

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.10887 of 2016

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

.....

Prasanta Kumar Patel

....

Petitioner

-versus-

**Orissa Power Transmission
Corporation Ltd. & Ors.**

....

Opposite Parties

For Petitioner : M/s. Satyabrata Mohanty(Advocate)
S.S. Mohapatra (Advocate)
P.K. Das (Advocate)
S.K. Das (Advocate)

For Opp. Parties : Ms. S. Pattnaik (Advocate)
Mr. B.K. Pattnaik (Advocate)
Mr. S.S. Parida (Advocate)

PRESENT:

THE HON'BLE JUSTICE BIRAJA PRASANNA SATAPATHY

Date of Hearing: 16.11.2022 and Date of Judgment: 29.11.2022

Biraja Prasanna Satapathy, J.

1. Heard Mr. Satyabrata Mohanty, learned counsel for the Petitioner and
Ms. S. Pattnaik, learned counsel appearing for the Odisha Power
Transmission Corporation Ltd.

2. This writ Petition has been filed inter alia with the following prayer:-

“Under the aforesaid facts and circumstances, it is therefore, prayed that this Hon’ble Court may graciously be pleased to

- (i) Hold/declare the Petitioner is entitled for promotion to the post of Asst. General Manager (AGM) w.e.f the date of his admitted juniors were promoted to the post of AGM under Annexure-2 with all consequential monetary and seniority.*
- (ii) Pass such other order(s) or issue direction(s) as may be deemed fit and proper in the bona-fide interest of justice.*

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

3. It is contended by the learned counsel for the Petitioner that the Petitioner while was continuing as an Asst. Manager in the establishment of the Opp. Parties, he was promoted to the post of Deputy Manager from 04.03.2014 vide order under Annexure-3. In the said office order while the Petitioner was placed at Sl. No. 58, O.P. No. 4 was placed at Sl. No. 59.

4. It is contended that in the provisional gradation list published by the Opp. Party-Corporation on 02.12.2013 of Electrical Engineers in Grade E-5 and below, the Petitioner while was placed at Sl. No. 66, the Private Opp. Party No. 4 was placed at Sl. No. 67.

5. Even though the Petitioner is placed above O.P. No. 4 in the rank of E-5, but ignoring his claim when the Opp. Party No. 3 was promoted to the post of Asst. General Manager (Electrical) in E-6 Grade vide order dtd.30.12.2015 under Annexure-2, the Petitioner moved RTI application seeking information of the ground for not giving him promotion to Grade

E-6, even though he is admittedly senior to O.P. No. 4 in all respect in Grade E-5. The Petitioner when provided with such information vide letter dtd.18.03.2016 under Annexure-4 and from the said information he came across the proceeding of the Departmental Promotion Committee held on 23.12.2015. In the said proceeding the Petitioner found that even though he was placed at Sl. No. 3 of the seniority list in the rank E-5, but his case was not considered as the rating in the EPAR pertaining to 2014-15 i.e.01.04.2014 to 06.04.2014 stand as "Average", which is required to be "Good" as per Clause 9.1 of the OPTCL Officers' Promotion Policy. Because of such view of the DPC, the Committee did not recommend his name for promotion to the post of Asst. General Manager (Electrical) in E-6 Grade while recommending O.P. No. 4 to the said rank. It is contended that pursuant to the said recommendation of the DPC dtd.23.12.2015 O.P. No. 4 was given promotion to the post of Asst. General Manager (Electrical) in E-6 Grade vide Office order dtd.30.12.2015 under Annexure-2.

6. It is further contended by the learned counsel for the Petitioner that on receipt of the information under Annexure-4 the Petitioner prayed for furnishing information under RTI with regard to his EPAR for the period 01.04.2014 to 31.03.2015 and the same was supplied to him vide letter dtd.18.05.2016 under Annexure-5. From the said information the Petitioner further came to know that for the period from 01.04.2014 to 06.08.2014,

even though the Reporting Officer as well as the Reviewing Officer reflected the EPAR of the Petitioner as “Good”, but the Accepting Authority without assigning any reason held the EPAR of the Petitioner for the said period as “Average”.

7. It is also contended that the said action of the Accepting Authority in treating the EPAR for the period from 01.04.2014 to 06.08.2014 as “Average” was never communicated to the Petitioner and therefore, in absence of such communication, the same should not have been taken into consideration by the DPC while considering the claim of the Petitioner for his promotion to the rank E-6.

