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IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.30745 of 2011

Subhendra Mohanty

....

Petitioner

Mr. G.A.R. Dora, Senior Advocate

-Versus-

State of Odisha and others

....

Opp. Parties

Mr.P.K. Muduli, AGA

**CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAİK**

DATE OF JUDGMENT :19.04.2022

R.K. Pattanaik, J.

1. Instant writ petition under Article(s) 226 and 227 of the Constitution of India, 1950 is filed by the Petitioner praying to quash Annexure-11 and notification dated 26th March, 2011 (Annexure-9) with a declaration to the effect that OP Nos.3 to 24 were to continue as juniors to him and for appropriate direction to alter the cadre and to provide him all resultant service benefits.
2. The Petitioner was recruited as a probationary Munsif vide notification dated 4th December, 1982 under Orissa Judicial Service Rules, 1964 and joined on 20th December, 1982 and on its successful completion, was posted as Judicial Magistrate Second Class on 1st March, 1984. Then the Petitioner was promoted to the cadre of OJS (I) JB on 13th September, 1989 and to the cadre of OJS (I) SB on 17th May 1995. In 2001, OP Nos.3

to 6, who were juniors to the Petitioner were given promotion to the cadre of OSJS (JB) by superseding him and thereafter, again it happened in the same year on 17th October, 2001 promoting five more judicial officers, namely, OP Nos.7 to 11 and as claimed, it was despite the fact that he had no adverse entry in the Confidential Character Roll and such denial in promotion was illegal. Thereafter, the petitioner submitted a representation dated 7th December, 2001 to consider his promotion to the cadre of OSJS (JB) but as has been contended, the same was kept pending without any decision. In the meantime, OP Nos.12 to 20 were promoted to the said cadre in 2002 superseding him which according him was unjustified. As further revealed, in November, 2002, a disciplinary proceeding was initiated against the Petitioner on the charges of (i) reaching the court late by 15 minutes on 26th July 2002, (ii) for being slow, casual and careless in disposing of civil cases in the month of June 2002, while posted as Civil Judge (SD), Sambalpur, as he had disposed of only two suits and in a suit bearing T.S. No.96 of 1992, decree was drawn after about a month though the plaintiff bank had accepted the proposal of OTS, and (iii) while working as such at Sambalpur, had passed an interim order of injunction in T.S. No.194 of 2001 arbitrarily which was later reversed in judicial side thereby resulting in judicial impropriety. As contended, said disciplinary action vide D.P. No.7 of 2002 was disposed of with a censure for charge (i) and partly vis-à-vis charge (ii), whereas, charge (iii) was dropped. It is claimed by the Petitioner that the District Judge and some judicial officers posted with him at the

station although reached late but they were let off with simple warning and in so far as charge (ii) is concerned, during relevant period, he had disposed of adequate number of civil cases and that apart, taking a month's time to draw a decree in T.S. No.96 of 1992 could not be a reason at all to supersede him by 21 officers. Thereafter, OP Nos.21 and 22 were promoted to the OSJS (JB) cadre on 29th November 2002 and 7th May 2003 respectively again superseding him and as per the Petitioner, after he was posted as Chief Judicial Magistrate, Phulbani on 5th October, 2005, number of junior judicial officers were promoted to the cadre of OSJS (SB). When after an enquiry into a theft incident in the Court Malkhana at Udala in the district of Mayurbhanj initiated in 2001, he was simply cautioned, the Petitioner alleges that denial of promotions to him was wholly unjustified, where after, again represented the High Court on 3rd May 2006 which was not considered and once more superseded on 4th and 21st September 2006, when some juniors were given promotion to the cadre of OSJS (SB). As pleaded, in the month of November, 2010, the Petitioner was informed of having successfully completed the probation as per Rule 33 of the OJS and OSJS Rules, 2007, however, without any justification, OP Nos.23 and 24 were placed above him in the civil list. As per the contention of the Petitioner, since he was given adhoc promotion to the cadre of OSJS (SB) on 28th December 2006 and continued till regularization, he would be guided by OSJS Rules, 1963 instead of OJS and OSJS Rules, 2007 and furthermore, was denied Selection Grade although was granted to OP Nos.4, 6 to 9

and also the fact that OP Nos.4 to 9, 16 and 18 were substantively appointed in the cadre of District Judge, after which, the last representation submitted on 7th January 2009 was disposed of but rejected on 8th August, 2011 with an intimation to him vide Annexure-11 without assigning any reason for its rejection.

