

A.F.R.

IN THE HIGH COURT OF ORISSA : CUTTACK

W.P.(C) NO.16781 of 2015

(An application under Articles 226 & 227 of the Constitution of India).

Tusar Kanti Tripathy & another ***Petitioners***

-versus-

State of Odisha and another ***Opposite Parties***

For Petitioner : ***Mr. B. S. Tripathy, Advocate***

For Opposite Parties : ***Mr. T.K. Praharaj, SC***
Mr. S. Das, Adv (O.P. Nos.2 & 3)
Mr. B.B. Mohanty, Adv (O.P. No.5)
Ms. P. Rath. Adv (O.P. Nos.4,6,7,
10-12)

CORAM:

JUSTICE V. NARASINGH

DATE OF FINAL HEARING :18.07.2023

DATE OF JUDGMENT: 31.07.2023

V. Narasingh, J.

1. The present Writ Petition has been filed assailing the selection/appointment of Opposite Party Nos.4 to 12 as Assistant Town Planner (ATP) / Junior Town Planner (JTP) in Bhubaneswar Development Authority (BDA), Opposite Party No.2. For convenience of ready reference the prayer is extracted hereunder;

“The petitioners, therefore, most respectfully pray that your Lordship may graciously be pleased to admit this writ application and issue rule nisi to the OPs to show cause as to why the selection/appointment of OP Nos.4 to 12 as Asst. Town Planner/Jr. Town Planner shall not be quashed;

And on their failing to show cause or showing insufficient cause issue a writ of certiorari quashing the impuend orders of appointment of OPs Nos.4 to 12 as Asst. Town Planner/Jr. Town Planner under annexures-4 and 5 respectively.

And pass such further order/orders as may be deemed fit and proper in the facts and circumstances of the case;

And allow this writ petition with cost;

And for this act of kindness the petitioners shall, as in duty bound, ever pray”

2. The petitioners applied for the post of Assistant Town Planner/ Junior Town Planner under Planning Authority and Urban Local Bodies in the state of Odisha. It is claimed by the petitioners that an advertisement bearing number 17254 dated 21.05.2013 was issued by government in Housing and Urban Development Department (OP No 1) and the authorities had moved the Odisha Public Service Commission (OPSC) for publication of such advertisement. OPSC raised certain objection regarding education qualification prescribed in the said advertisement as per letter number 3871 dated 27.06.2013 and requested the Government to amend the relevant recruitment rules. Referring to such suggestion Opposite Party No.1 issued a notification Dtd 6.9.2014 at Annexure-1 cancelling the said

advertisement and indicated that steps are being taken to issue “a fresh advertisement”xxx“after formulation of new service rules”. For better appreciation the said Annexure-1 is culled out hereunder:

Government of Odisha
Housing and Urban Development Department

NOTIFICATION

Bhubaneswar, dated 6.9.14

No. HUD-TP-MISC-0014-2014 17784 /HUD. The Advertisement bearing No.17254/2013-14, Dt. 21.5.2013 published for recruitment to the post of Assistant Town Planners/ Junior Town Planners/Deputy Municipal Planners/ Assistant Municipal Planners in different Planning Authorities/ Urban Local Bodies of the State is hereby cancelled on the following grounds.

1. The Odisha Public Service Commission has advised that, the candidate without having Bachelor's Degree cannot be eligible for the post which require Bachelor's Degree as minimum essential qualification as stipulated in the advertisement since Degree qualification in Planning cannot be construed as Post Graduate Degree in Planning.

2. Accordingly, the Housing and Urban Development Department have taken steps to formulate the new service rule with regard to requisite qualification and experience for recruitment to the post of Assistant Town Planner/ Junior Town Planners in the State which is under consideration of the Government. **A fresh advertisement will be issued for above posts after formulation of new Service Rules.**

By order of the Governor

P.D.-cum-Joint Secretary to Government”

3. It is the grievance of the petitioners that without waiting for amendment of the recruitment rules the secretary BDA issued

another advertisement on 14/1/2015 at Annexure-2 for appointment of Assistant Town Planner and Junior Town Planner under BDA and the consequential selection of Opp. Parties 4 to 12 is under challenge. It is further claimed by the petitioners that they fulfilled the requisite criteria as prescribed in the advertisement and accordingly they applied for the said post. They participated in the recruitment process. However because for formation of a defective selection committee by office order dated 03 .02. 2015 under the chairmanship of Vice Chairman BDA consisting of 9 members the selection committee with ulterior motive selected Opp. Parties 4 to 12 whereas ignored the legitimate claim of the petitioners.

4. It is the further stand of the petitioners that the selection committee was not duly constituted as per the Rules in vogue. It was also urged that the selection committee is not the final authority after the process of selection since such select list has not been approved by the 'authority'. It is their further submission that the self-same advertisement was also challenged by one Balhab Chandra Sahu before this High Court in WP(C) No. 2025 of 2015 wherein by way of filing a counter affidavit by the Senior Administrative Officer of BDA admitted that under the Odisha Development Authorities Rule, 1983 particularly Rule 5 and 6 thereof no prior approval of the Authority was taken and accordingly in absence of any approval of the Development Authority in the present case the appointment/ selection of Opposite Parties No. 4 to 12 is liable to be quashed.

