

**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH**

OA No. 437 of 2017

MA No. 540 of 2017

Present: Hon'ble Mr. Gokul Chandra Pati, Member (A)
Hon'ble Mr. Swarup Kumar Mishra, Member (J)

Rajesh Kumar Manik, aged about 41 years, S/o Sri Ghanashyam Manik, presently working as Yoga Trainer in All India Institute of Medical Sciences, Bhubaneswar At-Sijua PO-Dumuduma, Dist.- Khurda.

.....Applicant

VERSUS

1. Union of India in the Ministry of Health and Family Welfare represented through its Secretary, At-Nirman Bhawan, Maulana Azad Road, New Delhi.
2. All India Institute of Medical Sciences, At-Sijua Po-Dumduma, Dist-Khurda represented through its Director.
3. Administrative Officer, All India Institute of Medical Sciences, At-Sijua, Po-Dumduma, Dist.- Khurda.

.....Respondents.

For the applicant : Mr.D.P.Dhalsamanta, counsel

For the respondents: Mr.M.R.Mohanty, counsel

Heard & reserved on : 10.8.2020 Order on : 28.8.2020

O R D E R

Per Mr. Gokul Chandra Pati, Member (A)

The applicant seeks the following reliefs in this Original Application (in short OA) under section 19 of the Administrative Tribunals Act, 1985:-

- “(a) The Original Application may be allowed.
- (b) The Notification dt. 05.05.2017 under Annexure A/8 may be quashed.
- (c) The Respondent may be directed to regularize the Applicant in the post of Yoga Trainer, or in the alternative, before his regularization in service, they may allow the applicant to participate in the process of recruitment for the post of Yoga Trainer giving him age relaxation.
- (d) Such other Order(s)/direction(s) may be given in giving complete relief to the applicant.”

2. The applicant was appointed as Yoga Instructor in All India Institute of Medical Sciences, Bhubaneswar (in short AIIMS) on ad-hoc basis since 20.1.2015. His ad-hoc/contractual service was extended from time to time. He is aggrieved by the Advertisement/Notification dated 5.5.2017 (Annexure-A/8 of the OA) by which, applications were invited for the post of Yoga Instructor

stipulating the maximum age for the said post to be 35 years. The applicant submitted a representation dated 19.5.2017 (Annexure-A/9a), requesting to be allowed to participate in the recruitment process of Yoga Trainer as per the above notification since he was ineligible to participate due to age criteria specified for the post in the said notification. He submitted a reminder dated 7.6.2017 (Annexure-9b) and filed this OA since no decision was taken on his representation.

3. The question of interim prayer was considered by this Tribunal and vide order dated 27.7.2017, it was ordered as under:-

“....However, a prima-facie case having been established, in conformity with the Section 24 of the AT Act, 1895, while granting two weeks time to Mr. Mohanty to file his objections to the interim relief, I make it clear that the status quo of the applicant as on date in the place of posting will be maintained and no further action, so far as recruitment of Yoga Trainer in pursuance of Annex. A/8 is concerned, may be initiated by the respondents for a period of 14 days from today.....”

Vide order dated 31.8.2017 of the Tribunal, the interim relief was to continue till next date of hearing. The respondents filed MA No. 540/2017 on 6.10.2017 for vacation of the above interim order and filed the Counter on 15.12.2017. Vide order dated 14.1.2020, both the MA and OA were to be heard on merit as the pleadings in OA were completed.

4. Heard learned counsel for the applicant and the respondents. Written notes of submissions were also filed by the respondents. Though the applicant's counsel was allowed to file written note of submissions vide orders dated 17.7.2020 and dated 10.8.2020, but the same was not filed by 17.8.2020 as stated in order dated 10.8.2020.

5. The main grounds advanced by the applicant in the pleadings as well as in hearing are as under:-

(i) The applicant is appointed against a vacancy for the year 2014 and at that time the upper age limit was 40 years and the applicant was eligible for regular appointment. Hence, subsequently he cannot be required to be within the maximum age for regularization.

(ii) Some category candidates have been allowed age relaxation vide Clause 8 of the advertisement dated 5.5.2017 (Annexure A/8).

(iii) The applicant is age barred to be employed elsewhere. He should have been regularized instead of appointment through impugned notification.

(iv) The recruitment process started in 2014 was delayed till 2017. Applicant had applied for regular appointment in 2014, but he was appointed on ad-hoc basis. Since he was successful in selection in 2014, his case should be considered for regularization.

(v) The maximum age for other AIIMSSs was specified to be 40 years, but for AIIMS Bhubaneswar, the maximum age was specified to be 35 years.

