

(2011) 02 OHC CK 0015

In the Orissa High Court

Case No : Civil Appeal No. 1272 of 2011

State of Orissa and Another

APPELLANT

Vs

Mamata Mohanty

RESPONDENT

Date of Decision : 09-02-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 21A

Limitation Act, 1963 — Section 3

Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 — Rule 2, 4, 5, 5(1), 5(2)

Citation : (2011) 02 OHC CK 0015

Hon'ble Judges : P. Sathasivam, J;B.S. Chauhan, J

Bench : Division Bench

Judgement

Dr. B.S. Chauhan, CJ.

1. All the aforesaid appeals have been filed against the judgments and orders of the High Court of Orissa at Cuttack which have been passed placing reliance on its earlier judgments in similar cases. The facts and legal issues involved herein are the same. Thus, they are heard together and are being disposed of by the common judgment and order. However, for convenience, Civil Appeal No. 1272 of 2011 is taken to be the leading case and some reference to facts would be taken from other appeals as and when necessary in the context of legal issues involved herein.

2. The appeal has been preferred against the judgment and order dated 22.3.2006 of the High Court of Orissa at Cuttack in Writ Petition (Civil) No. 14157 of 2005.

FACTS:

3. (A) The respondent was appointed as a Lecturer in Niali College, Niali, on 9.7.1979 and her appointment as such was approved by the Director of Higher Education, Orissa, a statutory authority - the appellant No.2, vide order dated

18.12.1985, and she was granted the benefit of receiving 1/3rd grant-in-aid.

(B) In order to provide better facilities to teachers and enhance the standard of higher education, the Government of Orissa, came out with a Notification dated 6.10.1989 with a revised pay scale enforceable with effect from 1.1.1986 as per the recommendations of UGC. However, the said Notification was applicable only in such cases where the post has been granted the benefit of grant-in-aid Scheme by 1.4.1989 and person manning that post had a good academic record i.e. 54 per cent or its equivalent grade in a Master's Course.

(C) Respondent did not make any representation before any authority to get the benefit of the said Notification dated 6.10.1989, rather approached the High Court on 11.11.2005 by filing Writ petition (Civil) No. 14157 of 2005 seeking a direction to the State Government to pay the pre-revised pay scale with effect from 1.1.1986 placing reliance on the various orders passed by the High Court earlier in cases of other persons e.g. in case OJC No.3705 of 1987.

(D) The present appellants contested the said writ petition pointing out that the respondent had secured only 40 per cent marks in her Master's course. She was by no means, eligible for appointment. Her appointment, being not in consonance with law, remained illegal.

(E) The High Court placing reliance on its earlier judgments, allowed the said writ petition giving the benefit of the U.G.C. pay scale to her w.e.f. 1.6.1984. Hence, this appeal.

4. The submissions made in all these appeals, particularly by the respondents are that the High Court had been dealing with the subject matter for a long time and judgments of the High Court have been upheld by this court. Once the SLPs against the judgments of the High Court which had been relied upon by the High Court while deciding these cases, have been dismissed in limine, judicial discipline and decorum demand that this Court should follow the same order. Thus, the judgments and orders impugned herein did not warrant any interference.

5. On the other hand, it has been submitted by learned counsel for the appellants that factual and legal issues involved in these cases have never been considered either by the High Court or by this Court in proper perspective. For example, in Civil Appeal No. 1274 of 2011, State of Orissa v. Mrs. Manju Patnaik, the matter had initially been filed before the Orissa Education Tribunal. Therein, the question arose as to whether the respondent herein had been appointed by following the procedure prescribed by the law for making the appointment. As the State had raised the issue that respondent had been appointed without following any procedure known in law for this purpose her appointment itself was illegal and void. The vacancy on the post of Lecturer in Chemistry in Paramananda College, Bolgarh, Dist-Khurda was never advertised nor were the names of eligible candidates requisitioned from the Employment Exchange. Admitted facts in the said case remain that the vacancy was advertise merely by

affixing notices on the notice board of the College and of Bolgarh Block Office inviting applications from the eligible candidates. More so, the respondent had not even faced an interview before the Selection Board, as envisaged by the Statutory Rules in force at the relevant time, rather she had been interviewed merely by representatives of the Committee of Management of the College. The Tribunal accepted the case of the State to that effect, but granted her reliefs sought by her. The High Court did not even consider the issue of validity of her appointment.

6. It is further submitted that none of the courts till today has considered that in case the institution has been accorded the benefit of grant-in-aid scheme subsequent to 1.6.1986, there could be no liability of the government to contribute partly or fully to the salary of any employee of the said college, prior to the date of grant of such benefit, whether UGC pay scale could be given prior to the date of according grant-in-aid benefits. In the post of respondent was included under grant-in-aid scheme w.e.f. 1.6.1988. She did not possess the requisite qualifications and the said respondent was put in grant-in-aid with effect from 1988 though vide impugned judgment she has been given benefit from 1.1.1986.

