

**(2008) 07 OHC CK 0035**

**In the Orissa High Court**

Doctors' Association of Acharya Harihar Regional Cancer  
Centre and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

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**Date of Decision :** 15-07-2008

**Acts Referred:**

**Citation :** (2008) 106 CLT 738 : (2008) 119 FLR 519 : (2008) 2 OLR 956 Supp

**Hon'ble Judges :** I.M. Quddusi, C.J;N. Prusty, J

**Bench :** Division Bench

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## **Judgement**

I.M. Quddusi, C.J.—By means of this Writ Petition, the Petitioners have prayed for a writ in the nature of mandamus commanding the Opposite Parties, more specifically Opposite Parties 1 and 2 to carry out necessary amendment and/or alterations/modifications in the Rules and Regulations of AHRCC and to suitably modify and/or alter/amend Rule 38.1 of the Said Rule and Regulations and raise the retirement age of Doctors-(Class-I employees) of AHRCC from 58 years to 60 years so as to bring them in parity with the Medical Officers (Doctors), as has been made by the State Government-Opposite Party No. 1 vide notification dated 31.12.2003 (Annexure-2) and also to declare that there is no intelligible differentia or any vital or relevant distinction between the Doctors of State Government and those working in AHRCC like the Petitioners and no differentiation or classification can be made with regard to their retirement age as has been allowed to the Medical Officers of the State Government.

2. Before the year 1981, the SCB Medical College & Hospital, Cutback was having a cancer wing which was upgraded to that of a Regional Centre for Cancer Research & Treatment in the year, 1981 as per the decision of the State Government with a view to develop it into an integrated complex providing for research, investigation, early detection and treatment of cancer and then the State Government constituted a society namely, "Acharya Harihar Regional Centre for Cancer Research and Treatment Society" having its registered office at Medical Road, Mangalabag, Cuttack with the main objective to provide for

research, investigation, early detection and treatment of cancer patients. The society was having its own bye-laws and its Rules and Regulations which inter alia provided that the Governing Body shall consist of different functionaries/officers of the State Government. The bye-laws further provided for an Executive Committee of the society consisted of different functionaries of the State Government including the Principal of SCB Medical College, Cuttack and the Director of AHRCC, Cuttack. The service Rules and Regulations for the employees of AHRCC, Cuttack were also framed by the Governing Body. Chapter-V of the said Rules and Regulations provided under Rule 38.1 that the date of retirement of Class-I employees of AHRCC shall be 58 years and in case of Class-IV employees, the age of retirement shall be 60 years. However, it was further provided that the Governing Body, in their discretion, may extend the date of retirement not exceeding the age of 60 years in case of person of exceptional ability and performance. The dispute arose when the State Government, vide notification dated 31.12.2003, raised the retirement age of the Government Doctors (Medical Officers) working under the Department of Health and Family Welfare to 60 years by making amendment in the Orissa Service Code through Orissa Service Code (Amendment) Rules, 2003 and accordingly with effect from January, 2004, the retirement age of all the Doctors of the State Government working under the Department of Health and Family Welfare was enhanced to 60 years.

3. The Petitioners are claiming parity with the Doctors working under the Health and Family Welfare Department.

4. In the counter affidavit filed on behalf of Opposite Party No. 2, it has been stated that regarding raising of the age of superannuation from 58 years to 60 years and the amendment of Rule 38.1 of the bye-law, Chapter-V, the matter was placed before the Governing Body of AHRCC, Cuttack on 12.7.1997 and 24.6. 1998, which has been considered and it has been decided by the Governing Body in the first annual general meeting held on 21.11.2005 to amend the Rule 38.1 of Chapter-V of the bye-laws for increasing the age of superannuation of the doctors of AHRCC from 58 years to 60 years. It has been resolved in the annual general meeting that the age of superannuation be 60 years for the doctors as has been in case of State Government doctors subject to concurrence by the Finance Department.

5. The State Government vide notification dated 31st December, 2003 made the Orissa Service Code (Amendment) Rules, 2003 pursuant to which Rule 71 of the Orissa Service Code was amended by way of incorporating a proviso after the proviso to Sub-rule (a) which is as under:

Provided further that the Allopathy Medical Officers belonging to both periphery and teaching cadre under the Health and Family Welfare Department shall be retained in the service up to the age of sixty years.