5. Per contra, the Opposite Party Nos. 2 and 3, Bhubaneswar Development Authority (BDA), filed counter affidavit disputing the stand of the petitioners and contended that

the provisions of the ODA Act as well as rules framed there under are not at all violated as claimed by the petitioners. The BDA being a statutory body duly exercised its power by issuing the advertisement at Annexure-2 and also conducted the selection process in terms of the relevant provisions of the statutory Rules. It is further submitted by the BDA that the objection raised by OPSC with respect to the educational qualification and the consequential decision of the government to cancel the previous advertisement with the further stipulation to take up the selection process after amendment of the rule has no bearing vis-a-vis the impugned advertisement at Annexure-2.

6. The BDA being a statutory and independent body the advise or objection raised by the OPSC is not applicable. The recruitment of ATP and JTP are meant for the posts in BDA and for that purpose the advertisement was published and such post are executive post(s) under BDA and therefore, the consultation with the OPSC is not required for filling up of such post. Not only that, it is further submitted that the decision of the H and UD Department under letter dated 06.09.2014 is not binding on BDA, as such notification has its application relating to the posts under the government.

7. To justify the selection process, it is further stated on behalf of BDA that it was approved in the 127th meeting of BDA to fill up the additional post like ATP and JTP to meet the urgency/exigency in public work. Such posts are created after due approval of the government under the ODA Act and rules. BDA is the competent authority to fill up the post by following due process of selection. The authority has inherent power to fill up the

post under its organization in view of exigency of public service or in the interest of organization, in absence of any recruitment.

8. General plenary power of the employer is always available for filling of its own post by issuing open advertisement and adopting a selection process in a transparent manner. As such there is no infirmity in publishing the advertisement at Annexure-2. It is vehemently contended by the BDA that the petitioners were not having the requisite qualification prescribed in the advertisement that is a degree in Town Planning. So far as petitioner number 1 and 2 are concerned although they possess a degree in architecture both the petitioners were not included in the shortlist drawn for the candidates for appearing in the interview for the reason that they did not possess the requisite educational qualification to apply such post in terms of the qualification prescribed in the advertisement.

The relevant Paragraph 7 of the Counter filed by BDA is extracted as under for convenience of reference;

“7. That in reply to the averment made in Para-5 of the writ application it is humbly submitted that the petitioners were lacking the requisite qualification prescribed in the advertisement. The petitioner no.1 & 2 do not possess a Degree in Town Planning although they possess a Degree in Architecture, Petitioner no.1 had applied for the post of ATP and petitioner no.2 had applied for the post of JTP. Both of the petitioners were not included in the Shortlist drawn up for the candidates for appearing in the interview.”

9. With respect to the constitution of the selection committee it was stated by BDA that there is no illegality in such constitution of selection committee under the chairmanship of the

Vice Chairman of BDA comprising of 8 other members out of which 6 were outsiders i.e. the Dean XIMB Bhubaneswar, Chief Architect Bhubaneswar, Additional Secretary H&UD department, HOD, Architecture IIT Kharagpur, Director of Town Planning Odisha and representative of ST&SC Department, Odisha. The committee also followed a transparent method of selection i.e. basing on evaluation of comparative merit by assigning 80% for career marking and 20% marks for interview. The ratio of 80% in career marking and 20% in the interview mark was fixed to select the most meritorious candidate having a bright academic career. After following such transparent procedure of selection the Ops 4 to 12 were selected for the post of ATP and JTP. Such selected Opposite parties had not only possessed the required qualification prescribed in the advertisement but also possessed degree and experience in Town Planning. Therefore their selection is just and proper.

10. With respect to the allegation of not conducting any written test examination it is contended by BDA that the post of ATP and JTP being technical in nature there was no necessity to conduct a written test. Selection was made basing upon the 80% of career mark and 20% interview mark, as already noted, which clearly shows that meritorious candidates have been selected possessing bright academic career.

11. It is further stated by the BDA that the procedure adopted by the OPSC for selecting the candidates cannot be equated with the present selection process and as such there is no illegality or irregularity as claimed by the petitioners. It is also urged that the post of ATP and JTP have been created with the

concurrence of the H&UD department, Odisha, after receiving prior approval of the “Authority”.

Accordingly the advertisement was published and selection process was completed and the merit list was drawn up. The select list was not given effect due to pendency of the W.P(C) 2025 of 2015 and operation of interim order. The select list has been given effect to soon after disposal of the said writ petition as per order dated 31st August 2015. All the selected candidates joined in the post much prior to the receipt of interim order dated 21. 9. 2015 passed in Misc Case No 15983 of 2015 in this writ petition, after taking into consideration the disposal of the WP(C) No. 2025/2015 which was disposed of on 31.8.2015“as withdrawn”.