7. In all these cases, admittedly most of the respondents did not possess the minimum eligibility, i.e. 54% marks in Master's course and some of them acquired it at a much later stage. It is pointed out by the learned counsel for the respondents herein, that Utkal University at Bhubaneswar had condoned the deficiency of eligibility-qualification by passing general orders from time to time. However, they failed to point out any statutory provision conferring competence upon the University to condone the deficiency, what to talk of reasonableness or propriety in condoning such deficiency. It is evidence from Civil Appeal No. 1280 of 2011, State of Orissa and Ors. v. Dr.Jadumani Sahoo, that the respondent was appointed as a Lecturer in Political Science in Begunia College, Begunia, Khurda, on 5.9.1978 and the post which he held came into grant-in-aid scheme on 1.6.1984. He acquired the degree of Ph.D. in 2000. His deficiency in qualification was condoned after about 10 years by the Utkal University on 28.10.1987, and he has also been granted the benefit of UGC pay scale w.e.f. 1.1.1986.

8. There are letters/circulars issued by the University as well as by the State of Orissa for condonation of the deficiency. However, the question does arise as to whether this kind of orders can be given effect to or be considered by the courts to grant a relief to the persons whose appointments had been illegal for want of eligibility and for not following the procedure prescribed by law, i.e. advertisement, etc.

9. Most of the petitions had been filed before the High Court after 10-15-20 years for grant of UGC pay scales w.e.f. 1.1.1986 and to pay the arrears etc. The High Court in all the cases granted the same with effect from 1.1.1986 or even with effect from 1.6.1984, without considering the issue of delay and laches, merely placing reliance upon its earlier judgments. Thus, the question does arise

as to whether the delay and laches could be condoned all together giving the respondents the impetus of the earlier judgments in cases of persons who had been diligent enough to approach the Court within a reasonable period.

10. It has been further submitted by learned counsel for the respondents that teachers in government colleges have also been granted the said benefit though not entitled and the respondents herein cannot be given hostile treatment in case the impugned judgments and orders herein are not upheld. Thus, the question does arise as to whether Article 14 of the Constitution is meant to perpetuate an illegality.

11. Considering the rival submissions made by learned counsel for the parties, we are of the view that as the questions raised hereinabove had never been considered by any of the courts and involve substantial questions of law of public importance, the cases require proper adjudication.

12. (A) STATUTORY PROVISIONS-RELEVANT PARTS:

The Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 (hereinafter called "Rules 1974").

Rule 2 (i) - "University" means Utkal University, Berhampur University, Sambalpur University and Sri Jagannath Sanskrit Vishwa Vidyalaya. Chapter II provides for establishment of the Selection Board and Rule 4 reads that there will be a Selection Board constituted by the Government for the purpose of making appointments of teaching and other staffs in aided schools.

Rule 5(1) thereof provides that the educational institutions would determine the vacancies subject-wise and indicate the same to the Director of Education who shall process the applications so received for those posts and transmit the same to the Selection Board after determining the genuineness of the vacancies in a particular college.

Rule 5(2) - The Selection Board shall, on receipt of applications and certificates referred to in Sub-rule (1) recommend a list of candidates in order of merit strictly according to the number of vacancies, to the concerned Directors who shall thereupon, allot candidates to the concerned institutions strictly in order of merit as per vacancy.

Rule 5(3) - Appointment shall be made by Managing Committee or the Governing Body as the case may be, of the candidates allotted under Sub-rule(2).

Rule 6 provides for Procedure of Selection - (1) The Selection Board shall, at such intervals as it deems proper, call for applications for various posts in respect of which vacancies are likely to arise in the course of the next one year in such manner as may be determined in the regulation of the Selection Board.

(2) The Selection Board shall conduct examinations including a viva voce examination of any candidate or all candidates with a view to determining their

merit and suitability in the matter appointed in its regulations.

Rule 7 - Condition of eligibility of candidates - Provided that upper age limit may be relaxable in respect of candidates belonging to Scheduled Castes, Scheduled Tribes and such other categories as may be specified by Government from time to time for recruitment to the similar or corresponding post under the Government.

The Orissa Aided Educational Institutions Employee's Common Cadre and Inter transferability Rules, 1979 (hereinafter called Rules 1979), make the post of teaching staff transferable to any other college, affiliated to any other University.

In View of the above, University means all the four universities of Orissa, not only Utkal University at Bhubaneswar. It is the Selection Board constituted under the Rules 1974, which could call the candidates for interview/tests and make the selection according to merit. The Selection Board shall make the teachers available to individual colleges as per their need. Thus, the Committee of Management does not have a right to make the appointment of a teacher of its own. More so, the teachers so appointed are liable to be transferred throughout the State of Orissa even to a College which may be affiliated to either of the aforesaid universities.

(B) RELEVANT PART OF NOTIFICATIONS/CIRCULARS/LETTERS:

(i) Government of Orissa - Education and Youth Services Department Resolution dated 5.9.1978 dealt with the subject-qualification for recruitment of lecturers in affiliated colleges of the State of Orissa and the relevant part reads as under:

A consistently good academic record with at least Ist or high second class (B in the seven point scale) at the Master's degree in a relevant subject. In other words, the University Grants Commission intended to determine high second class as average of minimum percentage of marks of second division and first division as (48+60) 54%....

(ii) Orissa State Gazette, August 19, 1983 published a resolution dated 16.7.1983 prescribing the eligibility for appointment of teachers in affiliated colleges. The relevant part reads as under:

(a) Candidate should have an M.Phil degree or a recognized degree beyond Master's level with at least a second class Master's degree:

(b) A candidate not holding an M.Phil degree should possess a high second class Master's degree i.e. 54% of marks and a second class Honours/Pass in the B.A./B.Sc./B.Com examination; or

(c) A candidate not holding an M.Phil degree but possessing a second class Master's degree should have obtained a first class in the Honours/Pass in B.A./B.Sc./B.Com examination.

