

**ORISSA HIGH COURT: CUTTACK**

**W.P.(C) NO. 10661 OF 2019**

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

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***AFR***

Gopinath Mishra ..... Petitioner

-Versus-

State of Odisha and others ..... Opp. Parties

For Petitioner : Mr. S.K. Pattnaik, Sr. Counsel  
along with P.K. Pattnaik,  
S.P. Das and S. Das,  
Advocates.

For Opp. Parties : Mr. S. Jena,  
Standing Counsel S&ME

P R E S E N T:

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

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**Date of hearing and judgment: 19.04.2022**

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***DR. B.R. SARANGI, J.*** The petitioner, by way of this writ  
petition, seeks to quash the order dated 22.06.2018

passed in O.A. No. 488 of 2009, by which the Odisha Administrative Tribunal, Principal Bench, Bhubaneswar though held that Sahadeb Mallick was wrongly promoted to the post of Head Clerk on 01.05.2006 and the case of the petitioner should have been considered at that time, but, in view of the fact that a departmental proceeding was pending against the petitioner at the time of DPC and the said proceeding concluded after his retirement from government service, and that the original application was not filed within the period of limitation, observed that no relief can be granted and by so observing dismissed the original application. He further seeks direction to the opposite parties to grant the benefit of promotion to him to the post of Head Clerk w.e.f. 01.06.2006 with all consequential service and financial benefits within a stipulated time.

2. The factual matrix of the case, in brief, is that the petitioner was working as Senior Clerk in the office of the Inspector of Schools, Bolangir since 13.11.1978

and retired from service on attaining the age of superannuation on 31.05.2008. Being senior in the cadre of Senior Clerk, he was serving in the post of Junior Accountant at the time of retirement. In the year 2006, he became the senior most Senior Clerk of the circle and was eligible for the post of Head Clerk. But ignoring his seniority, the Inspector of Schools promoted one Sahadev Mahalik, a scheduled caste candidate, to the rank of Head Clerk on ad hoc basis, even though he was junior to the petitioner. There were five posts of head clerk under the Inspector of Schools, Bolangir Circle, Bolangir and one post of head clerk is meant for the office of the Inspector of Schools, Bolangir and other four posts for D.I. of Schools of Bolangir district. In view of the judgment of the apex Court in the case of **R.K. Sabarwal v. State of Punjab**, AIR 1995 SC 1371, out of five posts, as per the roster point, one post is meant for S.T. and another for S.C. candidates, and rest three posts for general candidates. But the Inspector of Schools, Bolangir filled up all the five posts

of Head Clerk by S.C. and S.T. candidates. Before 01.05.2006, four S.C. and S.T. category candidates were promoted to the rank of Head Clerk of them three belonged to S.T. and one belonged to S.C. category. Again, the Inspector Schools, Bolangir on the recommendation of the DPC promoted another S.C. candidate, namely, Sahadev Mallick to the rank of Head Clerk who joined on 01.05.2006, as per the DPC proceeding dated 28.04.2006.

2.1 But fact remains, 80 point roster came into force with effect from 21.04.1994 and, therefore, out of total five posts of Head Clerk as per roster, the first post will go to S.T. and the 4<sup>th</sup> post will go to scheduled caste and the rest three posts will be filled up by unreserved category candidates. As there was only five posts of Head Clerk after roster point no.5, it will not be worked out. After promotion of Sahadev Mallik, who belonged to scheduled caste category, to the post of Head Clerk on 01.05.2006, the petitioner had filed a representation to the Inspector of Schools, Bolangir on 17.05.2006. But,

when no action was taken thereon by the Inspector of Schools, he had intimated the fact to the Director, Secondary Education by way of representation on 15.11.2006. After retirement, again the petitioner submitted another representation to the Inspector of Schools, Bolangir on 29.07.2008, which is still pending.

2.2 Since Sahadev Mallick, the S.C. candidate who is junior to the petitioner, was promoted to the 5<sup>th</sup> post of Head Clerk by the Inspector of Schools on a wrong notion of roster point, the right of the petitioner has been infringed and, therefore, he claims that he should be allowed retrospective promotion to the post of Head Clerk with effect from 01.05.2006. Therefore, the petitioner approached the tribunal by filing O.A. No.488 of 2009. On being noticed, opposite party no.3 filed counter affidavit stating inter alia that according to the gradation list in the rank of Senior Clerk of Bolangir Circle as on 01.01.2006, Rama Narayan Mishra and Sastya Nanda Sarangi were senior most Senior Clerk of the circle. The vacancies of the Head Clerk occurred in