3. While challenging the action of the Court as violative of the fundamental rules and service jurisprudence, it has been contended by the Petitioner that not only the promotions at different points of time were denied to him illegally but also the last of the representations was rejected without indicating any reason which is considered as one of the fundamentals of proper administration as has been highlighted upon in ***Breen v. Amalgamated Engineering Union (1971) 1 All ER 1148***. Thus, according to the Petitioner, the service rules were flouted and also the cardinal principles of service jurisprudence, while denying him promotion continuously and therefore, it needs to be restored with effect from 25th August, 2001.

4. Per contra, O.P.No.2 pleaded that the initial placement of the Petitioner is not disputed but as far as the claim that he was superseded without any reason does not have any basis. It is rather contended that on each of the occasions, when the juniors were promoted, the case of Petitioner was deferred in view of pending allegations for consideration of the Vigilance Committee and the Full Court and in so far as the representation dated 7th December, 2001 is concerned, it was rendered infructuous after

he was posted as Chief Judicial Magistrate, Phulbani on 5th October, 2005 on being promoted to the erstwhile cadre of OSJS (JB). It is again contended that the allegation that the representation of the Petitioner was kept pending without being considered while promotions were given to juniors is far from truth. It is also denied by O.P.No.2 with regard to D.P. No.7 of 2002 that the Petitioner was singled out when other officers similarly at fault for reaching the court late were let go with simple warning. As per O.P.No.2, the representations dated 3rd May, 2006 and 7th January, 2009 submitted by the Petitioner were entertained by the Court and then rejected. It is also pleaded that the promotion of the Petitioner to the OSJS (SB) could not be allowed in the year 2006, as other officers, who superseded him, were found to be more suitable. As regards, the Petitioner's claim on seniority being regulated under 40 point roster and applicability of Rule 13 of the OJS & OSJS Rules, 2007, O.P.No.2 disputed it with the pleading that such placement of seniority is not automatic and that apart, the roster point had not been approved and implemented and the civil list after 2006 was yet to be published with the Court's approval. O.P.No.2 contended that the representations of the Petitioner dated 7th January, 2009 and 26th July, 2007 were duly considered but rejected by the Full Court on 2nd August, 2011. All along, it has been pleaded by O.P.No.2 that no illegality was committed, while taking up the promotion matters and the allegation regarding disposal of the representations arbitrarily was stoutly denied. Lastly, it was claimed that the Petitioner is not entitled to

restoration of his seniority in the cadre and promotion to the cadre OSJS (JB) and OSJS (SB) commencing from 25th August, 2001 and therefore, the writ petition is liable to be dismissed.

5. The Petitioner filed a rejoinder and reiterated that the promotions effected without considering his case to be violative of the service rules and therefore, the seniority should be restored retrospectively with a placement in the civil list above O.P.Nos.3 to 22. On the whole, the pleading of the Petitioner is to the effect that deferred or non-consideration of the representations vitiated the decision of supersession. In order to bolster up the demand for promotions with retrospective effect, an additional affidavit dated 7th March, 2021 was filed along with a copy of a judgment dated 31st July, 2017 passed in W.P.(C) No.7398 of 2013, wherein, compulsory retirement of the Petitioner from judicial service was interfered with by the Court with a direction to grant him the consequential service benefits.

6. Heard Mr. G.A.R. Dora, learned Senior Advocate appearing for the Petitioner and Mr. P.K. Muduli, learned Additional Government Advocate for OP Nos.1 and 2.

7. Mr. G.A.R. Dora contended that the case of the Petitioner was not considered for promotion ever since 2001, rather, the initial representation was kept pending till it had become infructuous. It is further contended that without any reason, the Petitioner's promotion was denied time and again which is an arbitrary action and clear violation of the service jurisprudence. Mr. G.A.R. Dora citing the judgment of this Court in W.P.(C) No.7398 of 2013 *W.P.(C) No.30745 of 2011*

strenuously urged that the decision on compulsory retirement since has been reversed in judicial side, promotion of the Petitioner should be allowed with effect from 25th August, 2001.