(vi) Since Recruitment Rules did not have any provision for regularization of service, the Government guidelines on regularization will be applicable in this case. He does not have any objection to applicability of the rules of 2014 in force at the time of his appointment on ad-hoc basis and 2015 rules will be applicable to new comers selected after coming into force of 2015 rules and it will not be applicable to the applicant.

(vii) Experience of the applicant within AIIMS and outside should be taken into consideration. Had the regular selection was conducted in 2015 or 2016 he would have been eligible to participate. But due to delay by the respondents, the notification at Annexure-A/8 was issued on 5.5.2017 and his experience was not being considered.

6. The respondents in their Counter as well as in written and oral arguments have opposed the OA for the following reasons:-

(i) As per the Recruitment Rules dated 21.8.2015 (Annexure-2 of the Counter), which was duly approved by the Ministry and Governing Body and Institute Body of AIIMS (Annexure-3 & 4 of the Counter) in 2016, the maximum age for Yoga Instructor is 35 years.

(ii) In 2014, maximum age for Yoga Instructor advertised was 40 years at a time when AIIMS, Bhubaneswar did not have separate Recruitment Rules. AIIMS, Bhubaneswar is a separate Institute with separate rules duly approved by the Governing Body and Institute Body of the institution.

(iii) The recruitment process started in 2014 was cancelled after approval of the new Recruitment Rules which came into force from 2016 and such cancellation was not objected by the applicant at that time. Hence, he cannot claim the age limit as per 2014 advertisement at this stage.

(iv) The respondents, in written notes have cited the following judgments in support of their case:-

- Punjab Water Supply & Sewerage....-vs- Ranjodh Singh & Others in Appeal (Civil) 5632 of 2006

- Badanga Talukdar vs. Saifuddullah Khan, (2011)12 SCC
- Order of Principal Bench of the Tribunal in OA No. 1447/2011
- Order of Jabalpur Bench of the Tribunal in OA No. 387/2018
- Order of Jabalpur Bench in OA nos. 83 & 183 of 2018
- Ajeet Singh Chandel vs. All India Institute of Medical Sciences

7. Rejoinder has been filed by the applicant mainly reiterating the contentions in the OA and stating that period of his service should have been taken into consideration for computing his age for the purpose of the notification dated 5.5.2017. The applicant claims that he was working as yoga trainer from age of 26 and since he has entered the service in AIIMS by fulfilling the criteria specified in earlier rule, he cannot be denied on the plea that he was age barred as per the 2015 rules and his experience in AIIMS and other institutions is required to be considered. Further, the authorities did not take action for regular appointment in 2015-16 and extended the applicant's appointment on ad-hoc basis. It is also stated that the Recruitment rules for different AIIMS cannot be different since as per the instructions dated 6.8.2013, different AIIMSSs are notified by amending the AIIMS Act, 1956 and the Ministry of Health and Family Welfare has circulated a uniform Recruitment Rules in 2015. those AIIMSSs cannot have different rules approved by the respective Institute Body.

8. We have considered the pleadings on record as well as the submissions by learned counsels on behalf of both the parties. It is stated in the Counter that appointment against some non-faculty posts was being approved by the authority on ad-hoc basis for initial period of 11 months and there are a number of ad-hoc employees continuing in AIIMS apart from the applicant. The appointment order dated 20.1.2015 (Annexure-A/5) stated as under:-

“Offer of Appointment”

Sub: Appointment to the post of Yoga Trainer in the Department of AYUSH, All India Institute of Medical Sciences, Bhubaneswar.

With reference to your application for the post of Yoga Trainer, in the Department of AYUSH, All India Institute of Medical Sciences, Bhubaneswar, it is to inform that the Director, AIIMS, Bhubaneswar has approved your adhoc appointment to the post of Yoga Trainer in the Department of AYUSH with the consolidated amount Rs.25,000/- per month. The offer of appointment is on temporary basis for a period upto 11 months from the date of joining, on the following terms and conditions. The period of appointment may further be extended with the approval of Director, AIIMS, Bhubaneswar.

1. *The appointment does not entitle you to any regular appointment unless meanwhile you are selected for appointment on regular basis and his/her appointment is approved by the Competent Authority. Your appointment may be terminated at any time without any prior notice and without assigning any reasons.*
2. *The Director, AIIMS Bhubaneswar will have full discretion to forward or withhold any of applications for appointment elsewhere.*

3. Your should also note that you will have to confirm to the rules, discipline and conduct prevailing in this Institute and those imposed by the Institute on all their employees. You will be governed by Residency Scheme of Govt. of India.
4. If you accept the offer on the above conditions, you should report for duty to the undersigned immediately but not later than 19.2.2015 failing which the offer of appointment shall be treated as cancelled.
5. If you wish to resign, you may do so by giving one month's notice pay and allowance with the Institute for the period by which the notice falls short of one month.,
6. No travelling or any other allowance will be paid for joining the duty.,
7. The offer of appointment is subject to verification of Original Degree/Diploma/Certificate of education qualifications and Date of Birth/Caste Certificates.
8. Private practice of any kind whatsoever is prohibited.
9. You are also directed to bring a Medical Fitness Certificate (As per attached format) before joining the post of Yoga Trainer.