(iii) Utkal University passed a resolution dated 20.8.1986 and condoned the

deficiency of qualification of different non-government college teachers.

(iv) Government of Orissa, Education and Youth Services Department Circular dated 27.11.1986 dealt with the subject - Continuance of under-qualified teachers in Non-Government Colleges-Eligibility to receive grant-in-aid from Government. The relevant part reads as under:

The decision of Utkal University communicated to Government in their letter No. A. 13570/86 dated 20.8.86 cannot be treated as a valid order of condonation of under qualification unless the concurrence of University Grants Commission has been obtained. The Universities which have made order of condonation after the concerned Regulation of the U. G. C. may refer the matter to U. G. C. and secure their concurrence for condonation.

(v) Government of Orissa, Education and Youth Services Department Circular dated 23.4.1987 provides that the requirement of seeking condonation by two other universities had been withdrawn.

(vi) Resolution dated 6.10.1989 published in the Gazette on 3.11.1989 provided for the revised pay scale of teachers i.e. UGC pay scales w.e.f. 1.1.1986.

(vii) Resolution dated 6.11.1990 provides for grant of UGC pay scales as the Utkal University has condoned the deficiency of eligibility i.e. qualifications.

The aforesaid Circulars/Letters fixed the minimum 54% marks in Master's Course as eligibility and the University has condoned the deficiency in eligibility i.e. educational qualification. The UGC pay scale granted by the Notification dated 6.10.1989 could be made available w.e.f. 1.1.1986.

13. While dealing with the aforesaid issues we have taken into consideration all submissions made by all the counsel involved in these group matters. However, the main arguments have been advanced by Shri Shibashish Misra, Ms. Kirti Renu Mishra and Shri Radhey Shyam Jena, Advocates for the State and Shri A.K. Sanghi, Shri P.N. Misra, Shri Shambhu Prasad Singh, Senior Advocates, Shri Ashok Panigrahi, Shri Kedar Nath Tripathy, and Shri Bharat Sangal, Advocates for the respondents.

EDUCATION:

14. Education is the systematic instruction, schooling or training given to the young persons in preparation for the work of life. It also connotes the whole course of scholastic instruction which a person has received. Education connotes the process of training and developing the knowledge, skill, mind and character of students by formal schooling. The excellence of instruction provided by an educational institution mainly depends directly on the excellence of the teaching staff. Therefore, unless they themselves possess a good academic record/minimum qualifications prescribed as an eligibility, it is beyond imagination of anyone that standard of education can be maintained/enhanced. "We have to be very strict in maintaining high academic standards and maintaining academic

discipline and academic rigour if our country is to progress". "Democracy depends for its very life on a high standard of general, vocational and professional education. Dissemination of "learning with search for new knowledge with discipline all round must be maintained at all costs. (Vide: The Sole Trustee, Lok Shikshana Trust Vs. The Commissioner of Income Tax, Mysore, ; Frank Anthony Public School Employees" Association Vs. Union of India (UOI) and Others, ; Osmania University Teachers" Association Vs. State of Andhra Pradesh and Another, ; and Director (Studies), Dr. Ambedkar Institute of Hotel Management, Nutrition & Catering Technology, Chandigarh & Ors.v. Vaibhav Singh Chauhan, (2009) 1 SCC 59).

15. In Dr. (Mrs.) Meera Massey, Dr. Abha Malhotra and Dr. S.C. Bhadwal and Others Vs. Dr. S.R. Mehrotra and Others, , this Court extensively quoted the Report of the University Education Commission, i.e., Radhakrishnan Commission, wherein grave concern was expressed observing that "there is negligence in applying criteria of merit in the selection" of teachers.

The Court also quoted from another Report of the Committee on some problems of University Administration 1964(1967) as :

The most important factor in the field of higher education is the type of person entrusted with teaching. Teaching cannot be improved without competent teachers.... The most critical problem facing the universities is the dwindling supply of good teachers.... The supply of the right type of teachers assumes, therefore, a vital role in the educational advancement of the country.

The Court further observed as under:

University imparts education which lays foundation of wisdom. Future hopes and aspiration of the country depends on this education, hence proper and disciplined functioning of the educational institutions should be the hallmark. If the laws and principles are eroded by such institutions it not only pollutes its functioning, deteriorating its standard but also exhibits to its own students the wrong channel adopted. If that be so, how could such institutions produce good citizens? It is the educational institutions which are the future hope of this country. They lay the seed for the foundation of morality, ethics and discipline. If there is any erosion or descending by those who control the activities all expectations and hopes are destroyed.

(emphasis added)

16. In The Chandigarh Administration and Others Vs. Mrs. Rajni Vali and Others, , this Court observed as under:

It is a constitutional mandate that the State shall ensure proper education to the students on whom the future of the society depends. In line with this principle, the State has enacted statutes and framed rules and regulations to control/regulate establishment and running of private schools at different levels. The State Government provides grant-in-aid to private schools with a view to ensure

smooth running of the institution and to ensure that the standard of teaching does not suffer on account of paucity of funds. It needs no emphasis that appointment of qualified and efficient teachers is a sine qua non for maintaining high standards of teaching in any educational institution.

