

ORISSA HIGH COURT: CUTTACK

W.P.(C) NO. 9848 OF 2012

In the matter of an application under Articles 226 and 227 of the Constitution of India.

AFR

Sashikanta Das Petitioner

-Versus-

State of Orissa and others Opp. Parties

For Petitioner : M/s. K.K. Swain and
P.N. Mohanty, Advocates

For Opp. Parties : Mr. B.P. Tripathy,
Addl. Govt. Advocate
[O.P.Nos.1 to 3]
M/s. Pami Rath and
S. Gumansingh, Advocates
(Intervenor)

P R E S E N T:

**THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
HONOURABLE MISS JUSTICE SAVITRI RATHO**

Date of hearing and judgment: 21.03.2022

DR. B.R. SARANGI, J.

The petitioner, by means of this writ petition, seeks to quash the order dated 05.04.2012 passed by the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 2894 (C) of 2011 at Annexure-9, the circular dated 26.07.2011 of the State Government at Annexure-8, so also the order dated 02.08.2011 at Annexure-7, and to issue direction to the opposite parties to consider his case for promotion to the post of Junior Assistant, Group-C by declaring him eligible for such promotion.

2. The factual matrix of the case, in brief, is that the petitioner was appointed as a Cook, by virtue of the order dated 13.02.1997, in the office of the Superintendent of Circle Jail, Cuttack, Choudwar. Pursuant to which, he joined in the said post on 22.02.1997 and continued to discharge his duties to the best satisfaction of the authority. While he was so continuing, he was transferred to the office of the D.P.O., ACS, Sambalpur to work as a Peon. From there, by virtue of the order dated 16.08.2003, he was sent on

deputation to the office of the I.G. of Prisons to work as a Peon. Thereafter, on 03.10.2007, the petitioner was again transferred to the office of the S.D.P.O., G. Udaygiri to work as a Peon on regular basis, pursuant to which, he joined in the office of the I.G. of Prisons and DCS, Orissa on 03.10.2007. But the petitioner claimed that he has rendered 10 years continuous service and, therefore, he is entitled to get promotion to the post of Junior Assistant in terms of Rule-12 and 12 (A) of Orissa Ministerial Service (Method of Recruitment and Conditions of Service of Assistants and Section Officers in the Offices of the Heads of Departments) Rules, 1994 (for short "Rules, 1994"). The said benefit having not been extended, the petitioner approached the tribunal by filing O.A. No. 2894(C) of 2011 and the tribunal in turn, vide order dated 05.04.2012, dismissed the original application. Hence this application.

3. Mr. K.K. Swain, learned counsel for the petitioner contended that since the petitioner was

rendering service as a Cook w.e.f. 13.02.1997 and, as such, has completed 10 years of continuous service, he is entitled to get promotion to the post of Junior Assistant from the year 2007. But the same was denied to him on the ground that he has not completed 10 years of continuous service. Relying upon Rule-12 of Rules, 1994 and 12 (A) of Orissa Ministerial Service (Method of Recruitment and Conditions of Service of Assistants and Section Officers in the Offices of the Heads of Departments) Amendment Rules, 2001, it is contended that if the initial date of joining of the petitioner as Cook w.e.f. 13.02.1997 is taken into consideration, the petitioner has completed 10 years of service from the year 2007. Therefore, the benefit of promotion should have been extended to the petitioner along with all consequential service and financial benefits as due and admissible to him in accordance with law. It is contended that such benefit has not been extended to the petitioner in view of the clarification issued by the authority on 02.08.2011, in pursuance of

the Home Department letter no.32667 dated 26.07.2011. It is contended that if as per Rules, 1994, which were framed in exercise of power conferred under Article 309 of the Constitution of India, the petitioner is entitled to get the benefit of promotion, by issuing an administrative circular, the same cannot be denied. To substantiate his contention, he has relied upon the judgments of this Court in the cases of **Radhashyam Panigrahi v. Registrar (Admn.), Orissa High Court**, 2009 (Supp.-I) OLR 682; **Santosh Kumar Sahu v. District Judge, Kalahandi and Nuapada**, 2009 (Supp.II) OLR 757 and of the apex Court in the case of **Pratibha Rani and others v. Union of India** (Civil Appeal No. 3792 of 2019 arising out of SLP (C) No. 31728 of 2018 disposed of on 10.04.2019).

It is further contended that the past service rendered by the petitioner should have been taken into consideration for computing the continuous service, in view of the observation made by the apex Court in paragraph-4 of the judgment rendered in the case of

Union of India v. C.N. Ponnappan, AIR 1996 SC 764.

It is thus contended that the tribunal has failed to count the service of the petitioner and on an erroneous appreciation of law, rejected the claim of the petitioner. Therefore, the petitioner has approached this Court by filing the present writ petition.