the month of March and April, 2006 which were filled up by promoting Sri Rama Narayan Mishra and S.N. Sarangi on 22.03.2006 and 31.03.2006 respectively and, as such, the plea of the petitioner, that he was senior most Senior Clerk in the year 2006, was denied. It was further contended therein that there were five posts of Head Clerk under the administrative control of Inspector of Schools, Bolongir and those posts were being filled up by observing the roster point as per the prevailing ORV Rules and instructions. Eighty point roster is applicable from 21.04.1994 and it was not categorically emphasized to ear-mark the roster point as post based at the time of filling up promotional posts, as per G.O. dated 21.04.1994, which came into force before the judgment of the apex Court in the case of **R.K. Sabarwal** (supra). Therefore, there was no relation between G.O. dated 21.04.1994 and the judgment of the apex court in the case of R.K. Sabarwal (supra) and, as such, no amendment has been made to the ORV Act regarding post-based reservation for promotion as on

the date of giving promotion to Sahadev Mallick. It is also contended in the counter affidavit that the DPC was convened on 28.04.2006 to consider the case of promotion to the rank of Head Clerk, the roster point was at sl.no.16 which is meant for S.C. candidate. Therefore, the DPC considered the case of one S.C. candidate, for which the case of Sahadev Mallick was taken into consideration, and accordingly he was promoted and joined in the promotional post on 01.05.2006. Had the case of Sahadev Mallick been considered against the U.R. vacancy, then the petitioner would have a grievance for the same. Further, there was a departmental proceeding bearing no.11673 dated 23.07.1999 in which the petitioner was punished as "censured". Another departmental proceeding, being no.5733 dated 03.05.2005, was also initiated against the petitioner which was disposed of on 27.02.2009 wherein he was found guilty of the charges and he was awarded penalty of "censure" vide order no.6163 dated

27.02.2009. Therefore, the case of the petitioner was not considered for promotion.

2.3 Relying upon the pleadings available on record, the tribunal came to a conclusion that since Sahadev Mallick was promoted against the S.C. vacancy on 01.05.2006, which was not challenged at the relevant point of time and, more so, the petitioner approached the tribunal at a belated stage and, therefore, merely filing representation before the authority will not suffice the claim of the petitioner for grant of promotion under sealed cover method. As such, the tribunal dismissed the original application filed by the petitioner on the ground of limitation as well as on merits. Hence this application.

3. Mr. S.K. Pattnaik, learned Senior Counsel appearing along with Mr. P.K. Pattnaik, learned counsel appearing for the petitioner contended that rejection of the original application of the petitioner on the ground of limitation cannot sustain in the eye of law. He

admitted that when the case of Sahadev Mallick was considered for promotion for the post of head clerk, a departmental proceeding was pending against the petitioner. It is contended that had the case of the petitioner been considered along with Sahadev Mallick, a sealed cover procedure would have been followed in terms of G.A. Department O.M. No.3928-Gen. dated 18.02.1994. But the same was not followed and his junior was promoted and, as such, the petitioner should not have been discriminated. It is further contended that after the petitioner was exonerated from the charges, he should have been granted consequential benefit of promotion from the date his juniors were promoted. Therefore, the tribunal has committed error apparent on the face of record by rejecting the original application of the petitioner on the ground of limitation. It is contended that since promotion was given to Sahadev Mallick on 01.05.2006, the petitioner filed representation before the authority for grant of promotion to him, and thereafter, when he retired from

service, he approached the tribunal by filing original application for having imposed with penalty of censure. Thereby, there was no delay on the part of the petitioner as cause of action still survives. To substantiate his contention, he has relied upon the judgment of this Court in the case of **Balajjinath Padhi v. Central Administrative Tribunal**, (2002) Orissa LR 667 and the apex Court in the case of **Sesh Nath Singh v. Baidyabati Sheoraphuli Cooperative Bank Ltd.**, AIR 2021 SC 2637.

4. Mr. S. Jena, learned Standing Counsel for School and Mass Education Department contended that since departmental proceeding was continuing against the petitioner, his case was not considered for promotion and, as such, the post was only meant for scheduled caste candidates, as per the roster point. Since Sahadev Mallick belonged to S.C. category, he was promoted to the 5<sup>th</sup> post of Head Clerk in terms of roster point applicable to him, as per the decision of the DPC dated 28.04.2006, though he was junior to the

petitioner. So far as the claim made by the petitioner, that while considering the case of Sahadev Mallick for promotion, his case should have been considered by adopting sealed cover method, in that regard, the petitioner has never raised any grievance at any point of time. As such, since departmental proceeding was pending against him, he could not have claimed the benefit at par with his juniors by following due procedure. In the circumstances, it is contended that the tribunal has not committed any error apparent on the face of record so as to interfere with the same by this Court, and accordingly claims for dismissal of the writ petition.

5. This Court heard Mr. S.K. Pattnaik, learned Senior Counsel appearing along with Mr. P.K. Pattnaik, learned counsel appearing for the petitioner and Mr. S. Jena, learned Standing Counsel for School and Mass Education Department for the State-opposite parties 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.