12. The private opposite parties no.4 to 12 are the beneficiaries of such selection process for the post of ATP/JTP and being appointed they are continuing as such. Opp Parties 4, 6-7 &10-12 represented by Ms. Pami Rath, learned counsel disputed at the outset the stand of the petitioners with respect to possessing the desired qualification. It is stated by the said Opposite parties that by way of notice dtd.6.2.2015 the status of the candidates who participated in the selection process was published. Referring to the list enclosed to Annexure-A/4 it is stated that Petitioner no 1’s name appears in the **list of applicants not fulfilling the eligibility criteria** for the post of ATP at Sl no 4 and JTP at Sl no. 84 and that of Pet no. 2 for JTP at Sl no.101.

12.A. Such rejection was admittedly never challenged by the petitioners. Since the petitioners were never shortlisted for the interview and were declared ineligible from inception therefore, the statement of the petitioners in their writ petition that they are

eligible and had applied for the post having the required qualification even after publication of the rejection list, is not only a false and deliberate misrepresentation but also amounts to fraud and deceit for suppressing the material fact. Accordingly the said Opposite parties. claimed that the petitioners have not approached this court with clean hand even though they were aware about rejection of their candidature rather deliberately made false submission.

13. To justify such stand, these opposite parties relied upon the decision of the Apex Court in KD Sharma vs. SAIL reported **2008 (12) SCC 481** wherein it is held that in case the applicant makes a false statement or suppresses material fact or attempt to mislead the court, the court may dismiss the action on that ground alone and may refuse to enter into the merit of the case.

14. So far the allegation with respect to non conducting of the written test examination as well as issuing the advertisement prior to amendment of the educational qualification as opined by the OPSC, it is answered by these opposite parties by saying that after participating in the selection process and after they were held to be ineligible they cannot take such a plea being unsuccessful and more so being found ineligible to participate in the selection process and when such inclusion in “ineligible list” was admittedly not assailed.

15. It is further stated that the petitioners after participating in the recruitment process and declared ineligible and also unsuccessful cannot challenge the appointment of these opposite parties on the ground that the recruitment was only consisted of career marking and interview without adopting the procedure of written test as one of the modalities.

16. The present opposite parties have been appointed in terms of a public advertisement and after being declared successful by a duly constituted selection committee they were appointed following a proper procedure of selection maintaining fair play for which their selection cannot be allowed to be set aside at the behest of the petitioners who resorted to deliberate misrepresentation making allegation which are unsubstantiated and in fact in derogation of the Act and Rules, governing the field.

17. The Opposite Party No.5 filed a separate counter being represented by learned Advocate Mr. B.B. Mohanty and submitted that he is a selected and appointed candidate as a Junior Town Planner and disputes the maintainability of the present writ petition on the ground of doctrine of estoppel and acquiescence and has prayed for dismissing the said writ petition in limine without delving into the merits and contention of the writ petition. It is contended that the petitioners along with the selected candidates arrayed as Opposite parties had participated in the selection process in terms of the conditions laid down in the advertisement whereas the petitioners' candidature were rejected on account of their unsuitability for not possessing the requisite educational qualification prescribed in the advertisement. Neither the conditions stipulated in the advertisement is under challenge nor the rejection of candidatures of the petitioners is under challenge. Instead of doing so the petitioners deliberately suppressed the fact and did not disclose their rejection of candidature but simultaneously made a false statement in the writ petition by saying that they do possess the requisite qualifications as per advertisement and had participated in the selection process. Moreover they have never challenged method of selection and

decision to fill up the post of ATP and JTP created in terms of Annexure A/1 dated 31.12.2014. As such the petitioners cannot maintain the present writ petition as they are fence sitters.

18. He relied upon the decision in Madras Institute of Development Studies and another Vs. K Sivasubramaniam and others reported in **(2016) 1 SCC 454** to fortify his stand. In the said decision the Apex Court held as under:-

“14. The question as to whether a person who consciously takes part in the process of selection can turn around and question the method of selection is no longer res integra.

15. [In Dr. G. Sarana vs. University of Lucknow & Ors.](#), (1976) 3 SCC 585, a similar question came for consideration before a three Judges Bench of this Court where the fact was that the petitioner had applied to the post of Professor of Anthropology in the University of Lucknow. After having appeared before the Selection Committee but on his failure to get appointed, the petitioner rushed to the High Court pleading bias against him of the three experts in the Selection Committee consisting of five members. He also alleged doubt in the constitution of the Committee. Rejecting the contention, the Court held:-

15. We do not, however, consider it necessary in the present case to go into the question of the reasonableness of bias or real likelihood of bias as despite the fact that the appellant knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee. He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee. This view gains strength from a decision of this Court in Manak Lal's case where in more or less similar circumstances, it was held that the failure of the

appellant to take the identical plea at the earlier stage of the proceedings created an effective bar of waiver against him. The following observations made therein are worth quoting: “It seems clear that the appellant wanted to take a chance to secure a favourable report from the tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point.”

