

(2021) 02 OHC CK 0023

In the Orissa High Court

Case No : Writ Petition (Civil) No. 4242 Of 2021

Dr. Snehalata Mallick

APPELLANT

Vs

State Of Odisha And Others

RESPONDENT

Date of Decision : 12-02-2021

Acts Referred:

Constitution Of India, 1950 — Article 226, 227

Citation : (2021) 02 OHC CK 0023

Hon'ble Judges : Dr. B.R. Sarangi, J

Bench : Single Bench

Advocate : J.K. Lenka, B.K. Nayak, A.K. Sahoo, B. P. Tripathy

Final Decision : Allowed

Judgement

Dr. B.R. Sarangi, J

1. The petitioner, who is at present working as Assistant Professor in the Department of O & G, Pandit Raghunath Murmu Medical College and

Hospital, Baripada, Mayurbhanj, has filed this writ petition to quash the order dated 21.01.2021 at Annexure-6 passed by opposite party no.1 rejecting

her representation for issuance of "No Objection Certificate" (NOC) to appear in the interview for the post of faculty at All India Institute of

Medical Sciences (AIIMS), Bhubaneswar pursuant to advertisement No. AIIMS/BBSR/ RECT./ REG.FAC/ 2020/873/3406 dated 13.11.2020 on the

ground of inadequacy of faculties in Government Medical Colleges.

2. The factual matrix of the case, in hand, is that the petitioner, after completion of her Post Graduation in O & G, was initially recruited as Assistant

Surgeon pursuant to open advertisement made in the year 2006. Accordingly, appointment order was issued in 2007, pursuant to which she joined in

District Headquarter Hospital, Kandhamal at Phulbani.

2.1. While she was so continuing, an advertisement bearing no.10 of 2016-17 was issued by Odisha Public Service Commission inviting online

applications from the prospective candidates for recruitment to the post of Assistant Professor (Specialist) in different disciplines under the Odisha

Medical Education Service (OMES) cadre for posting in Government Medical Colleges in the State in the rank of Group-A under Health and Family

Welfare Department. The petitioner, having requisite qualification and eligibility, applied for the post of Assistant Professor and she came out

successful in the written examination, whereafter in February, 2019 she joined as Assistant Professor in the Department of O & G, Pandit Raghunath

Murmu Medical College & Hospital, Baripada, Mayurbhanj and continuing as such till date.

2.2. The Director, AIIMS, Bhubaneswar issued an advertisement on 13.11.2020 for recruitment of Faculty posts (Group-A) in various Departments of

AIIMS, Bhubaneswar on direct recruitment basis for the recruitment year 2020. The AIIMS, Bhubaneswar is an Autonomous Institute of National

importance and an apex health care institute being established by the Ministry of Health and Family Welfare, Government of India under the Pradhan

Mantri Swasthya Suraksha Yojana (PMSSY) with an aim of correcting regional imbalance in quality tertiary level health care in the country and

attaining self-sufficiency in Graduate, Post Graduate and higher medical education and training.

2.3. The petitioner belonging to S.T. category fulfilled all the eligibility criteria for being appointed in faculty post (Group-A), i.e., Asst. Professor in O

& G and had applied in time for the said post as per advertisement dated 13.11.2020. But, as per Clause-19 of the advertisement, the petitioner was to

submit NOC from the present employer at the time of interview or as per the instructions issued from time to time. It was also clarified in the said

advertisement that no candidate will be allowed to appear in the interview without NOC from his employer. Therefore, the petitioner, vide letter dated

25.11.2020, requested the Commissioner-cum-Secretary, Health & Family Welfare Department for issuance of NOC and the Dean and Principal,

Pandit Raghunath Murmu Medical College and Hospital, Baripada, vide letter dated 02.12.2020 under Annexure-4, forwarded the same to the

Director of Medical Education & Training for issuance of NOC to appear in the interview for recruitment in faculty post (Group-A) as per

advertisement issued by AIIMS, Bhubaneswar. The Director of Medical Education & Training, Odisha, vide letter dated 15.12.2020 under Annexure-

5, requested the Government for issuance of NOC in favour of the petitioner. But, opposite party no.1, vide letter dated 21.01.2021 under Annexure-6,

intimated the Director of Medical Education & Training, Odisha that the Government after careful consideration rejected the application of the

petitioner for grant of NOC taking into consideration the inadequacy of faculties in Government Medical Colleges. Hence this application.