4. Mr. B.P. Tripathy, learned Addl. Government Advocate appearing for the State opposite parties contended that initially the petitioner was appointed as a Cook, which is a district cadre post and, as such, on his request, he was brought over to the directorate cadre post. As per Rules, 1994, the petitioner, having not completed 10 years of continuous service, is not entitled to the benefit, as claimed by him. As such, he justifies the order impugned passed by the tribunal and contended that this Court should not interfere with the same at this stage.

5. Ms. Pami Rath, learned counsel appearing for the intervenor-opposite party contended that the

petitioner was never senior to the intervenor, rather the gradation list, which has been placed on record by way of Misc. Case No.15515 of 2012 and published vide order dated 14.09.2007 at Annexure-3 to the misc. case, does not contain the name of the petitioner, whereas the intervenor's name finds place at sl.no.24 of the said gradation list. More so, the petitioner never challenged the said gradation list at any time, after its publication on 14.09.2007. Thereafter, a subsequent gradation list was published on 15.01.2009, wherein the name of the petitioner finds place at sl.no.33, having joined on 03.10.2007 in the Heads of Department, whereas the name of the intervenor finds place at sl.no.25 having joined in Heads of Department on 17.06.1999. Consequentially, the promotion given on the basis of continuous service of 10 years to the intervenor is well justified and, as such, the claim of the petitioner cannot sustain in the eye of law, as he had not completed 10 years continuous service from the date of joining i.e. 03.10.2007. As a consequence

thereof, the tribunal has not committed any error in denying the benefit to the petitioner so as to warrant interference by this Court. To substantiate her contention, she has relied upon the judgment of the apex Court in the case of **K.P. Sudhakaran v. State of Kerala**, (2006) 5 SCC 386.

6. This Court heard Mr. K.K. Swain, learned counsel for the petitioner; Mr. B.P. Tripathy, learned Addl. Government Advocate appearing for the State-opposite parties; and Ms. Pami Rath, learned counsel appearing for intervenor-opposite party by hybrid mode. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

7. Undisputedly, the petitioner was appointed as a Cook in the office of Circle Jail, Cuttack, Choudwar on 13.02.1997, which is a district cadre post. After joining in the said post, he was transferred

from place to place. On his request to come over to the directorate of Heads of Department category, vide his representation dated 25.09.2007 at Annexure-A/3 to the additional affidavit filed by the intervenor, he was brought over to the Heads of Department, pursuant to which he joined on 03.10.2007. Thereby, his earlier service rendered in the district cadre post cannot be taken into consideration for determination of continuous service.

8. It is worthwhile to mention here that in exercise of power conferred by the proviso to Article 309 of the Constitution of India, the Governor was pleased to amend the Orissa Ministerial Service (Method of Recruitment and Conditions of Service of Assistants and Section Officers in the Offices of the Heads of Departments) Rules, 1994 and formulated the Orissa Ministerial Service (Method of Recruitment and Conditions of Service of Assistants and Section Officers in the Offices of the Heads of Departments) Amendment Rules, 2001, of which Rule-12-A reads as under:

“12-A- Percentage of filling of vacancies and eligibility criteria

(1) 5% of vacancies in the post of Junior Assistant in the office of a Heads of Departments shall be filled up by way of promotion from among the Group-D employees of that office on the basis of recommendation of the Departmental Promotion Committee constituted under rule 16 (1);

Provided that in case required number of Group-D employees are not available for promotion to the post of Junior Assistant in a particular year, these vacancies shall be filled up by candidates recruited under rule 4 (1) (i).

(2) No Group-D employee shall be eligible for consideration for promotion to the post of Junior Assistant unless he has given willingness to that effect in writing and has put in minimum of 10 years of continuous service and has passed +2 Arts/Science/Commerce or possess such other qualification as are equivalent to pass in +2 examination.”

9. On perusal of the aforementioned provisions, it is made clear that no Group-D employee shall be eligible for consideration for promotion to the post of Junior Assistant unless he has given willingness to that effect in writing and has put in minimum of 10 years of continuous service and has passed +2 Arts/Science/Commerce or possess such other

qualification as are equivalent to pass in +2 examination. Needless to say, the petitioner, having joined as Cook in the district cadre post on 13.02.1997, cannot claim that he has got 10 years of continuous service by 2007 and is otherwise eligible to get promotion to the post of Junior Assistant. Rather, the documents available on record, i.e., Annexure-A/3, clearly indicates that the petitioner had made request on 25.09.2007, stating that he should be brought over to the prison directorate, as one post of peon was lying vacant, and on consideration of the same, he was brought over to the directorate cadre post on 03.10.2007. Pursuant thereto, he joined and continued to rendering service in the directorate cadre, thereby foregoing his service rendered under the district cadre. In view of such position, the claim made by the petitioner, that he has rendered 10 years of continuous service in terms of Rule-12-A of Rules, 2001, cannot have any justification, as he was brought over to the directorate cadre only on 03.10.2007.