16. *[In Madan Lal & Ors. vs. State of J&K & Ors.](#) (1995) 3 SCC 486, similar view has been reiterated by the Bench which held that:-*

“9. Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of [Om Prakash Shukla v. Akhilesh Kumar Shukla](#) it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.

17.. *[In Manish Kumar Shahi vs. State of Bihar](#), (2010) 12 SCC 576, this Court reiterated the principle laid down in the earlier judgments and observed:-*

“We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of

selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under [Article 226](#) of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition."

18.. In the case of [Ramesh Chandra Shah and others vs. Anil Joshi and others](#), (2013) 11 SCC 309, recently a Bench of this Court following the earlier decisions held as under:-

"In view of the propositions laid down in the above noted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents.""

19. He further submitted that the grounds raised by the petitioner with respect to improper constitution of selection committee being in violation of ODA Rule 1983 is figment of imagination and is misconceived. The said opposite party has justified his stand by referring to the relevant provision of law as to how the petitioners have misinterpreted the word "Authority" with respect to taking approval before issuance of appointment orders.

Learned Counsel Sri B.B. Mohanty submitted with vehemence that "Authority" as has been defined under the ODA Act is none other than the BDA and under no circumstances it can mean "the government". So far selection process as well as malafide of vice chairman including non conducting of a written test examination etc., the opposite party no. 5 has relied upon the decision of Apex court wherein it has been stated that a candidate

after participating in the selection process cannot claim and cannot challenge the process of selection after being found to be unsuccessful. Since the selection committee rejected candidature of the petitioners on the ground of not having the requisite eligibility in terms of the qualification such rejection being not under challenge the grievance of the petitioner with respect to selection procedure as well as the conduct of the vice chairman etc. is not sustainable in the eye of law.

20. Learned counsel Sri Mohanty appearing for the opposite party No. 5 also submitted that even if the qualification as suggested in Annexure- 2 to the writ petition basing upon the views expressed by Orissa Public Service Commission have not been incorporated but the same has nothing to do with the present selection process where taking into consideration the newly created posts and requirement to man such post the BDA authorities decided to go ahead with the selection process on the basis of the qualification in terms of their own guidelines and prescribed procedures.

21. To justify his stand the opposite party No. 5 has relied upon the decision in Ashok Kumar versus state of Bihar reported in **AIR 2016 SC 5069** wherein Apex court has categorically held that after surrendering to a procedure of selection and after participating in the selection process the challenge to the result of selection and the process of selection is not permissible by an unsuccessful candidate in the selection process as it would be hit by the principle of estoppel. Paragraph No.11, 12 and 15 as relied upon by the Learned Counsel are as under :-

" 11. The appellants participated in the fresh process of selection. If the appellants were aggrieved by the decision to hold a fresh process, they did not espouse their remedy. Instead, they participated in the fresh process of selection and it was only upon being unsuccessful that they challenged the result in the writ petition. This was clearly not open to the appellants. The principle of estoppel would operate.

12. The law on the subject has been crystalized in several decisions of this Court. In *Chandra Prakash Tiwari v. Shakuntala Shukla*, this Court laid down the principle that when a candidate appears at an examination without objection and is subsequently found to be not successful, a challenge to the process is precluded. The question of entertaining a petition challenging an examination would not arise where a candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein, merely because the result is not palatable. In *Union of India v. S. Vinodh Kumar*, this Court held that:

"18. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same...

(See also *Munindra Kumar v. Rajiv Govil* and *Rashmi Mishra v. M.P. Public Service Commission*)."

The same view was reiterated in *Amlan Jyoti Borroah* (*supra*) where it was held to be well settled that candidates who have taken part in a selection process knowing fully well the procedure laid down therein are not entitled to question it upon being declared to be unsuccessful.

In *Manish Kumar Shah v. State of Bihar*, the same principle was reiterated in the following observations :

"16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the Petitioner is not entitled to challenge the criteria or process of selection. Surely, if the Petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The Petitioner invoked jurisdiction of the High Court under *Article 226* of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the Petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition. Reference in this connection may be made to the Judgments in *Madan Lal v. State of J. and K.* MANU/SC/0208/1995: (1995) 3 SCC 486, *Marripati Nagaraja v. Government of Andhra Pradesh and Ors.* MANU/SC/8040/2007 : (2007) 11 SCC 522, *Dhananjay Malik and Ors. v. State of Uttaranchal and Ors.* MANU/SC/7287/2008 : (2008) 4 SCC 171, *Amlan Jyoti Borooah v. State of Assam* MANU/SC/0077/2009 : (2009) 3 SCC 227 and *K.A. Nagamani v. Indian Airlines and Ors.* (*supra*)."

In Vijendra Kumar Verma v. Public Service Commission, candidates who had participated in the selection process were aware that they were required to possess certain specific qualifications in computer operations. The appellants had appeared in the selection process and after participating in the interview sought to challenge the selection process as being without jurisdiction. This was held to be impermissible.