(emphasis added)

17. In view of the above, it is evident that education is necessary to develop the personality of a person as a whole and in totality as it provides the process of training and acquiring the knowledge, skills, developing mind and character by formal schooling. Therefore, it is necessary to maintain a high academic standard and academic discipline along with academic rigour for the progress of a nation. Democracy depends for its won survival on a high standard of vocational and professional education. Paucity of funds cannot be a ground for the State not to provide quality education to its further citizens. It is for this reason that in order to maintain the standard of education the State Government provides grant-in-aid to private schools to ensure the smooth running of the institution so that the standard of teaching may not suffer for want of funds. Article 21A has been added by amending our Constitution with a view to facilitate the children to get proper and good quality education. However, the quality of education would depend on various factors but the most relevant of them is excellence of teaching staff. In view thereof, quality of teaching staff cannot be compromised. The selection of the most suitable persons is essential in order to maintain excellence and the standard of teaching in the institution. It is not permissible for the State that while controlling the education it may impinge the standard of education. It is, in fact, for this reason that norms of admission in institutions have to be adhered to strictly. Admissions in mid academic sessions are not permitted to maintain the par excellence of education.

APPOINTMENT / EMPLOYMENT WITHOUT ADVERTISEMENT

18. At one time this Court had been of the view that calling the names from Employment Exchange would curb to certain extent the menace of nepotism and corruption in public employment. But, later on, came to the conclusion that some appropriate method consistent with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly. Even if the names of candidates are requisitioned from Employment Exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from the open market by advertising the vacancies in newspapers having wide circulation or by announcement in Radio and Television as merely calling the names from the Employment Exchange does not meet the requirement of the said Article of the Constitution. (Vide: Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi and others, ; State of Haryana and others Vs. Piara Singh and others etc. etc., ; Excise Superintendent Malkapatnam, Krishna District, A.P. Vs. K.B.N. Visweshwara Rao and Others, ; Arun Tewari & Ors. v. Zila Mansavi

Shikshak Sangh & Ors., AIR 1998 SC 331; Binod Kumar Gupta & Ors. v. Ram Ashray Mahoto & Ors. AIR 2005 SC 2103; National Fertilizers Ltd. and Others Vs. Somvir Singh, ; Telecom District Manager and Others Vs. Keshab Deb, ; State of Bihar Vs. Upendra Narayan Singh and Others, ; and State of Madhya Pradesh & Anr.v. Mohd. Ibrahim, (2009) 15 SCC 214).

19. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the Employment Exchange or putting a note on the Notice Board etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance of the said Constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit.

ORDER BAD IN INCEPTION:

20. It is a settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development can not validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironic to permit a person to rely upon a law, in violation of which he has obtained the benefits. If an order at the initial stage is bad in law, then all further proceedings consequent thereto will be non est and have to be necessarily set aside. A right in law exists only and only when it has a lawful origin. (Vide: Upen Chandra Gogoi Vs. State of Assam and Others, ; Mangal Prasad Tamoli (Dead) by Lrs. Vs. Narvedshwar Mishra (Dead) by Lrs. and Others, ; and Ritesh Tewari and Another Vs. State of U.P. and Others,).

The concept of adverse possession of lien on post or holding over are not applicable in service jurisprudence. Therefore, continuation of a person wrongly appointed on post does not create any right in his favour. (Vide Dr. M.S. Patil Vs. Gulbarga University and Others,).

ELIGIBILITY LACKING:

21. In Dr Prit Singh Vs. S.K. Mangal and Others, , this Court examined the case of a person who did not possess the requisite percentage of marks as per the statutory requirement and held that he can not hold the post observing :

...It need not be pointed out that the sole object of prescribing qualification that the candidate must have a consistently good academic record with first or high second class Master's Degree for appointment to the post of a Principal, is to

select a most suitable person in order to maintain excellence and standard of teaching in the institution apart from administration..... The appellant had not secured even second class marks in his Master of Arts Examination whereas the requirement was first or high second class (55%). The irresistible conclusion is that on there relevant date the appellant did not possess the requisite qualifications..... On the date of the appointment the appellant did not possess the requisite qualifications and as such his appointment had to be quashed.

(emphasis added)

22. In *Pramod Kumar Vs. U.P. Secondary Education Services Commission and Others*, , this Court examined the issue as to whether a person lacking eligibility can be appointed and if so, whether such irregularity/illegality can be cured/condoned. After considering the provisions of the U.P. Secondary Education Services Commission Rules, 1983 and U.P. Intermediate Education Act, 1921, this Court came to a conclusion that lacking eligibility as per the rules/advertisement can not be cured at any stage and making appointment of such a person tantamounts to an illegality and not an irregularity, thus cannot be cured. A person lacking the eligibility cannot approach the court for the reason that he does not have a right which can be enforced through court.

This Court further held as under;

If the essential educational qualification for recruitment to a post is not satisfied, ordinarily the same cannot be condoned. Such an act cannot be ratified. An appointment which is contrary to the statute/statutory rules would be void in law. An illegality can not be regularized, particularly, when the statute in no unmistakable term says so. Only an irregularity can be (See *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, : *National Fertilizers Ltd. and Others Vs. Somvir Singh*, ; and *Post Master General, Kolkata and Others Vs. Tutu Das (Dutta)*,).