To

Shri RajeshKu Manik
C/0 Dr.Debasis Misra
V-SSUT, Burla
Sambalpur.

Deputy Director (Admin)
AIIMS, Bhubaneswar."

9. Applicant's ad-hoc appointment was extended for further period of 11 months or till the vacancy is filled up through regular recruitment vide order dated 11/15.12.2015 (Annexure-A/6). Vide order dated 18/22.11.2016 (Annexure-A/7), it was extended again for another 11 months. The office order dated 18.22.11.2016 (Annexure-A/7 of the OA) stated as under:-

"The Director, AIIMS, Bhubaneswar is pleased to accord approval for the extension of Contractual engagement of Shri Rajesh Kumar Manik, Yoga Trainer, Department of Ayush, for another 11 months or till the vacancy is filled up through regular recruitment, whichever is earlier, with effect from 21.12.2016 after 01 day break on 20.12.2016 as per existing terms and conditions."

10. The terms of appointment of the applicant clearly stated that the appointment was valid for a specific period or till a regular appointment is made. The applicant has accepted the terms and conditions of the appointment without challenging it in accordance with the law. The Recruitment Rules dated 21.8.2015 (Annexure-2 of the Counter) specified the maximum age for Yoga Instructor to be 35 years and when the applicant's ad-hoc appointment was extended vide orders at Annexure A/6 & A/7, the said Recruitment rules specifying the maximum age of 35 years for Yoga Instructor, had already been approved by the Ministry of Health and Family Welfare,. The applicant did not object to the said age criteria for Yoga Instructor in the Recruitment Rules of 2015 under which he was ineligible for regular appointment.

11. It is also noticed that as per the averments in the Counter, many employees are continuing on ad-hoc basis in AIIMS, when the Recruitment Rules for regular appointment are in force and there is a circular dated

1.5.2015 of the Ministry of Health and Family Welfare, which is referred in the Rejoinder (Annexure-A/14). This is not desirable in view of the law laid down by Hon'ble Apex Court in the judgment in the case of **Secretary, State Of Karnataka and others vs. Umadevi and Others reported in AIR 2006 SC 1806**. It was held in the aforesaid judgment that all appointments are required to be as per the Constitutional Scheme, implying that it should be in accordance with the Recruitment rules after giving opportunity all eligible candidates.

12. Regarding the question whether the action of the respondents to appoint the applicant on ad-hoc from time to time since 20.1.2015 (A/5) will give rise to any right of the applicant to be regularized in the post, we take note of the following observations of Hon'ble Apex Court in the case of Umadevi (supra) as under :-

“36. While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain -- not at arms length -- since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible.....

.....

38. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.”

13. The argument of the applicant that since in the advertisement for the year 2014, he was eligible for regular appointment as Yoga Instructor, the respondents should have regularized his service. The averments in the Counter that cancellation of 2014 advertisement as per the order dated 11.6.2016 (Annexure-5 of the Counter) was not objected to by the applicant, have not been contradicted by the applicant. In this OA also the said order dated 11.6.2016 has not been challenged by the applicant. It was necessary for the

applicant to have challenged the aforesaid order dated 11.6.2016 cancelling the advertisement issued in 2014 for recruitment for the post of Yoga Instructor, under which he was eligible to participate in the recruitment process. It was particularly so since as per the new Recruitment Rules dated 21.8.2015, the applicant was not fulfilling the eligibility criteria for regular appointment as he was age barred. Having not challenged the order dated 11.6.2016, the applicant cannot invoke the criteria for the post specified in 2014 advertisement for the present advertisement dated 5.5.2017 (A/8) and we are inclined to agree with the contentions of the respondents in the Counter in this regard. Further, no rule or executive instruction of Government has been furnished by the applicant in support of his contention that since he was eligible for the post of Yoga Instructor in 2014, he was eligible to participate in the advertisement dated 5.5.2017, even if he does not fulfill the age criteria. It is also noticed that the applicant did not take any action as per law prior to 5.5.2017 advertisement to claim regularization or to claim relaxation in age because of his experience. His claim for relaxation in age because of his experience is not supported by any rule or Government instructions.