In Ramesh Chandra Shah v. Anil Joshi, candidates who were competing for the post of Physiotherapist in the State of Uttarakhand participated in a written examination held in pursuance of an advertisement. This Court held that if they had cleared the test, the respondents would not have raised any objection to the selection process or to the methodology adopted. Having taken a chance of selection, it was held that the respondents were disentitled to seek relief under [Article 226](#) and would be deemed to have waived their right to challenge the advertisement or the procedure of selection. This Court held that:

"18. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome."

In Chandigarh Administration v. Jasmine Kaur, it was held that a candidate who takes a calculated risk or chance by subjecting himself or herself to the selection process cannot turn around and complain that the process of selection was unfair after knowing of his or her non-selection. *In Pradeep Kumar Rai v. Dinesh Kumar Pandey*, this Court held that :

"Moreover, we would concur with the Division Bench on one more point that the appellants had participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the appellants did not challenge it at that time. This, it appears that only when the appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time. Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted."

This principle has been reiterated in a recent judgment in *Madras Institute of Development v. S.K. Shiva Subaramanyam*.

15. In this view of the matter, the Division Bench cannot be held to be in error in coming to the conclusion that it was not open to the appellants after participating in the selection process to question the result, once they were declared to be unsuccessful. During the course of the hearing, this Court is informed that four out of six candidates, who were ultimately selected figured both in the first process of selection as well as in the subsequent selection. One candidate is stated to have retired."

22. It was reiterated that on this aspect law laid down by the Apex court is clear that when a candidate appears at an

examination without objection and is subsequently found to be not successful, he is precluded from assailing the same. The question of entertaining a petition challenging a selection would not lie where a candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein merely because the result is not palatable.

23. With respect to the allegation of malafide against Vice chairman of BDA it is contended by the opposite party no.5 relying upon a decision of Apex court in the matter of Federation of Railway Officers Association and others Vs. Union of India reported in AIR 2003 SC 1344 in which Apex court while answering to the issue relating to malafide, held that allegation regarding mala fides cannot be vaguely made and it must be specified and clear. Paragraph 12 relied upon is extracted as under:

"12. In examining a question of this nature where a policy is evolved by the Government judicial review thereof is limited. When policy according to which of the purpose for which discretion is to be exercised is clearly expressed in the statute, it cannot be said to be unrestricted discretion. On matter affecting policy and requiring technical expertise Court would leave the matter for decision of those who are qualified to address the issue. Unless the policy of action is inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of the power, this Court will not interfere with such matter."

24. Further the allegation against whom the malafide is raised should have been made as a party to meet such allegations. In the present case admittedly that has not been done. Relying upon the said decision it is further contended by Learned Counsel for O.P.No.5 that where a policy is evolved by the government,

scope of judicial review thereof is limited. The policy decision of the competent authority cannot be a subject matter of adjudication and interference unless inconsistent with the Constitution of India or resulting in arbitrary or abuse of power.

25. The Petitioners have filed rejoinder affidavit supplementing their earlier stand with additional grounds that the select list is not sustainable. **However, with respect to the rejection of candidatures of the petitioners on the ground of not having the minimum eligibility as much as not having made any prayer for any kind of relief for the petitioners themselves is undisputed.**

25.A. The averment in counter filed by Ops 4,6,7 and 10 to 12 in para 4 runs thus;

“4. That the Petitioner at para 5 have stated that they had applied in pursuance to advertisement dated 14.1.2015 and have also further stated that they applied with the knowledge that they were holding the requisite criteria.

This statement is totally false and has been deliberately made to misguide the court. The day on which they have sworn the affidavit for filing this writ application they knew very well that the statement made at Para 5 is false.

By way of notice dated 6.2.2015, the status of eligibility and non-eligibility of all the candidates were published. The present petitioners' candidature was clearly rejected on the ground of being found not possessing the educational qualification. The said rejection has also not been challenged by the Petitioners'.

A copy of notice dated 6.2.2015 along with the list showing the status of the candidates as to whether they fulfill the educational qualification is annexed as **ANNEXURE A/4.**

Thus the Petitioners were never short listed for the interview and were declared in-eligible. This statement is not only false and a deliberate misrepresentation made on affidavit but amounts to fraud and deceit. The petitioner cannot be said to have approached the Court with clean hands.

On the day of filing the writ application they knew that their applications were rejected. It was not a case where one does not get appointment due to not being high up in merit, but in the instant case they were specifically declared in-eligible on ground of lack of education qualification.....”