RELAXATION

23. In *Dr. J.P. Kulshreshtha and Others Vs. Chancellor, Allahabad University and Others*, , issue of relaxation of eligibility came for consideration before this Court wherein it was held as under:

... We regretfully but respectfully disagree with the Division Bench and uphold the sense of high second class attributed by the learned single Judge. The midline takes us to 54% and although it is unpalatable to be mechanical and mathematical, we have to hold that those who have not secured above 54% marks cannot claim to have obtained a high second class and are ineligible.....We have earlier held that the power to relax, as the Ordinance now runs, in so far as high second class is concerned does not exist. Inevitably, the appointments of the 3 respondents violate the Ordinance and are therefore, illegal.

(emphasis added)

24. In *Mrs. Rekha Chaturvedi (Smt) Vs. University of Rajasthan and Others*, , this Court again dealt with the power of relaxation of minimum qualifications as the statutory provisions applicable therein provided for relaxation, but to what extent and under what circumstances, such power could be exercised was not provided therein. Thus, this Court issued the following directions:

A. The University must note that the qualifications it advertises for the posts should not be at variance with those prescribed by its Ordinance/Statutes.

B. The candidates selected must be qualified as on the last date for making applications for the posts in question or on the date to be specifically mentioned in the advertisement/notification for the purpose.

C. When the University or its Selection Committee relaxes the minimum required qualifications, unless it is specifically stated in the advertisement/notification both that the qualifications will be relaxed and also the conditions on which they will be relaxed, the relaxation will be illegal.

D. The University/Selection Committee must mention in its proceedings of selection the reasons for making relaxations, if any in respect of each of the candidates in whose favour relaxation is made.

E. The minutes of the meetings of the Selection Committee should be preserved for a sufficiently long time and if the selection process is challenged until the challenge is finally disposed of. An adverse inference is liable to be drawn if the minutes are destroyed or a plea is taken that they are not available.

(emphasis added)

25. In *P.K. Ramachandra Iyer and Others Vs. Union of India (UOI) and Others*, , this Court while dealing with the same issue, held that once it is established that there is no power to relax the essential qualifications, the entire process of selection of the candidate was in contravention of the established norms prescribed by advertisement. The power to relax must be clearly spelt out and cannot otherwise be exercised.

26. In *Secretary, A.P. Public Service Commission Vs. B. Swapna and Others*, , this Court held that:

Another aspect which this Court has highlighted is scope for relaxation of norms.....Once it is most satisfactorily established that the Selection Committee did not have the power to relax essential qualification, the entire process of selection so far as the selected candidate is concerned gets vitiated.

27. This Court in *Kendriya Vidyalaya Sangathan and Others Vs. Sajal Kumar Roy and Others*, , held:

The appointing authorities are required to apply their mind while exercising their discretionary jurisdiction to relax the age-limits... The requirements to comply with the rules, it is trite, were required to be complied with fairly and reasonably.

They were bound by the rules. The discretionary jurisdiction could be exercised for relaxation of age provided for in the rules and within the four corners thereof.

(emphasis added)

28. In Food Corporation of India and Others Vs. Bhanu Lodh and Others, this Court held:

Even assuming that there is a power of relaxation under the Regulations..... the power of relaxation cannot be exercised in such a manner that it completely distorts the Regulations. The power of relaxation is intended to be used in marginal cases..... We do not think that they are intended as an "open sesame" for all and sundry. The wholesale go-by given to the Regulations, and the manner in which the recruitment process was being done, was very much reviewable as a policy directive, in exercise of the power of the Central Government u/s 6(2) of the Act.

29. In Dr. Bhanu Prasad Panda Vs. The Chancellor, Sambalpur University and Others, , one of the questions raised has been as to whether a person not possessing the required eligibility of qualification i.e. 55% marks in Master's degree can be appointed in view of the fact that the UGC refused to grant relaxation.

On the issue of relaxation of eligibility, the Court held as under:

... The essential requirement of academic qualification of a particular standard and grade viz. 55% in the "relevant subject" for which the post is advertised, cannot be rendered redundant or violated..... The rejection by UGC of the request of the Department in this case to relax the condition relating to 55% marks at post-graduation level..... is to be the last word on the claim of the appellant and there could be no further controversy raised in this regard....

(emphasis added)

In view of the above, this Court held that the appointment of the appellant therein has rightly been quashed as he did not possess the requisite eligibility of 55% marks in Master's course.

30. In absence of an enabling provision for grant of relaxation, no relaxation can be made. Even if such a power is provided under the Statute, it cannot be exercised arbitrarily. (See: Union of India (UOI) Vs. Dharam Pal Etc.,).

31. Such a power cannot be exercised treating it to be an implied, incidental or necessary power for execution of the statutory provisions. Even an implied power is to be exercised with care and caution with reasonable means to remove the obstructions or overcome the resistance in enforcing the statutory provisions or executing its command. Incidental and ancillary powers cannot be used in utter disregard of the object of the Statute. Such power can be exercised only to make such legislation effective so that the ultimate power will not become illusory, which otherwise would be contrary to the intent of the legislature. (vide: Matajog

Dobey Vs. H.C. Bhari, ; and State of Karnataka Vs. Vishwabarathi House Building Coop. Society and Others,).

More so, relaxation in this manner is tantamount to changing the selection criteria after initiation of selection process, which is not permissible at all. Rules of the game cannot be changed after the game is over. (Vide K. Manjusree Vs. State of A.P. and Another, ; and Ramesh Kumar Vs. High Court of Delhi and Another, .