6. The Cancer Wing of the S.C.B. Medical College & Hospital, Cuttack was

converted and registered as Society which has its own Bye-laws and pursuant to the advertisement published by the Society for the post of doctors in different disciplines, Petitioners 2 to 5 who were working as Allopathy Medical Officers belonging to periphery cadre were selected and appointed as Medical Officers which was subject to the terms and conditions of the provisions of the existing Bye-laws/Staff Rules of the Society and as would be amended from time to time with the service benefits extended by Finance Department Resolution No. 25726/F. dated 12.6.1981 read with Finance Department Resolution No. 2276/F. dated 20.1.1990.

Therefore, the Petitioners 2 to 5 who were in the services of State Government became the employees of that Society. The Bye-laws of the Society provides that appointment, promotion, probation, conduct and service condition of the State Government will be applicable to Acharya Harihara Regional Cancer Centre unless stated in the Bye-laws. But Bye-law 38.1 provides that the age of retirement of Class-I employees of AHRCC shall be 58 years.

7. In counter affidavit filed on behalf of the State Government sworn to by Shri Bipin Bihari Swain, Under Secretary to Government, Health and Family Welfare Department, it has been stated that the extension of retirement age of the employees of the institute is vested with the Governing Body of the institute to take appropriate decision as per the provisions of byelaws and as such, Government have no scope to take any decision alone in this matter. The said paragraph of the counter affidavit is quoted as under:

That since the prayer of the Petitioner regarding extension of retirement age of the employees (Technical and Non-Technical) of the institute is concerned, it is submitted that the same has been vested with the Governing Body to take appropriate decisions as per the provisions of byelaws. As such Government have no scope to take any decision alone in this matter.

8. On 21.11.2005, the Governing Body of the Institute resolved to enhance the age of superannuation of the doctors of the Institute to 60 years subject to the concurrence by the Finance Department. It appears that the State Government also realized the same and issued notification enhancing the age of superannuation of doctors working in Acharya Harihar Regional Cancer Centre, Cuttack from 58 to 60 years vide notification dated 11.9.2006, but not with effect from the date of notification issued in respect of doctors in the teaching cadre or those who are in Government service, but prospectively. The notification dated 11.9.2006 is reproduced hereinafter

Government of Orissa Health and Family Welfare Department Notification

No.ME-I-CI-2/06 22614/H Bhubaneswar, Dated 11.9.2006

The proposal for enhancement of age of retirement of the doctors working in the Acharya Harihar Regional Cancer Centre, Cuttack from 58 years to 60 years was under active consideration for some time past.

After careful consideration of the recommendation of the Governing Body of Acharya Harihar Regional Cancer Centre, Cuttack and taking into consideration of the fact that retirement age of Allopathy Medical Officers belonging to periphery and teaching cadre from 58 to 60 years has already been enhanced during 2003, Government have been pleased to enhance the age of superannuation of doctors working in Acharya Harihar Regional Cancer Centre, Cuttack from 58 years to 60 years prospectively from the date of issue of the Notification.

This has been concurred in by Finance Department in their UOR No. 55 CS-III dated 16.2.2006.

By Order of the Governor, Sd/- C. Basu, Principal Secretary to Government.

9. Though the Finance Department of the State Government had given their concurrence on 16.2.2006 yet the notification was issued on 11.9.2006. No reason has been given by the State Government for not issuing the notification soon after the concurrence was given by the Finance Department. The AHRCC Institute is a society having its own bye-law and, therefore, their employees formed a distinct class than the employees of the State Government. Therefore, increasing the age of superannuation of the doctors of AHRCC was within the domain of the Governing Body of the Society and any increase in the age of superannuation is dependant upon the amendment of the Bye-law.

10. Judicial review with regard to the enhancement of the age of superannuation could only come when there would have been any discrimination within the same class. Certainly the doctors who are employees of a society and those doctors in Government service cannot form one class. Therefore, there is no scope of interference if the Society resolved on 22.11.2005 to increase the age of superannuation subject to concurrence of the Finance Department.

By way of interim order, Petitioner Nos. 2 and 4 who were going to be superannuated on 31.1.2005 and 30.11.2005 respectively were allowed to continue till the final decision was taken by the Government. Of course it was directed that they shall not be paid any salary or given any service benefit until further orders of this Court. In view of the interim order, they continued to work. Therefore, in the above noted circumstances it would be harsh if they are not paid their salary for the period they worked beyond 58 years. We, therefore, dispose of this Writ Petition with a direction to the Opposite Parties to pay the salary to Petitioners 2 and 4 for the period they worked beyond 58 years pursuant to the interim orders passed by this Court.

N. Prusty, J.

I agree.