3. Dr. J.K. Lenka, learned counsel for the petitioner argued emphatically that non-grant of "no objection certificate" to the petitioner to enable her

to participate in the interview pursuant to the advertisement issued in Annexure-2 affects her fundamental rights, inasmuch as, depriving her from

participating in the process of selection is arbitrary, unreasonable and contrary to the provisions of law and, more particularly, is discriminatory one

which violates Articles 14 and 16 of the Constitution of India. It is further contended that every person has a right to be considered for the choice post,

pursuant to the advertisement issued by the authority and such consideration cannot be denied by the employer by rejecting the application for

issuance of NOC and that itself amounts to arbitrary exercise of power by the authority concerned. It is further contended that with the touchstone of

the provisions contained under Articles 14 and 16 of the Constitution of India, there shall be equal opportunity for all the citizens in the matter relating

to employment or appointment to any post under the State and under Article 16(2) no citizen shall on the grounds 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. Thereby,

every eligible person is entitled to apply for and to be considered of his claim for recruitment provided he satisfies the prescribed requisite qualification.

Thereby, rejection of the representation filed by the petitioner for grant of NOC by opposite party no.1 is in gross violation of the constitutional

mandate, as enshrined under Articles 14 and 16 of the Constitution of India, therefore seeks for interference of this Court.

4. Mr. B.P. Tripathy, learned Addl. Government Advocate appearing for the State argued with vehemence justifying the order rejecting the

representation for NOC filed by the petitioner. It is contended that the representation for issuance of NOC, which was received by the Department of Health & Family Welfare on 11.01.2021, on being forwarded by the Director of Medical Education and Training, Odisha, was examined with reference to the dearth of faculties in the Department of O & G, Pandit Raghunath Murmu Medical College & Hospital, Baripada and contended that out of total sanctioned strength of 30 nos. of Asst. Professors in O&G Discipline, the man in position is only 17. Besides that, one new medical college and hospital is going to start at Puri from the year 2021 and many new government medical colleges are in the pipeline. Thereby, the State Government is duty bound to fill up the faculty posts in all the medical colleges and hospitals as per the NMC criteria. Therefore, the opposite party no.1 is well justified in rejecting the representation submitted by the petitioner for grant of NOC, even though the same was duly recommended to the Government by the Dean and Principal of Pandit Raghunath Murmu Medical College & Hospital, Baripada and also the Director of Medical Education and Training, Odisha, Bhubaneswar and, thereby, no illegality or irregularity has been committed so as to cause interference by this Court in the present application.

5. This Court heard Dr. J.K. Lenka, learned counsel for the petitioner and Mr. B.P. Tripathy, learned Addl. Government Advocate appearing for the State opposite parties by virtual mode, and perused the record. Pleadings having been exchanged between the parties and with the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

6. The facts, as delineated above, are not in dispute. The substantial question that falls for consideration by this Court is whether the opposite party no.1 is well justified in rejecting the representation filed by the petitioner for issuance of NOC to enable her to appear in the interview, pursuant to the advertisement issued by the AIIMS, Bhubaneswar in Annexure-2 dated 13.12.2020. The same should be considered in the touchstone of reasonableness, arbitrariness within the meaning of Articles 14 and 16 of the Constitution of India.

7. As the facts are not in dispute and admittedly the petitioner belonged to ST category and continuing as Asst. Professor in Pandit Raghunath Murmu

Medical College & Hospital, Baripada in the district of Mayurbhanj, pursuant to the advertisement issued by the AIIMS, Bhubaneswar dated

13.12.2020 under Annexure-2, she applied for the post of Asst. Professor under S.T. category, but before the interview conducted, she had to produce

an NOC to be granted by the present employer.

8. In the present context, Clause-19 of the advertisement, being relevant is extracted hereunder:-

19. The applicants already in Government service (including AIIMS Employees) shall have to produce No Objection Certificate from their present employer at

the time of Interview or as per the instructions issued from time to time. However, they have to take prior permission from their employer while applying for the

post. No candidate will be allowed to appear the interview without NOC from his employer.

