No. 5796/PSC dated 17.7.2023 at Annexure-11.*
- b) *To quash the impugned notification No. 5794/PSC dated 17.7.2023 at Annexure-12.*
- c) *Direct the OPs to consider the Petitioner against Advertisement No. 11 of 2018-19 dated 6.10.2018 at Annexure-2 in pursuance to judgment dated 23.12.2022 at Annexure-5 and order dated 11.1.2023 at Annexure-6, and appoint him to the post of Assistant Professor in the Discipline of Dentistry against the Dept. of Orthodontics.*

And may pass any other/further order(s), as this Hon'ble Court may deem fit in the interest of justice and equity."

3. Heard Miss Pami Rath, learned Senior Counsel with Mr. P Mohanty, learned counsel for the petitioners; Mr.

Saswat Das, learned Additional Government Advocate for the State; Mr. P.K. Mohanty, learned Senior Counsel with Mr. P. Mohanty and Mr. A. Behera, learned counsel appearing for OPSC; Mr. Sameer Kumar Das and Mr. A. Mishra, learned counsel appearing for private opposite parties.

FACTS :

4. The petitioner in W.P.(C) No. 27118/2023 passed Bachelor of Dental Surgery (BDS) from SCB Medical College and Hospital, Cuttack in the year 2011 and PG also from the said institution in 2016 in Oral Pathology and Microbiology. The petitioner in W.P.(C) No. 23014/2023 passed BDS from SCB Medical College and Hospital in the year 2010 and PG from RADC, Calcutta in the year 2014 in the discipline of Orthodontics & Dentofacial Orthopedics. The petitioners were selected for Senior Resident-ship (SR) in the year 2017.

5. An advertisement was issued by Odisha Public Service Commission (OPSC) being Advertisement No.11 of 2018/19 on 06.10.2018 inter alia for recruitment to one post of Asst. Professor in the Department of Oral Pathology & Microbiology and two posts in the Department of Orthodontics. The last date for submission of applications was 12.11.2018. Said advertisement

indicated that the selection of candidates for recruitment to the posts will be made on the basis of Odisha Medical Education Service (Method of Recruitment and Conditions of Service) Rules, 2013 (for short, 2013 Rules). Said advertisement further provided the required academic qualification and teaching experience in the discipline of Oral Pathology and Microbiology as M.D.S. (Oral Pathology and Microbiology) with 3 years teaching experience in the subject from a recognized Medical College as Tutor or Senior Resident and in the discipline of Orthodontics as M.D.S. (Orthodontics) with 3 years teaching experience in the subject from a recognized Medical College as Tutor or Senior Resident. The petitioners applied pursuant to said advertisement within the cut-off date. The advertisement, inasmuch as it laid down the eligibility condition of 3 years teaching experience as Senior Resident was challenged before this Court in a batch of writ applications being W.P.(C) No.16048 of 2019 and batch mainly on the ground that the said requirement under 2013 Rules was bad in law being contrary to the Medical Council of India (MCI) Regulations. The batch of writ petitions was disposed of by a common judgment passed by a coordinate Bench of this Court on 23.12.2022. The points raised and decided in the common judgment will be discussed in extenso a little later. The petitioners had also filed original application before the erstwhile Odisha Administrative Tribunal which was transferred to this Court and registered as WPC(OAC) No. 121 of 2019. The writ application was disposed of by order dated 11.01.2023 in line with the common judgment dated 23.12.2022. The petitioners were called for written examination and verification of documents but the results were not published because of the pending litigations. According to the petitioners, the coordinate Bench of this Court in the common judgment dtd.23.12.2022 has held that the Odisha Medical Education Service (Method of Recruitment and Conditions of Service) Rules, 2021 (for short '2021 Rules') had been made applicable to the Advertisement No. 11 of 2018-19 dated 06.10.2018 and therefore, their names should have been published and declared as qualified. However, the final result in respect of Dentistry discipline was not published. The petitioners therefore, approached this court in WP(C) No. 17968 of 2023 (filed by petitioner in W.P.(C) No. 27118 of 2023) and W.P.(C) No.17992 of 2023 (filed by petitioner in W.P.(C) No. 23014 of 2023), which were disposed of directing the OPSC to consider the representations of the petitioners. By order dated 19.7.2023, copy of which is enclosed as Annexure-11 of W.P.(C) No. 27118 of 2023 and by order dated 12.07.2023, copy of which is enclosed as Annexure-10 of W.P.(C) No.23041 of 2023, the