25.B. Paragraph-3 of the counter affidavit filed by the Opposite Party No.5 is also extracted hereunder for convenience of ready reference;

“3. That at the threshold the O.P.No.-5, who was selected and appointed as Junior Town Planner humbly submits that the present Writ Petition is not maintainable in law being hit by doctrine of estoppels and acquiescence and thus may be dismissed in limine without delving onto the merits of the Contentions as the Writ Petitioner who were candidates in pursuance of the Advertisement dated 14.01.2015 filed the present Writ Petition invoking Extraordinary Writ Jurisdiction of this Hon’ble Court after they failed to make it to the list of shortlisted candidates to appear at the Interview in terms of qualification and Career marking which was adopted as criteria of selection in the Advertisement sought to be raised. To be particular and emphatic the Writ Petitioner did neither challenge the Advertisement before the last date of receipt of candidatures nor has challenged the same specifically in the present Writ Petition on what so ever ground. Besides, without challenging the method of selection and the decision to fill up the posts of ATP and JTP created only by letter dated 31.12.2014 and only after they had surrendered to the terms of the

Advertisement they have now sought to assail the result when the same became unpalatable to them. Hence going by the settled Position of Law {2016 (1) SCC Page 454 in the matter of Madras Institute of Development Studies and another Vs. K. Sivasubramanian & Others} the Petitioners are fence sitters who are not to be granted with any opportunity by the Hon'ble Court to invoke the Extraordinary Writ Jurisdiction as they have acquiesced their right to challenge the selection and appointment having participated in the selection and failed. Hence the present writ petition is not maintainable in the eyes of Law.”

25.C. Rejoinder by petitioner (para7 runs thus)

“7. That with regard to the averments made in the paragraph-7 of the counter affidavit filed by the OP Nos.2 & 3 and the averments made in paragraphs-4, 5 & 6 of the counter affidavit filed by the OP Nos. 4, 6, 7, 10, 11, 12 and 5 it is humbly submitted that the qualifications, experience, age and procedure for direct appointment of ATPs/JTPs in the rank of Class-I & Class-II should not be at variance with those prescribed by statues/ Rules. But in the instant case, the entire process of direct appointment to the post of ATPs/JTPs was in contravention of the established rules prescribed by State Govt. All the selected candidates (OP No.4 to 12) who have been appointed to the post of ATPs/JTPs do not possess minimum requisite qualification i.e. **Degree in Regional/ Town Planning** from a recognized University or Institution and all such does not come under the eligibility criteria for selection in pursuant to the advertisement made by OP Nos.2 & 3. What would be the qualification for the post but as the selected candidates i.e., OP Nos.4 to 12 do not possess minimum mandatory requisite qualification **Degree in Regional /Town Planning**, they are not eligible for appointment

to the post of ATPs/JTPs in the rank of class-1 and class-II respectively till amendment of relevant Rules i.e. the Odisha Town Planning Service Rules 1970. OP Nos.2 & 3 applying double standards in their treatment. They unfairly allowed the OP Nos. 4 to 12 that, they fulfilled the required educational qualification. i.e. Degree in Regional / Town Planning, that they have not actually possess. But on the other hand they unfairly rejected petitioners' application on the same ground i.e. lack of educational qualifications i.e. Degree in Regional/ Town Planning. Such type of double standards policy are unfair in the eye of law. Hence appointment order is vitiated. The entry to the post of ATPs/JTPs in BDA, Bhubaneswar were through back door method made by the Vice-Chairman, BDA who is not competent to give appointment. This is an act of nepotism and favoritism and thus such appointments under annexures-4 & 5 dtd.04.9.15 are illegal appointments in wholly arbitrary process.

26. Learned Counsel for the petitioners Sri Tripathy relied upon decisions of Apex court in **AIR 2020 SC 2060** (Ranjit Singh Kardam Vs. Sanjeev Kumar) to justify their stand that the court has the power to interfere with the process of selection where there is any illegality in selection process and mere participation in the selection process will not stand as an estoppel.

27. Mr. Tripathy, Learned counsel for the petitioners argued that if the recruitment agency had not published any criteria on the basis of which candidates were owing to be subjected for selection process and the candidates participated in the selection without knowing the criteria of selection they cannot be prevented from challenging the process of selection when ultimately they came to

know that the recruiting agency systematically has diluted the merit in the process of selection.

28. When the criteria of selection is published for the first time along with final result they cannot be estopped from challenging the criteria of selection and the entire process of selection. Accordingly the writ petitioners who had participated in the selection are not estopped from challenging the selection in the facts and circumstances of the case at hand. When there is allegation of alteration of criteria of selection affecting merit then it is malice-in-law and not malice-in- fact. Under such circumstances the writ petition is maintainable even in absence of specific allegation against the members of the selection committee and without impleading them as parties.

29. Similarly relying upon the decision in Raj Kumar & others Vs. Shakti Raj & others reported in **(1997) 9 SCC 527** it is submitted by the petitioners that the principles of estoppel does not apply to cases where malafidies and illegality have been adopted to give appointment to preferential candidates.

30. Petitioner also relied on the judgement of the Apex Court in the case of state of Orissa & anr v Mamata Mohanty reported in **(2011) 3 SCC 436** more particularly para 20 thereof to substantiate his assertion that since the action of the authorities (Ops 2&3) is illegal from inception ,all consequential actions and in the present case, selection of pvt Opp parties is liable to be set aside.