14. The applicant has cited the example of the All India Institute of Medical Science located in Raipur and in some other places, for which the maximum age for Yoga Instructor was specified to be 40 years. But he does not explain how such advertisement by another institution will override the requirement of the Recruitment Rules applicable for AIIMS, Bhubaneswar and the requirement of the advertisement dated 5.5.2017 (A/8), in this regard. No document has been furnished to show that the age criteria for the post in question specified in another All India Institute will also be applicable for AIIMS, Bhubaneswar, while the Recruitment rules have been approved by the Governing Body and Institute Body of AIIMS, Bhubaneswar. In the Rejoinder, it is mentioned that the Recruitment Rules for different AIIMSs cannot be different. The relevant consideration for the purpose of the dispute in this OA is the Recruitment Rules of AIIMS, Bhubaneswar and not of another institution. How any other AIIMS has different age criteria for the post in question is not relevant issue for this case. Further the age criteria specified in the Recruitment Rules of AIIMS, Bhubaneswar has not been challenged in this OA.

15. The order dated 21.4.2011 of the Principal Bench of the Tribunal in the case of Mrs. Neelam Malik and others vs. Union of India and others in OA No. 1447/2011 which is cited by the respondents, the applicants had claimed age relaxation for the posts advertised by the Staff Selection Commission as they were working on contractual basis. One of the plea of the applicants in that case was that age relaxation was allowed in another institution and that a

similar claim in another case has been allowed by the Tribunal. Considering the issue, it was held by the Tribunal in OA No. 1447/2011 that the judgment relied upon related to regularization issue and not for fresh recruitment and hence, it was distinguishable. The OA No. 1447/2011 was dismissed.

16. Learned counsel for the respondents have also submitted the judgment of Hon'ble Madhya Pradesh High Court in the case of Ajeet Singh Chandel vs. All India Institute of Medical Sciences, in which the petitioners claimed regularization against the post in which they were working on contractual basis for a long time and they challenged when advertisement was issued for regular filling up of the post in question. While rejecting the claim of regularization of the petitioners in that case, it was observed as under:-

“22. The law laid down in Uma Devi (supra) makes it clear that argument of Shri Amit Singh, learned counsel for the respondent has substantial force. The petitioners admittedly entered contractual appointment with clear understanding about the nature of employment and, therefore, the doctrine of legitimate expectation cannot be pressed into service. Apart from this, the constitution of selection committee mentioned in Para-5.4 of the petition does not tally with clause-5 of executive instructions dated 04.04.2013 relied upon by Shri Ruprah. The petitioners have not completed 10 years of service 11 M.P. Nos.4640/18, 636/19,695/19,1009/19,970/19 uninterruptedly or without intervention of the Court. At the cost of repetition, the important fact needs to be remembered that although petitioners' initial appointment on contract basis was pursuant to an advertisement, they were later on discontinued and, thereafter, were appointed afresh without there being any advertisement and transparent selection process as per the public policy. In this view of the matter, the contention of Shri Ruprah that petitioners' appointment can at best be said as "irregular" and not "illegal" cannot cut any ice. Putting it differently, the petitioners initial appointment on contract basis was pursuant to an advertisement but said appointment came to an end. They were discontinued and, thereafter, they were appointed afresh without subjecting them to any selection process. In this background, the judgments cited by Shri Ruprah in the cases of Upendra Singh, Narendra Kumar Tiwari, Sheo Narain Nagar, Surendra Kumar & Prem Ram (supra) are of no assistance.”

17. Regarding the claim of the applicant to be permitted to participate in the recruitment process, it is stated in para 4.9 of the OA that the applicant has submitted representations dated 19.5.2017 and 7.6.2017 [Annexure-9(a) & 9(b) of the OA]. In reply, it is stated in the Counter that “*due to overage the application of the petitioner was not accepted in the portal of AIIMS, Bhubaneswar for processing.*” In reply to above contentions in the Counter, it is stated in Rejoinder that the “*applicant satisfies all the requirements embodied in the recruitment rule but is age barred in terms of the prescription made in the notification dt. 05.05.2017.*” The applicant claims age relaxation in same analogy as allowed to the reserved category candidates as specified in the advertisement. But in absence of any rule or instruction of Government of

India in support of such claim in applicant's representation or in his pleadings on record, such a claim cannot be accepted.

18. In view of the foregoing discussions, we are of the view that the grounds mentioned in the OA, do not justify any interference of this Tribunal in the matter. Accordingly, the OA is dismissed and the interim order dated 27.7.2017 passed in this OA stands vacated. There will be no order as to cost.

(SWARUP KUMAR MISHRA)
MEMBER (J)

(GOKUL CHANDRA PATI)
MEMBER (J)

I.Nath