representations of the petitioners were rejected and by another notification issued on 16.08.2023 the opposite party No.4 of W.P.(C) No. 27118 of 2023 was shown to have been selected against the sole post of Oral Pathology & Microbiology, copy of which is enclosed as Annexure-13. Similarly, by notification issued on 17.07.2023 the opposite party Nos.4 and 5 of W.P.(C) No. 23014 of 2023 were shown to have been selected against the two posts of Orthodontics, copy of which is enclosed as Annexure-11. Insofar as the petitioners are concerned their representations were rejected on the ground that they did not possess the required period of Tutor/Senior Resident-ship in the concerned subject. Being thus aggrieved, the petitioners have approached this court seeking the aforementioned relief(s).

6. The private opposite parties have filed a counter challenging the maintainability of the writ application firstly, on the ground of res judicata and secondly, on the ground that the petitioners having knowingly participated in the selection process cannot be permitted to challenge the same after becoming unsuccessful therein. On merits it is contended that the common judgment passed by the coordinate Bench has not allowed the prayer of the petitioners therein but categorically held that the petitioners had not challenged the selection process in time but had done so eight months after its conclusion. The coordinate Bench further directed the government to only consider relaxation of the age of the petitioners in case they apply against future advertisements to be issued as per the 2021 Rules in which the 3 year Senior Resident-ship requirement has been done away with.

SUBMISSIONS:

7. A preliminary objection has been raised on behalf of the State as well as the private opposite parties that the writ applications are hit by the principle of res judicata inasmuch as both the petitioners had admittedly filed an original application before the erstwhile Odisha Administrative Tribunal which was transferred to this Court and registered as WPC(OAC) No.121 of 2019 on the self-same cause of action but the same was disposed of by order passed on 11.01.2023 in terms of the common judgment passed in the batch of cases wherein the Court took note of the fact that having participated in the selection process, the candidates cannot question the procedure adopted therein. In this regard Miss Pami Rath would argue that the present writ applications are on a different cause of action inasmuch as the rejection of

the representations submitted by the petitioners are under challenge and the impugned orders of rejection were passed subsequent to the disposal of WPC(OAC) No. 121 of 2019.

8. Mr. Saswat Das, learned State Counsel and Mr. Sameer Kumar Das, learned counsel appearing for the private opposite party have both argued that regardless of the rejection of the petitioners' representations, the principle remains the same inasmuch as they having not challenged the selection process at the relevant time but willfully participated therein, are estopped from challenging the same. Their earlier case was rejected on the same ground. So what they could not obtain directly in the earlier writ applications, they want to get the same indirectly in the form of the present writ applications. According to Mr. Das, such a course cannot be countenanced in law. Mr. Das has relied upon the judgment of the Supreme Court rendered in the case of **Institution of Mechanical Engineers (India) v. State of Punjab**, reported in (2019) 16 SCC 95: AIR 2019 SC 3882 in this context.
9. On the other hand, Miss Rath has relied upon the judgment of the Supreme Court in the case of **Dr. (Major) Meeta Sahai v. State of Bihar**, reported in (2019) 20 SCC 17 to contend that a candidate, by agreeing to participate in selection process only accepts the prescribed procedure and not the illegality in it. In the instant case the authorities concerned have violated the regulations of the Dental Council of India (DCI) by prescribing the eligibility condition in question over and above the same, which is illegal. Therefore, notwithstanding the participation of the petitioners in the selection process, they are still entitled to challenge the same in view of the apparent illegality involved in the selection process.

FINDINGS:

10. As regards the question of application of the principle of res judicata, it would be apposite to refer to the judgment passed in the earlier writ application, i.e., WPC (OAC) No.121 of 2019. A reading of Paragraph-3 of the judgment dtd.11.01.2023 passed by the coordinate Bench of this Court reveals that the petitioners had challenged the Advertisement No.11 of 2018-19 as also Rule 4(1) of the 2013 Rules as being contrary to MCI Regulations. Observing that similar aspect had already been dealt with and adjudicated in the common judgment passed in the batch of writ applications on 23.12.2022, the coordinate Bench deemed it proper to dispose of the writ application in the following manner:

“7. In view of aforesaid judgment dated 23.12.2022 passed in W.P.(C) No.16048 of 2019 and batch of cases, this Writ Petition is partly allowed to the extent of allowing the Petitioners to participate in the recruitment process for selection of teaching staff under different branches of Dental studies in the SCB Dental College, Cuttack in which the Petitioners are eligible to apply under Odisha Medical Education Service (Method of Recruitment and Conditions of Service) Rules, 2021.”