DELAY /LACHES:

32. In the very first appeal, the respondent filed Writ Petition on 11.11.2005 claiming relief under the Notification dated 6.10.1989 w.e.f. 1.1.1986 without furnishing any explanation for such inordinate delay and laches on her part. Section 3 of the Limitation Act 1963, makes it obligatory on the part of the court to dismiss the Suit or appeal if made after the prescribed period even though the limitation is not set up as a defence and there is no plea to raise the issue of limitation even at appellate stage because in some of the cases it may go to the root of the matter. (See: Lachhmi Sewak Sahu v. Ram Rup Sahu & Ors., AIR 1944 Privy Council 24; and Kamlesh Babu and Others Vs. Lajpat Rai Sharma and Others,).

33. Needless to say that Limitation Act 1963 does not apply in writ jurisdiction. However, the doctrine of limitation being based on public policy, the principles enshrined therein are applicable and writ petitions are dismissed at initial stage on the ground of delay and laches. In a case like at hand, getting a particular pay scale may give rise to a recurring cause of action. In such an eventuality, the petition may refuse to grant relief for the initial period in case of an unexplained and inordinate delay. In the instant case, the respondent claimed the relief from 1.1.1986 by filing a petition on 11.11.2005 but the High Court for some unexplained reason granted the relief w.e.f. 1.6.1984, even though the Notification dated 6.10.1989 makes it applicable w.e.f. 1.1.1986.

34. This Court has consistently rejected the contention that a petition should be considered ignoring the delay and laches in case the petitioner approaches the Court after coming to know of the relief granted by the Court in a similar case as the same cannot furnish a proper explanation for delay and laches. A litigant cannot wake up from deep slumber and claim impetus from the judgment in cases where some diligent person had approached the Court within a reasonable time. (see: Rup Diamonds and Others Vs. Union of India and Others, ; State of Karnataka and Others Vs. S.M. Kotrayya and Others, and Jagdish Lal and others Vs. State of Haryana and others, .

RELIEF NOT CLAIMED - CANNOT BE GRANTED:

35. Pleadings and particulars are required to enable the court to decide the rights of the parties in the trial. Thus, the pleadings are more to help the court in narrowing the controversy involved and to inform the parties concerned to the

question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted." Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties. The pleading and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. (Vide : Sri Mahant Govind Rao v. Situ Ram Kesho, (1898) 25 In. App. 195; Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar, ; Ishwar Dutt Vs. Land Acquisition Collector and Another, ; and State of Maharashtra v. Hindustan Construction Company Ltd., (2010) 4 SCC 518).

ARTICLE 14 :

36. It is a settled legal proposition that Article 14 is not meant to perpetuate illegality and it does not envisage negative equality. Thus, even if some other similarly situated persons have been granted some benefit inadvertently or by mistake, such order does not confer any legal right on the petitioner to get the same relief. (Vide Chandigarh Administration and another Vs. Jagjit Singh and another, ; Yogesh Kumar and Others Vs. Government of NTC, Delhi and Others, ; Anand Buttons Ltd. Vs. State of Haryana and Others, ; K.K. Bhalla Vs. State of M.P. and Others, ; Maharaj Krishan Bhatt and Another Vs. State of Jammu & Kashmir and Others, ; Upendra Narayan Singh (supra); and Union of India (UOI) and Another Vs. Kartick Chandra Mondal and Another,).

This principle also applies to judicial pronouncements. Once the court comes to the conclusion that a wrong order has been passed, it becomes the solemn duty of the court to rectify the mistake rather than perpetuate the same. While dealing with a similar issue, this Court in Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc., observed as under:

To perpetuate an error is no heroism. To rectify it is the compulsion of judicial conscience. In this, we derive comfort and strength from the wise and inspiring words of Justice Bronson in *Pierce v. Delameter* (A.M.Y. at page 18: "a Judge ought to be wise enough to know that he is fallible and, therefore, ever ready to learn; STATE OF ORISSA -V-great and honest enough to discard all mere pride of opinion and follow truth wherever it may lead; and courageous enough to acknowledge his errors.

(See also re: *In Re: Sanjiv Datta and Others, ; Nirmal Jeet Kaur Vs. The State of Madhya Pradesh and Another, ; and Mayuram Subramanian Srinivasan Vs. C.B.I.,).*

37. We are fully alive of the object and purpose of according recognition and affiliation to educational institutions. It is the educational authorities of the State which grant recognition to a Committee of Management for opening or running an educational institution. Affiliation is granted by the particular University or Board for undertaking the examination of the students of that college for awarding degrees and certificates. Therefore, while granting the recognition and

affiliation even for non-governmental and non-aided private colleges, it is mandatory to adhere to the conditions imposed by them, which also include the minimum eligibility for appointment of teaching staff. The authority at the time of granting approval has to apply its mind to find out whether a person possesses the minimum eligibility has been appointed. In the instant case, it appears to be a clear cut case of arbitrariness which cannot be approved.

ARBITRARINESS:

38. The rule of law inhibits arbitrary action and also makes it liable to be invalidated. Every action of the State or its instrumentalities should not only be fair, legitimate and above-board but should be without any affection or aversion. It should neither be suggestive of discrimination nor even give an impression of bias, favouritism and nepotism. Procedural fairness is an implied mandatory requirement to protect against arbitrary action where Statute confers wide power coupled with wide discretion on an authority. If the procedure adopted by an authority offends the fundamental fairness or established ethos or shocks the conscience, the order stands vitiated. The decision making process remains bad. (Vide Haji T.M. Hassan Rawther Vs. Kerala Financial Corporation, ; Dr Rash Lal Yadav Vs. State of Bihar and Others, ; and Tata Cellular Vs. Union of India,).