Admittedly, the petitioner is already in government service and therefore she has to produce NOC from the present employer at the time of interview

or as per the instructions issued from time to time and she has to take prior permission from her employer while applying for the post and, as such, no

candidate will be allowed to appear in the interview without NOC from the employer. To satisfy this requirement, the petitioner submitted a

representation to opposite party no.1, which was duly recommended by the Dean and Principal of Pandit Raghunath Murmu Medical College &

Hospital, Baripada, Mayurbhanj and approved by the Director of Medical Education and Training, Odisha, Bhubaneswar, which was placed before

opposite party no.1 for grant of NOC. But such recommendation of the Dean and Principal of Pandit Raghunath Murmu Medical College & Hospital,

Baripada, Mayurbhanj and approval made by the Director of Medical Education and Training, Odisha, Bhubaneswar has been rejected taking into

consideration inadequacy of faculties in the Government Medical Colleges. The reason which has been assigned in rejecting the claim of the petitioner

is absolutely misconceived, in view of the fact that every person has a desire to achieve his goal in life by participating in the process of selection

conducted by the competent authority. Being a model employer, the State Government cannot and should not stand on the way of a prospective

candidate like the petitioner, who wants to grow in future, by creating obstacle in

rejecting her representation to grant NOC which is mandatorily required for the purpose of appearing in the interview. On her participating in the interview, whether the petitioner will come out successful or not, that is still in embryonic stage. But depriving her from participating in the process of selection in not granting NOC amounts to causing death of foetus before it sees the light of day and no model employer should do that, otherwise it will create havoc in the matter of employment.

9. Reasons for inadequacy of faculties, if will be considered from other angle, will be attributable to the State authority and no other person. Instead of

going for regular recruitment to the posts, which are available, by following due recruitment process in accordance with law, the State Government is

taking a novel stand by increasing the age of superannuation of the doctors in the State. As is revealed from the past experience, the age of

superannuation of the doctors in the State, which was earlier fixed to 58 years was enhanced to 60 years and thereafter to 62 years and now it is 65

years. At present, it is being contemplated to enhance their age to 70 years, which has also been objected to by the beneficiaries, who are in service,

through their associations. By enhancing their age of superannuation, it creates a blockage on the entry into service by the newly qualified persons

those who are eligible to be considered for getting an appointment by following due process of law. In other angle also, if it will be taken into

consideration, the Government is also facing economic ruination by enhancing the age of superannuation of the higher grade officers by curtailing the

lower grade posts and not filling up the same by following due procedure of law. For example, at the remuneration, which is paid to a Professor, two

Asst. Professors can get appointment in the base level post, which could have mitigated the inadequacy of faculties in the department itself. More so,

it would have given encouragement to the youngsters to work vigorously and to cater to the needs of the public at large, and by this process the State

would have been benefited and the situation which the State is facing would not have been there.

10. As a welfare State, the State of Odisha has an obligation to encourage its citizens to do much better in their life time for the interest of the public

at large. Rejection of the representation of the petitioner for NOC, even though recommended by the competent authority, by the State Government

on the plea of inadequacy of faculties in the Government Medical Colleges cannot have any justification. More particularly, in a matter where a

candidate wants improvement in his life by appearing in interview, that cannot be taken away in such a slipshod manner, which amounts to arbitrary

and unreasonable exercise of power, being violative of Articles 14 and 16 of the Constitution of India.

11. The petitioner has specifically pleaded in paragraph-10 of the writ petition to the following effect:

“10. That, one, Dr Manas Ranjan Das, while working as Associate Professor in the Department of Surgery, SCB Medical College & Hospital, Cuttack had

applied for the post of Professor of Surgery in AIIMS. Even if there is acute shortage/inadequacy of faculties, the Govt. issued NOC in his favour during 2017-18

and he was subsequently selected and appointed as Professor, AIIMS, Bhubaneswar. In not giving NOC to the petitioner is illegal, arbitrary and discriminatory

being violative of Articles 14 and 16 of the Constitution.”

Even though a counter affidavit has been filed by opposite party no.1, there is no specific denial to such pleadings of the petitioner. Thereby, opposite

party no.1 has admitted such position. If permission has been accorded in respect of a similarly situated candidate to participate in the process of

interview enabling him to get selected and appointed as Professor, similar benefit cannot be denied to the petitioner on the ground of inadequacy of

faculties. The situation, which was prevailing at the time when the candidate had applied, i.e., during 2017-18, the same situation is also prevailing now.