8. Mr. P.K. Muduli would contend that Petitioner was superseded since the Court had received allegations against him which were pending consideration. According to Mr. P.K.Muduli, promotion is not a matter of right by virtue of seniority only. It is contended that the decision of the Court denying promotion to the Petitioner cannot said to have been vitiated. While advancing such an argument, Mr. P.K.Muduli placed reliance on the citations of the Supreme Court, such as, *State Bank of India and others v. Mohd. Mynuddin* (1987) 4 SCC 486; *All India Backward Classes and Minorities Welfare Association and another v. Union of India and others* 1988 (Supp.) SCC 500; *U.V. Mahadkar v. Subhash Anand Chavan and others* (2016) 1 SCC 536; and *Haryana State Electronics Development Corporation Limited and others v. Seema Sharma and others* (2009) 7 SCC 311 contending that the Court's decision on promotion of the Petitioner should not be interfered with unless the same is proved to have been vitiated for any bias or malafide although the fact is that his judicial service was restored.

9. It is well settled principle that decisions on promotion should not ordinarily be tinkered with by the Courts unless the action is shown to be arbitrary and without any justification. In other words, if such a decision on promotion, if vitiated by malafide or on account of bias, then only Courts are to intervene and issue

directions. In *Mohd. Mynuddin* (supra), the Apex Court categorically held that promotion to a higher post is to be made on the basis of merit and no officer can claim it as a matter of right by virtue of seniority alone. In the above decision, it has also been observed that it is not even sufficient to have a satisfactory service record for claiming promotion since because an officer may be capable of discharging duties of the post held by him but may not be fit for taking up higher responsibilities. In the instant case, the Petitioner's initial promotion was refused. According to OP No.2, the decision on promotion of the Petitioner was deferred pending decision on the allegations received against him. When for that reason, the promotion was deferred that of the Petitioner, in the considered view of the Court, it can be said to be in any way unjust. Often the authority defers decision on promotion for good reasons at a given point of time. That apart, on many occasions, it has been noticed that an officer though capable of discharging duties but he has not been considered for promotion and may be for variety of reasons. In fact, promotion is always a subjective satisfaction which is not to be weighed objectively. Furthermore, suitability is one of the major and decisive factor for considering promotion of an officer and higher the responsibility, greater is the demand for suitability which embraces within itself, the conduct, credibility besides overall performances. That apart, promotion and decision thereon is based on an assessment covering a certain period of time. According to the Court, if some element of doubt sneaks in the mind of the authority regarding credibility of the officer either for

his conduct or level of performance, promotion may be denied to him. Too many factors influence a decision on promotion as it does not simply depend on the CCRs. One may even be meritorious but that cannot again be a sole criterion for promotion. It has been experienced that officers clearing on merit may still be found unsuitable for various reasons as too many criteria influence the decision of the authority. That apart, whenever a promotional post is to be filled up, a comparative assessment on merit among the eligible officers is carried out and in that process, some juniors jump in and receive promotion superseding seniors and in such cases, administrative decision cannot be said to be unjustified unless it is incomprehensible. At a particular point of time, with all the relevant facts on record including the ability of an officer and whether, he did possess the quality or necessary attributes to assume and undertake the responsibility of a higher post after promotion is duly examined. So far as the case of the Petitioner is concerned, promotion was denied to him which was on account of pending allegations. In fact, the Petitioner was not fully exonerated but he was censured on certain charges and the administrative enquiry into the incident of 1988 ended with a cautionary note. Irrespective of the fact that the Petitioner was saddled with minor punishments, what appears to have influenced the Court is the very conduct and credibility for which promotion was refused initially on account of pending allegations and thereafter, due to result of the disciplinary proceeding and the administrative enquiry.

10. No doubt, the Petitioner's plea on compulsory retirement was accepted and the Court held that it was unwarranted. But, in the considered opinion of the Court, such restoration in service by itself not a ground to have a revisit vis-à-vis the decision on promotion of the Petitioner with retrospective effect. A judgment overruling a decision of compulsory retirement through a judicial process is not in every case to impact promotion having been denied to an officer at certain stages of service career. At the cost of repetition, it is stated that a decision on promotion normally depends on many factors inclusive of the personal qualities and attributes of an officer besides merit. If promotion is refused, no arbitrariness can straightaway be attributed unless it is clearly evident from record. The Petitioner alleged that no reason was assigned while rejecting the representations submitted by him. But, as it is made to suggest, in view of the allegations received by the Court and later on for the disciplinary proceeding and decision thereon and not being confident enough about the credibility aspect, the promotion was denied to the Petitioner. In fact, decisions on the administrative side regarding promotion is not an exercise in vacuum and without any consideration. In the case of the Petitioner, promotion was either deferred or denied or allowed at a later stage but without retrospective effect was on account of pending allegations and final decisions thereon which may have resulted in minor punishments. Nevertheless, any such decision of the Court on its administrative side is not to be disturbed merely on the ground that no reason was communicated to the Petitioner on the rejection of the representations.