6. On the basis of the pleadings, as discussed above, it is emerged that admittedly five posts of Head Clerk were available under the Inspector of Schools, Bolangir Circle to be filled up by promotion and on the basis of 80 point roster, 5<sup>th</sup> post of Head Clerk was to be filled up by reserved category candidates. The decision of the DPC held on 28.04.2006 clearly indicates that 5<sup>th</sup> post of Head Clerk was coming under roster point at sl.no.16, which was meant for S.C. candidates. Thereby, the DPC considered the case of one S.C. candidate, namely, Sahadev Mallick, who at that point of time was the senior most S.C. candidate, even though admittedly he was junior to the petitioner. In addition to the same, a departmental proceeding was pending by that time. The DPC could have considered the case of the petitioner for promotion by adopting sealed cover procedure, but the same was not adhered to, as the post was meant for S.C. candidate. Therefore,

consideration of the case of the petitioner under sealed cover procedure also does not arise. As the Inspector of Schools, Bolangir Circle was treated as one unit for the purpose of 80 point roster and as the roster should have been taken into consideration as post-based, which means as there were five posts of Head Clerk, only roster point nos.1 to 5 of 80 points roster should have been taken into consideration, as per the principles decided by the apex Court in the case of **R.K. Sabarwal** (supra). If that would have been done, then the first post of Head Clerk would have gone to S.T. and the 4<sup>th</sup> post of Head Clerk would have gone to S.C. and rest three posts to U.R. category candidates. As the same was not followed, all the five posts of Head Clerk were occupied by the reserved category candidates and more particularly, the 5<sup>th</sup> post of Head Clerk was considered and allowed to a junior, namely, Sahadev Mallick, who was at sl.no.20 of the gradation list, whereas the promotion of the petitioner was not considered, though he was at sl.no.1. Therefore, the

tribunal has come to a finding that injustice has been caused to the petitioner and wrongly Sahadev Mallick was given promotion. Such finding of the tribunal cannot sustain in view of the fact that the said 5<sup>th</sup> post was filled up by following 80 point roster and, as such, the same is meant for S.C. category and admittedly the petitioner does not belong to S.C. category to get such benefit. More so, a proceeding was initiated against the petitioner which was not concluded by the time the DPC was held. Even though Sahadev Mallick was promoted and the petitioner filed representation before the authority to consider his case, the same was not considered, as by that time the petitioner had already retired from service on attaining the age of superannuation on 31.05.2008.

7. The second limb of contention of learned counsel for the petitioner is that erroneously the tribunal has come to a finding that the application filed by the petitioner is barred by limitation. Admittedly, the DPC was held on 28.04.2006, pursuant to which

Sahadev Mallick was given promotion on 01.05.2006. But the petitioner, instead of challenging the same before the tribunal, only filed a representation before the authority and kept silent over the matter, even after retirement from service w.e.f. 31.05.2008. When punishment of censure was imposed on the petitioner in the departmental proceeding initiated against him, he approached the tribunal by filing the original application and, as such, the delay in approaching the tribunal challenging the promotion of Sahadev Mallick, which was made on 01.05.2006 was not explained. More so, under the provisions contained under Section 21 of the Administrative Act, 1985, one year limitation period has been prescribed from the date of cause of action. Though the cause of action arose w.e.f. 01.05.2006, when Sahadev Mallick got promotion to the post of Head Clerk, but the petitioner awaited till 2009, after his retirement, and approached the tribunal by filing the original application beyond the period of limitation prescribed under the Administrative

Tribunal's Act and, as such, the original application suffers from delay and laches.

8. Coming to the judgment of the Division Bench of this Court in the case of **Balajinath Padhi** (supra), on which reliance was placed by learned Senior Counsel appearing for the petitioner, it is found that, in the said case, this Court relying upon the judgment of this Court in the case of **Hari Sankar Dikshit v. Dharanidhar Dixit**, ILR 1971 Cult. 1387, ruled that Section 5 of the limitation Act, 1963 does not prescribe that an application must be filed in writing, though the invariable practice is that an application is filed. In absence of an application, if sufficient evidence is available in the case record to condone the delay and the Court is satisfied with it, delay can be condoned. Similar was also the view of the apex Court in the case of **Sesh Nath Singh** (supra), on which reliance was also placed by learned Senior Counsel appearing for the petitioner.

9. As it appears, the above cases had been disposed of taking into consideration the provisions contained under Section-5 of the Limitation Act. But in the case at hand Section-5 of the Limitation Act is not the subject-matter of consideration. Here, the period of limitation has been prescribed under the Administrative Tribunal's Act and Section-5 of the Limitation Act has no application. As such, under the statute limitation of one year period has been prescribed to approach the tribunal from the date of cause of action. There is no dispute with regard to the principles laid down by this Court as well as the apex Court, as mentioned supra, but the question is that if the period of limitation has been prescribed under the statute, that itself is to be adhered to, failing which the matter would not be taken into consideration in proper perspective. In such view of the matter, this Court does not find any error apparent on the face of record so as to interfere with the order impugned on the ground of limitation.

10. In view of the aforesaid facts and circumstance, this Court is of the considered view that 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 19<sup>th</sup> April, 2022, Ashok/GDS**