11. Thus essentially, there was no adjudication as such in respect of the specific challenge to the advertisement and the rule in question but the earlier decision (in the common judgment) was reiterated. It thus becomes imperative to refer to the common judgment, which incidentally both parties are relying upon heavily. It is seen that the challenge in the said writ applications was also to the eligibility condition of 3 years Senior Residency as being contrary to the DCI Regulations. So, prima facie, whatever was decided therein remains binding for all concerned and to such extent, the petitioners cannot re-agitate the issue. After analyzing the facts and law, the coordinate Bench held as follows:

“28. Coming to the case at hand, the date of the impugned advertisement is on 02.11.2018 and the impugned advertisement for application is available in the Website from 13.11.2018 to 12.12.2018 till

11.59 PM. The present writ petition has been filed on 22.08.2019 (more than 8 months after) which is much after the selection process is over. The petitioner knew very well that the eligibility criteria of direct recruitment of Assistant Professor is quoted (supra) corresponding to Rule 4(1) of Odisha Medical Education Service (Method of Recruitment and Conditions of Service) Rules, 2013 and participated in the selection process. They could have challenged the conditions of the advertisement terming it unconstitutional or it is contrary to the spirit of guidelines prescribed by the Dental Council of India.

29. Even the Petitioners herein have never challenged the impugned Rule 4 (1) of Odisha Medical Education Service (Method of Recruitment and Conditions of Service) Rules, 2013 which is said to be against their interest. In such view of the matter, the selection

process which has already been over and candidates, who have met the conditions stipulated in the above rules, have been duly selected cannot be disturbed at this stage. Moreover, they are eligible under the OMES Rules prevalent then.” (Emphasis supplied)

12. According to Miss Rath, notwithstanding the above observations, the coordinate Bench still granted relief in the following manner:

30. *Since the Petitioners have long been waiting for the fruit of this litigation and are eligible under the new Rules, this Court is of the view that the Petitioners can be allowed to face the recruitment test made under the Odisha Medical Education Service (Method of Recruitment and Conditions of Service) Rules, 2021. The State Government shall take steps to allow the Petitioners to participate in the recruitment test conducted by the OPSC with relaxation of age, in case they are overaged.*

31. *In view of the above, all the Writ Petitions are partly allowed to the extent of allowing the Petitioners to participate in the recruitment process for selection of teaching staff under different branches of Dental studies in the SCB Dental College, Cuttack in which the Petitioners are eligible to apply under Odisha Medical Education Service (Method of Recruitment and Conditions of Service) Rules, 2021.”*

13. This Court fails to comprehend as to how the afore-quoted observations would enure to the benefit of the petitioners as claimed in the present writ applications. Plainly understood, what was referred to in the afore-quoted paragraphs of the common judgment was obviously to the recruitment process to be undertaken in future. Had the Court intended to grant the relief claimed, it could have allowed the writ applications by directing the authorities to appoint the petitioners as per Advertisement No. 11 but it was not done so. The observations in paragraphs-28 and 29 of the common judgment particularly, the highlighted ones are highly significant in this context more so as the judgment has gone unchallenged. However, looking at the possibility that the petitioners may become over-aged for future recruitments, the coordinate Bench only allowed them to participate therein by relaxing the age limit, if so required. There is no specific finding that the eligibility condition of 3 years Senior Resident-ship is bad in law being contrary to the DCI

Regulations or that the new Rules (2021 Rules) would be applicable to the recruitment process already concluded long since pursuant to Advertisement No. 11.