39. In the State of Andhra Pradesh and Another Vs. Nalla Raja Reddy and Others, , a Constitution Bench of this Court observed as under:

Official arbitrariness is more subversive of doctrine of equality than the statutory discrimination. In spite of statutory discrimination, one knows where he stands but the wand of official arbitrariness can be waived in all directions indiscriminately.

40. Similarly, in S.G. Jaisinghani Vs. Union of India (UOI) and Others, , a Constitution Bench of this Court observed as under:

... Absence of arbitrary power is the first essence of the rule of law, upon which our whole Constitutional system is based.... Rule of law; from this point of view, means that the decision should be made by the application of known principle and rules and in general such decision should be predictable and the citizen should know where he is, if a decision is taken without any principle or without any rule, it is unpredictable and such a decision is antithesis to the decision taken in accordance with the rule of law.

(See also: Commissioner of Police, Bombay Vs. Gordhandas Bhanji,).

41. It is a matter of common experience that a large number of orders/letters/circulars, issued by the State/statutory authorities, are filed in court for placing reliance and acting upon it. However, some of them are definitely found to be not in conformity with law. There may be certain such orders/circulars which are violative of the mandatory provisions of the Constitution of India. While dealing with such a situation, this Court in Ram Ganesh Tripathi and others Vs. State of U.P. and others, came across with an illegal order passed by the statutory

authority violating the provisions of Articles 14 and 16 of the Constitution. This Court simply brushed aside the same without placing any reliance on it observing as under:

The said order was not challenged in the writ petition as it had not come to the notice of the appellants. It has been filed in this Court along with the counter affidavit..... This order is also deserved to be quashed as it is not consistent with the statutory rules. It appears to have been passed by the Government to oblige the respondents....

(emphasis added)

42. The whole exercise done by the State authorities suffers from the voice of arbitrariness and thus is violative of Article 14 of the Constitution. Therefore, it cannot be given effect to.

PER IN CURIAM - Doctrine:

43. "Incuria" literally means "carelessness". In practice per incuriam is taken to mean per ignoratum. The Courts have developed this principle in relaxation of the rule of stare decisis. Thus the "quotable in law". Is avoided and ignored if it is rendered, in ignoratum of a Statute or other binding authority.

In Mamleshwar Prasad and Another Vs. Kanhaiya Lal (Dead) through L. Rs., , this Court held :

...where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of binding precedents. It should be a glaring case an obtrusive omission.

(emphasis added)

44. In State of Orissa and another Vs. Damodar Nayak and another, , question arose that in case the teacher at the time of appointment, did not possess the requisite eligibility, i.e., qualifications, whether he could claim any benefit under the grant-in-aid Scheme. Respondent-teacher therein had secured 53.9% marks and required eligibility provided for 54%. This Court held that undoubtedly 53.9% marks were very close to required marks i.e. 54%, but the teacher so appointed did not possess the eligibility. The court took notice of the fact that he was appointed in 1978 but acquired further qualification on 10.7.1987, and held:

Admittedly since the first respondent on the date of his appointment was not possessing the requisite qualification and acquired the same only on 10.7.1987 he will be eligible to the benefit of the grant-in-aid w.e.f. 1.8.1987 and onwards.

45. This Court while hearing the SLP (C) Nos. 14206-14209 of 2001, State of Orissa & Anr. V. Kalidas Mohapatra & Ors., on 11.3.2002 observed as under:

Heard.

The so-called contention of deficiency in the qualification being much earlier in the circular of the Government dated 06.11.1990, we see no infirmity with the impugned judgment requiring our interference. The Special Leave Petitions are dismissed accordingly.

This Court further dismissed the Review Petition Nos. 1529-1532 of 2002 against the said judgment and order on 28.8.2002.

46. From the aforesaid discussion, the following picture emerges:

(i) The procedure prescribed under the Rules, 1974 has not been followed in all the cases while making the appointment of the respondents/teachers at initial stage. Some of the persons had admittedly been appointed merely by putting some note on the Notice Board of the College. Some of these teachers did not face the interview test before the Selection Board. Once an order of appointment itself had been bad at the time of initial appointment, it cannot be sanctified at a later stage.

(ii) At the relevant time of appointment of the respondents/teachers there has been a requirement of possessing good second class i.e. 54% marks in Master's Course and none of the said respondents had secured the said percentage.

(iii) Their appointments had been approved after a long long time. In some cases after 10-12 years of their initial appointment by the statutory authority i.e. Director of High Education.

(iv) A candidate becomes eligible to apply for a post only if he fulfils the required minimum benchmark fixed by the rules/advertisement. Thus, none of the respondents could even submit the application what to talk of the appointments.

(v) The so-called relaxation by the Utkal University was accorded by passing a routine order applicable to large number of colleges, that too after a lapse of long period i.e. about a decade.

(vi) Fixation of eligibility falls within the exclusive domain of the executive and once it has been fixed by the State authorities under the Rules 1974, the question of according relaxation by Utkal University could not arise and, therefore, the order of condonation etc. is nullity.

(vii) The relaxation has been granted only by Utkal University though Rule 2 (i) of Rules 1974 defined "University" means Utkal University, Berhampur University, Sambalpur University and Sri Jagannath Sanskrit Vishwa Vidyalaya.