11. Furthermore, Mr. P.K. Muduli, learned AGA referring to the decision of the Supreme Court in *U.V. Mahadkar* (supra) contended that promotion is always based on certain defined criteria and eligibility with preference to merit. In the above decision, the Supreme Court observed that in case of merit-cum-seniority, merit would be given preference over seniority and it is only when senior most candidate has no merit or is not suitable for appointment merely because of seniority, choice has to be of the meritorious candidate. The aforesaid observation of the Supreme Court applies to the Petitioner's case since his non-consideration to the Selection Grade post has also been agitated and questioned. In fact, in the aforesaid case, the Supreme Court referred to one of its earlier decisions in the case of *Central Council for Research in Ayurveda and Siddha v. K. Santhakumari* (2001) 5 SCC 60, wherein, it has been held that promotion to Selection Grade post is not automatic even on the basis of ranking in the gradation list and the promotion is primarily based on merit and not on seniority alone. Again, as it appears, the Court was not persuaded to promote the Petitioner to the Selection Grade, a decision which appears to have been influenced due to trust deficit and want of credibility for his overall conduct and therefore, the contention that he was otherwise eligible but sidelined, in view of the principles laid down in the cited decisions (supra), cannot be sustained and therefore, it has to be rejected.

12. It is to be borne in mind that premature retirement does require fulfilment of certain conditions which has been reiterated by the Supreme Court in ***Baikuntha Nath Das v. Chief District Medical Officer (1992) 2 SCC 299***, wherein, it has been held that such a decision shall have to be interfered with only when it is actuated by malafide or based on no evidence or arbitrary in the sense that no reasonable person would form any such opinion on the given materials which is again a decision based on public interest. No doubt, the Petitioner's compulsory retirement was overturned, which is rather based on distinct set of principles and fulfilment of certain conditions but that cannot be a ground or justification by itself for restoring his promotion with effect from 2001.

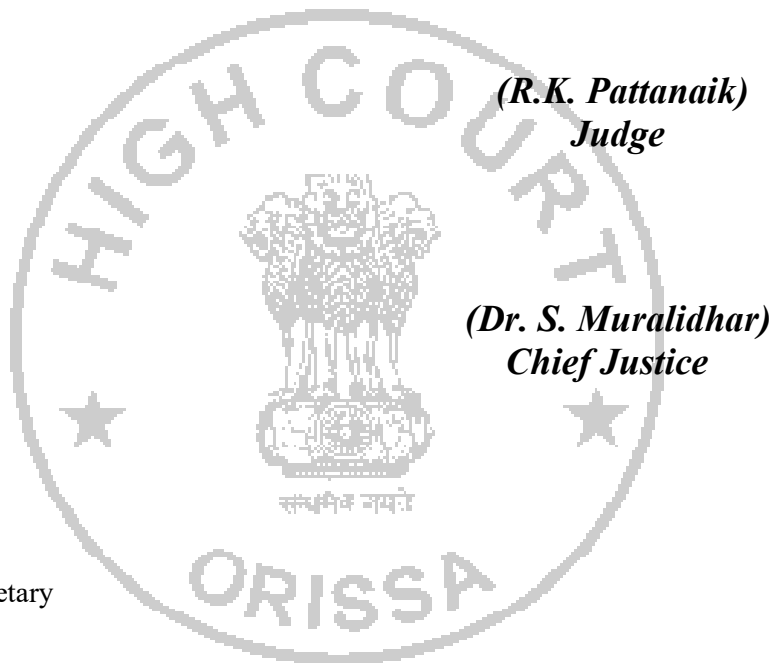
13. Regard being had to the submissions made for the respective parties and taking into account the totality of the facts and circumstances of the case and in view of the credibility having been lost in due course, the Court is not inclined to examine other grounds raised and finally reaches at a conclusion that the Petitioner has been rightly declined promotion with retrospective effect and it cannot be restored despite the judicial decision on compulsory retirement.

14. Many a time, the decision making process is influenced by credibility. It is often said that credibility is a basic survival tool. If it is lost once, may be difficult to regain and could even be lost forever. In every sphere of life, credibility plays a crucial role. Without further elaboration, it would probably be better to wind

up with a final observation that the episode of the Petitioner appears to be a result of credibility deficit, a situation from where, one cannot so easily sail through despite having a satisfactory track record.

15. Accordingly, it is ordered.

16. In the result, the writ petition stands dismissed.



KC Bisoi/Secretary