14. This effectively seals the fate of the petitioners as nothing remains to be adjudicated in this respect that is, the legality or otherwise of Rule-4 of the 2013 Rules. The ratio of **Dr. (Major) Meeta Sahai (supra)** relied upon by Miss Rath would therefore not apply to facts of this case since there is nothing to show that the rule in question or the relevant Clause in the advertisement was illegal. The grievance raised in such respect earlier has already been addressed in the order passed in the common judgment. Said order has not been challenged in the higher forum. Hence, the petitioners cannot re-agitate the issue in the present writ application, that too in the garb of questioning the correctness of the rejection of their representations. It would tantamount to doing something indirectly which could not be done directly as held in the case of **Institution of Mechanical Engineering** (supra).
15. This leaves the Court only to decide whether the rejection of the representations of the petitioners, vide Annexure-11 in W.P.(C) No. 27118 of 2023 and Annexure-10 in W.P.(C) No. 23014 of 2023 is legally justified.
16. As already stated, the petitioners submitted representations to the Secretary, OPSC on 03.05.2023 with request to publish the result of the recruitment for the post of Asst. Professor in the discipline of Oral Pathology & Microbiology and Orthodontics. Since no action was taken, the petitioners approached this Court in W.P.(C) No.17968 of 2023 and W.P.(C) No.17992 of 2023. The said writ petitions were disposed of by order dated 06.06.2023 by a coordinate Bench of this Court directing the Secretary, OPSC to take a decision on the representations of the petitioners within a month. The representations of the petitioners were thereafter considered by the Secretary, OPSC and by order dated 19.07.2023 and 12.07.2023, same were rejected on the ground that the petitioners do not have three years Senior Resident-ship experience in the concerned discipline. By notices published on 16.08.2023(Annexure-13 of W.P.(C) No.27118 of 2023) and on 17.07.2023 (Annexure-12 of W.P.(C) No.23014 of 2023), the candidature of candidates including the petitioners was intimated as having been rejected on the ground mentioned against each. In so far as the petitioners are concerned, the ground of rejection is stated to be absence of required period of experience as SR/Tutor in the concerned subjects.

17. There is no dispute that the Advertisement No.11 of 2018-19 was published in terms of the 2013 Rules, Rule- 4(1) of which provides that the candidate must have completed three years Senior Resident-ship for being eligible. As already stated, neither the clause in the advertisement nor the Rule was ever challenged. It is also true that in the 2021 Rules, the requirement of three years Senior Resident-ship has been done away with but then the 2021 Rules cannot be made applicable to the recruitment process initiated pursuant to advertisement No. 11 and concluded much prior to coming into force of the said Rules. It is admitted that the petitioners were selected for Senior Resident-ship on 26.03.2017 and completed the same on 27.07.2020. Thus, as on 12.11.2018, which is the cutoff date for consideration of eligibility condition as per Advertisement No. 11, the petitioners did not have the required three years Senior Resident-ship experience. This Court is therefore, of the view that their candidature was rightly rejected.
18. Miss P. Rath made a feeble attempt to argue at the end that the requirement of three years Senior Resident-ship in the 'subject' is otherwise arbitrary because as per the 2013 Rules, Dentistry is only one subject in any Medical College throughout Odisha. In so far as other Medical Colleges of the State are concerned there is no sub-classification for Senior Resident-ship under the broad discipline of Dentistry like Oral Pathology & Microbiology and Orthodontics etc. Such sub-classification is available only in SCB Medical College. Since the petitioners' candidature was rejected because they did not have three years experience as Senior Resident-ship as also for not having such experience in Oral Pathology & Microbiology and Orthodontics, this would result in serious discrimination as only candidates from SCB Medical College alone would be considered eligible. The authorities should have therefore, taken into consideration the above aspect to hold that Senior Resident-ship in Dentistry is the requirement and not the sub-classifications thereunder.
19. This Court is not impressed with the argument as above for the reason that the petitioners admittedly did not possess the required three years experience as on the cutoff date and therefore, the question raised as regards the subclassification under Dentistry discipline etc. are rendered purely academic in nature. In the absence of the fundamental requirement of three years experience of the petitioners this Court would refrain from indulging in any such academic exercise.

20. Thus, from a conspectus of the analysis of facts and law involved, this Court is of the view that firstly, the writ petition is not maintainable either on facts or on law. Even assuming for the sake of argument only that it is maintainable, then also the petitioners have failed to make out a case for interference with the impugned order by this Court for the reasons indicated hereinbefore.
21. In the result, the writ petitions fail and are therefore, dismissed but in the circumstances, without any cost.

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