(viii) Granting relaxation at this stage amounts to change of criteria after issuance of advertisement, which is impermissible in law. More so, it is violative of fundamental rights enshrined under Articles 14 and 16 of the Constitution of the similarly situated persons, who did not apply considering themselves to be ineligible for want of required marks.

(ix) The exercise of condonation of deficiency had not been exercised by any

University other than Utkal University.

(x) The post of the teachers i.e. respondents is transferable to any college affiliated to any other University under the Rules 1979.

(xi) The power to grant relaxation in eligibility had not been conferred upon any authority, either the University or the State. In absence thereof, such power could not have been exercised.

(xii) This Court in Damodar Nayak (supra) has categorically held that a person cannot get the benefit of grant-in-aid unless he completes the deficiency of educational qualification. Further, this Court in Dr.Bhanu Prasad Panda (supra) upheld the termination of services of the appellant therein for not possessing 55% marks in Master Course.

(xiii) The aforesaid two judgments in Damodar Nayak (supra) and Dr. Bhanu Prasad Panda (supra) could not be brought to the notice of either the High Court or this Court while dealing with the issue. SLP in the case of Kalidas Mohapatra & Ors. (supra) has been dealt with without considering the requirement of law merely making the reference to Circular dated 6.11.1990, which was not the first document ever issued in respect of eligibility. Thus, all the judgments and orders passed by the High Court as well as by this Court cited and relied upon by the respondents are held to be not of a binding nature. (Per in curiam).

(xiv) In case a person cannot get the benefit of grant-in-aid scheme unless he completes the deficiency of educational qualification, question of grant of UGC pay scale does not arise.

(xv) The cases had been entertained and relief had been granted by the High Court without considering the issue of delay and laches merely placing reliance upon earlier judgments obtained by diligent persons approaching the courts within a reasonable time.

(xvi) The authority passed illegal orders in contravention of the constitutional provisions arbitrarily without any explanation whatsoever polluting the entire education system of the State, ignoring the purpose of grant-in-aid scheme itself that it has been so provided to maintain the standard of education.

(xvii) The High Court granted relief in some cases which had not even been asked for as in some cases the UGC pay scale had been granted with effect from 1.6.1984, i.e. the date prior to 1.1.1986 though the same relief could not have been granted. Thus, it clearly makes out a case of deciding a case without any application of mind".

(xviii) In some cases the UGC pay scale has been granted by the High Court prior to the date of according the benefit of grant-in-aid scheme to the concerned teachers which was not permissible in law in view of the law laid down by this Court in Damodar Nayak (supra).

(xix) The grievance of the respondents that not upholding the orders passed by

the High Court in their favour would amount to a hostile discrimination is not worth acceptance for the reason that Article 14 of the Constitution envisages only positive equality.

(xx) Concept of adverse possession of lien on post or holding over are inapplicable in service jurisprudence.

(xxi) The submission on behalf of the respondents that Government orders/circulars/letters have been complied with, therefore, no interference is called for, is preposterous for the simple reason that such orders/circulars/letters being violative of statutory provisions and constitutional mandate are just to be ignored in terms of the judgment of this Court in Ram Ganesh Tripathi (supra).

47. In view of the above, it stands crystal clear that a teacher who had been appointed without possessing the requisite qualification at initial stage can not get the benefit of grant-in-aid scheme unless he acquires the additional qualification and therefore, question of grant of UGC pay scale would not arise in any circumstance unless such teacher acquires the additional qualification making him eligible for the benefit of grant-in-aid scheme. The cumulative effect therefore comes to that such teacher will not be entitled to claim the UGC pay scale unless he acquires the higher qualification i.e. M.Phil/Ph.D.

48. In the facts and circumstances of the case, we feel that terminating the services of those who had been appointed illegally and/or withdrawing the benefits of grant-in-aid scheme of those who had not completed the deficiency in eligibility/educational qualification or withdrawing the benefit thereof from those who had been granted from the date prior to completing the deficiency, may not be desirable as a long period has elapsed. So far as the grant of UGC pay scale is concerned, it cannot be granted prior to the date of acquisition of higher qualification. In view of the above, the impugned judgment/order cannot be sustained in the eyes of law.

49. The full particulars of the respondent-teachers are not before us as in some cases there had been claim and counter claim of possessing the requisite marks i.e. 54% in Master's Course, as in Civil Appeal No. 1253 of 2011, State of Orissa & Anr. V.Lokanath Mishra & Ors. Thus, we pass the following directions;

(i) In case of dispute regarding possessing of 54% marks, the authorities, Secretary of Higher Education/Director of Higher Education may examine the factual position and decide the case of individual teachers in accordance with law laid down in this case;

(ii) If a person did not possess the requisite qualification on the date of appointment and was not entitled for grant-in-aid scheme unless he completes the deficiency, his case would be considered from the date of completing the deficiency for grant of UGC pay scale. However, in no case, the UGC pay scale can be granted prior to the date of according the benefit of the grant-in-aid scheme, i.e. by acquiring the degree of M.Phil/Ph.D.

(iii) The aforesaid exercise shall be completed within a period of four months from today; and

(iv) The arrears of pay, if any, shall be paid to the teacher concerned within a period of four months thereafter.

50. In view of the above, all appeals stand disposed of. No order as to costs.