8. It is also contended that since the Reporting Officer as well as the Reviewing Officer treated the period from 01.04.2014 to 06.08.2014 as “Good”, the Accepting Authority without assigning any reason should not have held the same as “Average”. If at all the same was treated as “Average”, then in view of the decision of the Hon’ble Apex Court reported in the case of *Dev Dutt Vrs. Union of India & Ors. ((2008) 8 SCC 725)* and another decision of the Hon’ble Apex Court reported in the case of *Sukhdev Singh Vrs. Union of India & Ors. ((2013)9 SCC 566)* as well as *Abhijit Ghosh Dastidar Vrs. Union of India & Ors. ((2009) 16 SCC 146)*, the view of the Accepting Authority in treating the EPAR as “Average” for the period in question should have been communicated to

the Petitioner and in absence of that the said view of the Accepting Authority should not have been taken into consideration by the DPC.

9. Hon'ble Apex Court in the case of **Dev Dutt** in Para 14, 39, 40 & 44 has held as follows:

“14. In our opinion, every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a benchmark or not. Even if there is no benchmark, non-communication of an entry may adversely affect the employee's chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a “good” or “average” or “fair” entry certainly has less chances of being selected than a person having a “very good” or “outstanding” entry.

39. In the present case, we are developing the principles of natural justice by holding that fairness and transparency in public administration requires that all entries (whether poor, fair, average, good or very good) in the annual confidential report of a public servant, whether in civil, judicial, police or any other State service (except the military), must be communicated to him within a reasonable period so that he can make a representation for its upgradation. This in our opinion is the correct legal position even though there may be no rule/G.O. requiring communication of the entry, or even if there is a rule/G.O. prohibiting it, because the principle of non-arbitrariness in State action as envisaged by Article 14 of the Constitution in our opinion requires such communication. Article 14 will override all rules or government orders.

40. We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the authority concerned, and the authority concerned must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible.

44. In *State of Maharashtra v. Public Concern for Governance Trust* (2007) 3 SCC 587, it was observed (vide para 39) :

“In our opinion, when an authority takes a decision which may have civil consequences and affects the rights of a person, the principles of natural justice would at once come into play.”

10. Hon’ble Apex Court in the case of **Sukhdev Singh** in Para 8 has held as follows:-

“8. In our opinion, the view taken in *Dev Dutt* that every entry in ACR of a public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving threefold objectives. First, the communication of every entry in the ACR to a public servant helps him/her to work harder and achieve more that helps him in improving his work and give better results. Second and equally important, on being made aware of the entry in the ACR, the public servant may feel dissatisfied with the same. Communication of the entry enables him/her to make representation for upgradation of the remarks entered in the ACR. Third, communication of every

entry in the ACR brings transparency in recording the remarks relating to a public servant and the system becomes more conforming to the principles of natural justice. We, accordingly, hold that every entry in ACR—poor, fair, average, good or very good—must be communicated to him/her within a reasonable period.”

11. Similarly, Hon’ble Apex Court in the case of ***Abhijit Ghosh Dastidar*** in Para 4 & 5 has held as follows:-

“4. It is not in dispute that CAT, Patna Bench passed an order recommending the authority not to rely on the order of caution dated 22-9-1997 and the order of adverse remarks dated 9-6-1998. In view of the said order, one obstacle relating to his promotion goes. Coming to the second aspect, that though the benchmark “very good” is required for being considered for promotion, admittedly the entry of “good” was not communicated to the appellant. The entry of “good” should have been communicated to him as he was having “very good” in the previous year. In those circumstances, in our opinion, non-communication of entries in the annual confidential report of a public servant whether he is in civil, judicial, police or any other service (other than the armed forces), it has civil consequences because it may affect his chances of promotion or getting other benefits. Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution. The same view has been reiterated in the above referred decision relied on by the appellant. Therefore, the entries “good” if at all granted to the appellant, the same should not have been taken into consideration for being considered for promotion to the higher grade. The respondent has no case that the appellant had ever been informed of the nature of the grading given to him.

5. Learned counsel appearing for the appellant has pointed out that the officer who was immediately junior in service to the appellant was given promotion on 28-8-2000. Therefore, the appellant also be deemed to have been given promotion from 28-8-2000.

Since the appellant had retired from service, we make it clear that he is not entitled to any pay or allowances for the period for which he had not worked in the Higher Administrative Grade Group A, but his retrospective promotion from 28-8-2000 shall be considered for the benefit of refixation of his pension and other retiral benefits as per rules.”

12. It is accordingly contended that in view of the decisions of the Hon’ble Apex Court as cited (supra) since the EPAR of the Petitioner for the period 01.04.2014 to 06.08.2014 was never communicated after acceptance of the same by the Accepting Authority as “Average”, the said entry in the EPAR cannot be taken into consideration by the DPC and accordingly not recommending his case for promotion, on the face of such recommendation in favour of the Private Opp. Party.