10. Since the petitioner joined in the directorate cadre and his name found place at sl.no.33 of the gradation list, which was published on 15.01.2009, whereas the name of the intervenor-opposite party found place at sl.no.25 of the said gradation list, taking into account his date of initial entry in the directorate as 17.06.1999, the intervenor-opposite party having completed 10 years continuous service in the directorate, was eligible to get promotion to the post of Junior Assistant, whereas the petitioner, having brought over to the directorate cadre on 03.10.2007, cannot be construed to have completed 10 years of continuous service in the directorate cadre post. Thereby, the amended Rules-12-A of Rules, 2001 cannot come into the rescue of the petitioner to get promotion to the post of Junior Assistant.

11. Contention was raised by Mr. K.K. Swain, learned counsel for the petitioner that the Rules, which have been framed in exercise of power conferred under proviso to Article 309 of the Constitution of India,

cannot be supplanted by an administrative instructions issued by the authority, a copy of which has been annexed as Annexure-7 to the writ petition. But fact remains, rules do not specify how 10 years continuous service is to be counted. Therefore, the Home Department, vide letter no.32667 dated 26.07.2011, envisaged the principles for counting of continuous service in the post of Peon in the directorate cadre. Thereby, the instructions issued on 02.08.2011 vide Annexure-7, may be an executive instruction, but that is with reference to Rule-12-A(2) and, as such, provisions have been made to supplement but not to supplant the same and, as such, it cannot be said that such administrative instructions are contrary to the rules. Thereby, the ratio decided in **Radhashyam Panigrahi** and **Santosh Kumar Sahu** (supra), on which reliance was placed by learned counsel for the petitioner, has no application to the present case. So far as the judgment of the apex Court in the case of **C.N. Ponnappan** (supra) is concerned, which was

relied upon by the learned counsel for the petitioner, the fact of said case is totally different and distinguishable from that of the present case and, as such, the said case is not applicable to the present case. Similarly, the judgment of the apex Court in the case of **Pratibha Rani** (supra), is of no help to the petitioner, as the same has no applicability to the present case, in view of the fact that the present case involves two separate rules and two separate cadres and 10 years continuous service is to be adjudged in consonance with Rule-12-A of Amendment Rules, 2001.

12. Reliance was placed by Ms. Pami Rath, learned counsel for the intervenor-opposite party on the judgment of the apex Court in **K.P. Sudhakaran** (supra), paragraph-11 of which reads as under:-

“11. In service jurisprudence, the general rule is that if a government servant holding a particular post is transferred to the same post in the same cadre, the transfer will not wipe out his length of service in the post till the date of transfer and the period of service in the post before his transfer

has to be taken into consideration in computing the seniority in the transferred post. But where a government servant is so transferred on his own request, the transferred employee will have to forego his seniority till the date of transfer, and will be placed at the bottom below the junior most employee in the category in the new cadre or department. This is because a government servant getting transferred to another unit or department for his personal considerations, cannot be permitted to disturb the seniority of the employees in the department to which he is transferred, by claiming that his service in the department from which he has been transferred, should be taken into account. This is also because a person appointed to a particular post in a cadre, should know the strength of the cadre and prospects of promotion on the basis of the seniority list prepared for the cadre and any addition from outside would disturb such prospects. The matter is, however, governed by the relevant service rules."

13. A bare reading of the aforementioned paragraph would go to show that in service jurisprudence, the general rule is that if a government servant holding a particular post is transferred to the same post in the same cadre, transfer will not wipe out his length of service in the post till the date of transfer and the period of service in the post before his transfer has to be taken into consideration in computing the seniority in the transferred post. Thereby, applying the

same principles to the present case, if the petitioner joined as a Cook in different cadre altogether and brought over to the directorate only on 03.10.2007, it cannot be construed that he has completed 10 years of continuous service by 2007, so as to entitle him to get promotion to the post of Junior Assistant. Rather, the intervenor-opposite party, having joined in the directorate cadre on 17.06.1999, had acquired continuous service of 10 years and is entitled to get promotion to the post of Junior Assistant in terms of Rule-12-A of the Amendment Rules, 2001.

14. In view of the above factual and legal analysis, this Court is of the considered view that the tribunal has not committed any error apparent on the face of record by denying the benefit claimed by the petitioner. Therefore, the order dated 05.04.2012 passed by the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 2894 (C) of 2011 under Annexure-9 does not warrant any interference by this Court.

15. In the result, the writ petition merits no consideration and the same is hereby dismissed. However, there shall be no order as to costs.

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DR. B.R. SARANGI,
JUDGE

SAVITRI RATHO, J. I agree.

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SAVITRI RATHO,
JUDGE

Orissa High Court, Cuttack
The 21st March, 2022, Ashok/GDS