31. The opposite parties No.2 and 3 (BDA) also filed a reply to the rejoinder affidavit filed by the petitioners disputing the stand taken and have also given proper justification defending the

selection of pvt Opp parties by relying upon the facts as well as provisions of law.

32. Similarly, the private opposite parties No. 4,6,7,10 to 12 have also filed a separate reply disputing the stand of the petitioners and reiterated their stand that the petitioners do not have any right to question the selection because they are ineligible candidates and they have deliberately suppressed their ineligibility to pursue this litigation, only to harass the petitioner.

33. Ms. Rath, learned Counsel for such Opp. Parties has relied upon on several decisions of Apex court. Referring to decision reported in (2008) 12 SCC 481 in the matter of K.D. Sharma Vs. Steel Authority Of India Ltd. & Others it is argued that Jurisdiction of the Apex Court under Article 32 and of the High Court under Article 226 of the constitution is extraordinary, equitable and discretionary. Prerogative writs mentioned therein are issued for doing substantial justice. It is therefore, of utmost necessity that the petitioner approaching the writ court must come with clean hands, put forward all the facts before the court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material fact or the petitioner is guilty of misleading the court, his petition may be dismissed at its threshold without considering the merits of the case. While exercising extraordinary power a writ court would certainly bear in mind the conduct of the parties who invokes the jurisdiction of the court. If the applicant makes a false statement or suppresses any material fact or attempts to mislead the court the court may dismiss the action on that ground only and may refuse to enter into the merit of the cases by stating “we will not listen to your application because of what you have done”.

The Apex Court in K.D. Sharma Vs. Steel Authority Of India (supra) has held that “*Fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. In fraud one gains at the loss and cost of another. Even the most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personal.*”

33.A. Similarly relying upon the decision reported in **2013 (10) SCC 253** Vijay S. Sathye Vs. Indian Air Lines Ltd. and also in the matter of **AIR 1988 SC 2181** Bharat Singh Vs. State of Haryana it is submitted by Ms. Pami Rath, Ld counsel that where by filing a false affidavit if the relief has been claimed that cannot be sustained in the eye of law. Furthermore, where a party has not denied the facts and arguments advanced by the opposite parties then it amounts to admission.

33.B. To counter the decision relied upon by the petitioners in Raj Kumar & others Vs. Shakti Raj & others reported in **(1997) 9 SCC 527**, Ms Rath, the Ld counsel also relied upon the decision reported in **2010 (12) SCC 576** Manish Kumar Sahi Vs. State of Bihar & others where Apex court held that after participating in a recruitment process and accepting the process of selection an unsuccessful candidate cannot challenge the criteria or process of selection. Surely, if the petitioner’s name had appeared in the merit list, he would not have even dreamt of challenging the selection. Since the petitioner invokes jurisdiction of High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list such conduct of the petitioner clearly disentitles him from questioning the selection and there is no error by refusing to entertain the writ petition.

33.C. Similarly in another case reported in (2008) 4 SCC 171 Dhanjaya Malik & others Vs. State of Uttaranchal & others the Hon'ble Apex court observed that the petitioner unsuccessfully participated in the selection without any demur and hence he is estopped from challenging the selection criterion inter alia that the advertisement and selection with regard to requisite educational qualification was contrary to rules. If they think that the advertisement and selection process were not in accordance with rules they could have challenge the advertisement and selection process without participating in the selection process.

34. The respective parties have filed their written notes of submission and also the memo of citations.

35. After going through the pleadings and the submission of respective learned counsels the following issues are required to be answered:

1. Whether the writ petition is maintainable?
2. If the writ petition is maintainable what relief can be granted in favour of the petitioners in absence of any specific prayer for their own appointment in place of the private opposite parties number 4 to 12.
3. Whether there is any suppression of facts by the petitioners and commission of fraud on the part of petitioners as alleged by pvt Opp. parties and if so what will be the legal consequences thereof?

36. To answer the first issue which is intertwined with issue no 2, admittedly this Court in the present lis is not dealing with a Public Interest litigation rather it is a service dispute where the selection and appointment of OP No. 4 to 12 is only under

challenge. The prayer of the petitioners in the writ petition is for quashing selection and appointment of the opposite parties number 4 to 12 as Assistant Town Planner and Junior Town Planner and to issue writ in the nature of certiorari quashing the impugned order of appointment. As pointed out by the respective Learned Counsel for the Opp. parties Ms. Pami Rath(Ops 4,6-7 and 10-12) and Sri B.B. Mohanty(Op no.5) - the selected candidates, in fact, there is no prayer by the petitioners relating to their own claim as well as there is no such averments even in the writ petition indicating whether the petitioners once successful in the case at hand can be appointed qua the selected private opposite parties. It is also not the prayer in the writ petition to declare the constitution of the selection committee or the selection procedure adopted by the BDA to be illegal or unjust.

37. Therefore in absence of any pleading and/or prayer with respect to the petitioners themselves in the present writ petition they cannot be treated as aggrieved party in a service dispute for which this Court is of the firm view that the case at hand does not merit consideration.