13. It is also contended that even though by the time the DPC held its meeting on 23.12.2015, further EPAR of the Petitioner for the period from 07.08.2014 to 31.03.2015 was available and the said period from 07.08.2014 to 31.03.2015 was treated as Very Good by the Reporting Officer, Reviewing Officer as well as by the Accepting Officer, but the DPC only take into consideration the EPAR for the period 01.04.2014 to 06.08.2014 while considering the claim of the Petitioner for promotion to the rank E-6.

14. It is submitted that since for the period from 07.08.2014 to 31.03.2015 the EPAR of the Petitioner was treated as "Very good" and the period from 01.04.2014 to 06.08.2014 was taken as "Average" by the Accepting Authority illegally without assigning any reason and the said entry since was never communicated to the Petitioner in terms of the decision of the Hon'ble Apex Court as cited (supra), the DPC completely erred in not recommending the case of the Petitioner while recommending the junior to the Petitioner i.e. O.P. No. 4 in its proceeding dtd.23.12.2015.

15. It is also contended that promotion from the rank of E-5 to E-6 is covered as per the guideline issued by the Corporation i.e. OPTCL Officers' Promotion Policy. Para 9.1 & 9.2 of the said guideline is relevant for the aforesaid purpose and reproduced hereunder:-

"9.1 Suitability for promotion shall be on the basis of Annual Appraisal/Performance Appraisal reports of eligibility period as mentioned in clause 6.3 including the latest report with reference to the year of DPC which is to be rated as Good.

9.2 If any of the reports during the eligibility period is found to be Adverse" in overall and this had not been expunged, the Officer shall be declared unsuitable for promotion. In case where one or more attributes in the Appraisal/performance Reports had been adverse but the overall rating is not below average and the adverse entries had not been expunged, the overall rating shall be downgraded to next below level for Merit-rating i.e. if overall rating is "Very Good" it would be treated as "Good" by D.P.C."

16. Making all such submission, Mr. Mohanty, learned counsel for the Petitioner submitted that even though the Petitioner was eligible for his promotion to the rank of E-6 by the time the DPC was held on 23.12.2015, but his case was not recommended by treating his EPAR for the period 01.04.2014 to 06.08.2014 as “Average”. Therefore, it is contended that in view of the illegality committed by the Opp. Parties, the Petitioner is entitled to get the benefit of promotion to the rank of E-6 and further promotion extended in favour of O.P. No. 4 from the date O.P. No. 4 was extended with such benefit of promotion with all consequential service and financial benefits.

17. Ms. Pattnaik, learned counsel appearing for the Opp. Party-Corporation on the other hand made her submission taking into account the stand taken in the counter affidavit. It is contended that for the period from 01.03.2014 to 06.08.2014 though the Reporting Officer and the Reviewing Officer held the EPAR of the Petitioner as “Good”, but the Accepting Officer since treated it as “Average”, in view of the provision contained under Para 9.1 of the guideline, the claim of the Petitioner was not rightly recommended by the DPC and consequentially he was not given promotion to the rank of E-6 while giving such benefit to the Opp. Party No. 4 vide order dtd.30.12.2015 under Annexure-2. It is also contended that since the EPAR of the Petitioner for the period 01.03.2014 to 06.08.2014 was treated as

“Average” and not an adverse, there was no occasion to communicate the said fact to the Petitioner.

18. It is also contended that since the Petitioner has not impleaded all the persons promoted vide order under Annexure-2, the writ Petition suffers from nonjoinder and misjoinder of Parties. It is further contended that as per the Clause 9.1 of the OPTCL Officers’ Promotion Policy, promotion shall be on the basis of annual appraisal report of the eligibility period as mentioned in Clause 6.3 of the said policy including the latest report with reference to the year of DPC, which is to be rated as “Good”. Since EPAR of the Petitioner for the period from 01.04.2014 to 06.08.2014 was “Average”, his case was not considered by the DPC and no illegality has been committed.

19. Even though notice of the writ Petition was issued to O.P. No. 4, but nobody has entered appearance on behalf of the said Opp. Party. However, since this Court is not going to disturb the promotion extended in favour of O.P. No. 4, the matter was heard finally by this Court in presence of the learned counsels appearing for the Petitioner and OPTCL.