Thereby, the action of opposite party no.1 is discriminatory one, which violates Article 14 of the constitution of India.

12. In Stroud’s Dictionary of Law, Vol.1 Page-695, the word “discrimination” has been defined to mean the difference in treatment of two or more persons or subjects.

In Dictionary of Political Science Joseph Dunner, 1965 Page-148, it has been defined that discrimination is an act of depriving an individual or a group of equality of opportunity.

13. In Narmada Bachao Andolan (III) v. State of Madhya Pradesh, AIR 2011 SC 1989, the apex Court explained the phrase “discrimination”

observing as follows:

“Unequals cannot claim equality. In *Madhu Kishwar v. State of Bihar*, AIR 1996 SC 1864:1996 AIR SCW 2178: (1996) 5 SCC 125, it has been held by

Supreme Court that every instance of discrimination does not necessarily fall within the ambit of Article 14 of the Constitution.”

14. In *Rajasthan State Industrial Development and Investment Corporation v. Subhas Sindhi Co-operative Housing Society Jaipur*, AIR 2013 SC 1226,

the apex Court examined the scope of discrimination. A party seeking relief on the ground of discrimination must take appropriate pleadings, lay down

the factual foundation and must provide details of the comparable cases, so that the court may reach a conclusion, whether the authorities have

actually discriminated against that party; and whether there is in fact any justification for discrimination, assessing the facts of both sets of cases

together.

15. In *Video Electronics Pvt. Ltd. v. State of Punjab*, AIR 1990 SC 820, the apex Court held that discrimination means an unjust, an unfair action in

favour of one and against another. It involves an element of intentional and purposeful differentiation and further an element of unfavourable bias; an

unfair classification. Discrimination under Article 14 of the Constitution must be conscious and not accidental discrimination arises from oversight

which the State is ready to rectify.

This view has also been taken by the apex Court in *Kathi Raning Rawat v. State of Saurashtra*, AIR 1952 SC 123.

16. In *Vishundas Hundumal v. State of Madhya Pradesh*, AIR 1981 SC 1636, the apex Court held that when discrimination is glaring, the State cannot

take recourse to inadvertence in its action resulting in discrimination. In a case where denial of equal protection is complained of and the denial flows

from such action and has a direct impact on the fundamental rights of the complainant, a constructive approach to remove the discrimination by putting

the complainant in the same position as others enjoying, favourable treatment by inadvertence of the State authorities, is required.

17. In *State of Uttar Pradesh v. Dayanand Chakrawarty*, AIR 2013 SC 3066, while referring to *Prem Chand Somchand Shah v. Union of India*,

(1991) 2 SCC 48, the apex Court held as follows:

“8. As regards the right to equality guaranteed under Article 14 the position is

well settled that the said right ensures equality amongst equals and its aim is to protect persons similarly placed against discriminatory treatment. It means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Conversely discrimination may result if persons dissimilarly situate are treated equally. Even amongst persons similarly situate differential treatment would be permissible between one class and the other. In that event it is necessary that the differential treatment should be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the ground and that differentia must have a rational

relation to the object sought to be achieved by the statute in question.â??

18. Applying the law laid down by the apex Court as mentioned supra to the present context, this Court is of the considered view that action of the

State opposite party no.1 is not only in gross violation of Article 14 of the Constitution of India but also arbitrary, unreasonable and discriminatory.

Thereby, the order dated 21.01.2021 in Annexure-6 rejecting the representation filed by the petitioner seeking NOC to appear in the interview for

faculty at AIIMS, Bhubaneswar, pursuant to advertisement issued on 13.11.2020, cannot sustain in the eye of law and is liable to be quashed and

accordingly quashed. Opposite party no.1 is directed to issue necessary NOC in favour of the petitioner to enable her to appear in the interview for

the post of faculty at AIIMS, Bhubaneswar, pursuant to advertisement issued on 13.11.2020 in Annexure-2, in terms of Clause-19 within a period of

seven days from the date of receipt of the judgment without creating any hindrance thereof.

19. The writ petition is allowed. However, there shall be no order as to costs.