38. Coming to the 3rd issue with respect to suppression of material facts as well as committing fraud on this Court the findings are as under:-

On perusal of the pleadings it transpires that petitioners have deliberately misrepresented the facts and they have not approached this court with clean hand. Admittedly the candidature of the petitioners was rejected and such rejection list was in public domain and presumption can easily be drawn that petitioners were very much aware of the same. Not only that the petitioners have deliberately suppressed such material fact about the rejection of

their candidature as much as they have failed to challenge the said rejection of their candidature in the present writ petition.

38.A. **Such aspect with supporting documents were vehemently urged by both State opposite parties, as well as Private opposite parties relying on the recitals in their respective counters. But, the same was uncontroverted and the petitioner did not choose to challenge the same.**

38.B. Thus it can be safely concluded that the petitioners had deliberately suppressed the material fact and such attempt has been adopted by the petitioners only with an intention to affect the Opp parties by misleading this court and to obtain an interim order.

38.C. There is no iota of doubt that this Court would not have entertained this present Writ Petition at the threshold had the petitioners placed on record the factum of their inclusion in the rejection list and the same not being admittedly assailed.

It is manifestly clear that the advertisement at Annexure-2 allegedly being contrary to the notification issued by the government in H and UD Department dated 06.09.2014 is what weighed with this Court in issuing notice. The same is borne out from the order dated 21.09.2015, quoted hereunder;

“Heard Mr. B.S. Tripathy, learned counsel for the petitioners.

The petitioners in this petition have assailed the advertisement dated 14.1.2015 vide Annexure-2, whereby applications have been invited for appointment of Assistant Town Planner & Junior Town Planner in the Bhubaneswar Development Authority, on the ground that the advertisement issued is contrary to the notification issued by the Government in

Housing and Urban Development Department dated 6.9.2014. It is urged that such advertisement has been issued without approval of the authority, which is violative of Rule 6 of the Development Authority Rules.

Issue notice to the opposite parties by registered post with A.D., requisites for which shall be filed by the Wednesday (23.9.2015). A short returnable date be fixed.

Call this matter along with W.P.(C) No.2025 of 2015.

Sd/-”

39. The decision in **AIR 1988 SC 2181** Bharat Singh Vs. State of Haryana relied upon by Ms. Rath is squarely applicable in the present case. Relevant extract of the said decision is quoted hereunder:-

"In our opinion, when a point, which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or the counter-affidavit, as the case may be, the Court will not entertain the point. There is a distinction between a hearing under the Code of Civil Procedure and a writ petition or a counter-affidavit. While in a pleading, i.e. a plaint or written statement, the facts and not the evidence are required to be pleaded. In a writ petition or in the counter affidavit, not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it."

40. Further the principle decided in **(2008) 12 SCC 481** in the matter of A.D. Sharma Vs. Steel Authority Of India Ltd. & Other as relied by the Opp. Parties is also applicable. Relevant extracts of the said decision are quoted hereunder:-

"15. It is well settled that "fraud avoids all judicial acts, ecclesiastical or temporal" proclaimed Chief Justice

Edward Coke of England before about three centuries. Reference was made by the counsel to a leading decision of this Court in S.P. Chengalvaraya Naidu (Dead) by Lrs. V. Jagannath (Dead) by Lrs. & Ors., (1994) 1 SCC 1 wherein quoting the above observations, this Court held that a judgment/decree obtained by fraud has to be treated as a nullity by every Court.

17. The Court defined fraud as an act of deliberate deception with the design of securing something by taking unfair advantage of another. In fraud one gains at the loss and cost of another. Even the most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam.”

41. The decisions relied on by the learned counsel for the petitioner on the face of it have no application in the factual matrix of the case at hand and in citing the said judgments, the petitioner chose to ignore the cardinal principle of interpretation of judgment as stated by the Apex Court in the case of Islamic Academy of Education and another vs. State of Karnataka and others reported in **(2003) 6 SCC 697** more particularly paragraphs 139 to 145 at page 771-772.

Paragraph-139 of the said judgment which referred to the earlier judgment of the Apex Court in the case of Executive Engineer, Dhenkanal Minor Irrigation Division vs. N.C. Budharaj reported in **(2001) 2 SCC 721**.

“139. A judgment, it is trite, is not to be read as a statute. The ratio decidendi of a judgment is its reasoning which can be deciphered only upon reading the same in its entirety. The ratio decidendi of a case or the principles and reasons on which it is based is distinct from the relief finally granted or the manner adopted for its disposal.

42. Hence on a conspectus of materials on record, this Court is of the considered view that on account of suppression of material facts which amounts to committing fraud on court and making deliberately wrong submission in the writ petition thereby approaching this court with unclean hands, this lis invoking plenary jurisdiction of writ court under Article 226 of the Constitution of India is not entertainable.

43. The Writ Petition is accordingly dismissed. Interim order stands vacated.

(*V.Narasingh*)
Judge

Orissa High Court, Cuttack,
Dated the 31st July, 2023/Santoshi