20. Heard learned counsel for the Parties. Perused the materials available on record. This Court after going through the same finds that in the rank E-5, the Petitioner in the provisional gradation list published on 02.12.2013 under Annexure-1 was placed above the Opp. Party No. 4. In the office

order dtd.04.03.2014, wherein the Petitioner and O.P. No. 4 were promoted to the post of Manager (Electrical) in E-5 grade, the Petitioner was placed above O.P. No. 4. But, the case of the Petitioner was not recommended by the DPC held on 23.12.2015 only on the ground that the EPAR of the Petitioner for the period from 01.03.2014 to 06.08.2014 since was marked as “Average” by the Accepting Authority, the Petitioner was not recommended on the face of such recommendation in favour of O.P. No. 4.

21. However, it is found that for the period 01.03.2014 to 06.08.2014 the Reporting Officer as well as the Reviewing Officer while treated the said period as “Good”, but the Accepting Officer without assigning any reason held the same as “Average” and the said fact was never communicated to the Petitioner. Therefore, placing reliance of the decisions cited by the learned counsel for the Petitioner as cited (supra), since the view of the Accepting Officer in treating the EPAR as “Average” for the period 01.03.2014 to 06.08.2014 was never communicated, the said view of the Accepting Officer was not to be taken into consideration by the DPC. Not only that this Court further finds that the EPAR of the Petitioner for the period 07.08.2014 to 31.03.2015 was treated as “Very Good” by the Reporting Officer, Reviewing Officer as well as the Accepting Officer. By the time the DPC was held on 23.12.2015 the EPAR of the Petitioner for the entire period 01.03.2014 to 31.03.2015 was very much available. But

the DPC only taking into account the EPAR for the period 01.04.2014 to 06.08.2014 did not recommend the case of the Petitioner.

22. As per the view of this Court the DPC should have taken into consideration the EPAR of the Petitioner for the entire period i.e. 01.04.2014 to 31.03.2015. Since the EPAR for the period 01.04.2014 to 06.08.2014, which was treated as “Average” by the Accepting Officer was never communicated to the Petitioner, the said view of the Accepting Officer could not have been taken into consideration by the DPC in view of the decision of the Hon’ble Apex Court as cited (supra).

23. This Court further finds that as per the Clause 9.1 of the OPTCL Officers’ Promotion Policy, suitability for promotion shall be on the basis of annual appraisal report of eligibility period. Therefore, by the time the DPC was held on 23.12.2015 the CCRs of the entire period 01.04.2014 to 31.03.2015 was very much available and in view of the EPAR of the Petitioner as “Very Good” for the period 07.08.2014 to 31.03.2015, the Petitioner should have been recommended for the post of Asst. General Manager (Electrical) in rank E-6.

24. This Court further finds that the decision relied on by the learned counsel appearing for Opp. Party-Corporation in the case of ***Union of India & Ors. Vs. E.G. Nambudiri (AIR 1991 SC 1216)*** is not applicable to the facts of the present case. This Court though does not dispute the stipulation

contained in the circular issued by the Corporation on 13.03.2007, wherein it has been indicated that the view of the Accepting Authority shall prevail over the Reviewing Authority, but as the view of the Accepting Authority was never communicated to the Petitioner, the same should not have been taken into consideration by the DPC.

25. Therefore, taking into account the entirety of the matter, the stand taken by the learned counsel appearing for the Parties and in view of the decisions of Hon'ble Apex Court in the case of **Dev Dutt** as well as **Abhijit Ghosh Dastidar**, this Court is of the considered opinion that the action of the Opp. Parties in not giving promotion to the Petitioner to the rank E-6 basing on the recommendation of the DPC is not just and proper.

26. Therefore, while holding so, this Court directs the Opp. Party-Corporation to take a fresh decision on the Petitioner's claim by conducting a Review DPC. It is observed that while considering the claim of the Petitioner by conducting the Review DPC, the EPAR of the Petitioner for the period 07.08.2014 to 31.03.2015 and the decision of the Hon'ble Apex Court in the case of **Dev Dutt** as well as **Abhijit Ghosh Dastidar** be taken into consideration. On such reconsideration if it is found that the Petitioner is otherwise eligible, the Petitioner be given promotion to the rank of E-6 from the date O.P. No. 4 was given such promotion. The Petitioner be also

given further promotion to the rank of E-7, if he is otherwise eligible as it is contended that O.P. No. 4 has been given such promotion in the meantime.

27. This Court directs the Opp. Party-Corporation to complete the entire exercise within a period of three (3) months from the date of receipt of this order. The financial benefit arising out of such extension of the benefit of the promotion be also extended within the aforesaid time period.

28. The writ Petition is disposed of with the aforesaid observation and direction.

(Biraja Prasanna Satapathy)
Judge

Orissa High Court, Cuttack
Dated the 29th of November, 2022/Sneha

