

IN THE HIGH COURT OF ORISSA AT CUTTACK
W.P.(C) No.8610 of 2015

Ramakanta Rath

....

Petitioner

Mr. Chandrakanta Nayak, Advocate

-Versus-

***The High Court of Orissa and
others***

....

Opp. Parties

Mr. P.K. Muduli, AGA

CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAİK

DATE OF JUDGMENT:29.07.2022

R.K. Pattanaik, J

1. Instant writ petition under Articles 226 and 227 of the Constitution of India, 1950 is at the behest of the Petitioner challenging the decision of Registrar (Judicial)-cum-Disciplinary Authority, High Court of Orissa (O.P. No.1) for not considering his departmental promotion with effect from 3rd December, 2002 instead of 30th June, 2006 and to consider the same in compliance of the order of this Court dated 11th December, 2012 passed in M.C. No.17027 of 2012 arising out of W.P.(C) No.15607 of 2005 by according seniority to him from the date when his juniors were promoted and in consonance with the gradation list dated 26th April, 2001 prepared vis-à-vis Senior Assistant and as per the civil list published and corrected up to October, 2013.

2. Initially the Petitioner joined as a Lower Divisional Assistant on 23rd February, 1981 and was later promoted to the higher post

as per the seniority and pursuant to the decision of O.P.No.1 from time to time but he was deprived of promotion to the post of Section Officer (as it was Superintendent Level-II by then) to which he was otherwise eligible according to the seniority and gradation list dated 26th April, 2001. In fact, the Petitioner while posted as Senior Assistant faced a departmental proceeding in 1999 on the allegation of interpolation of Court records but then, at the end of the proceeding, since charges were found proved, he was reverted to the post of Junior Assistant, whereafter, he preferred an appeal but the findings and the penalty imposed was confirmed by the Appellate Authority. As per the Petitioner, the aforesaid decision of the Appellate Authority was challenged in W.P.(C) No.15607 of 2005 and the same was disposed of by order dated 9th November, 2010, whereby, the decision on the first charge of interpolation was set aside though the second one sustained and as the penalty was held to be disproportionate, the matter was remitted back for orders by the disciplinary authority which then imposed a punishment of stoppage of one increment without cumulative effect by its order dated 15th December, 2010. It is the contention of the Petitioner that though thereafter, he was promoted, it was with effect from 2006 and not from 3rd December, 2002 notwithstanding the fact that the major charge of interpolation was set aside in W.P.(C) No.15607 of 2005. As pleaded, the above decision of O.P.No.1 to promote the Petitioner from 30th June, 2006 was without any cogent reason ignoring his seniority for promotion. According to the Petitioner, he was allowed to draw annual increment with effect from 1st August, 2010 but pursuant to the decision of the disciplinary authority and order passed in D.P. No.2 of 1999, the increment

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which was falling due on 1st August, 2002 was stopped. Furthermore, the Petitioner claims that by virtue of the order dated 11th December, 2012 in M.C. No.17027 of 2012 arising out of W.P.(C) No.15607 of 2005, he submitted a representation dated 17th December, 2012 before O.P.No.2. It is further claimed that as he had already been promoted and holding the post of Section Officer in the year 2013, he was stated to be promoted to the post of Superintendent Level-II vide notification dated 6th December, 2013 retrospectively with effect from 30th June, 2006 indicating that the pay shall be fixed notionally without any entitlement to the arrear differential salary for the period from 30th June, 2006 to 10th April, 2012. The Petitioner, therefore, claims for refixation of inter-se seniority among the Senior Assistants considering the civil list corrected up to 2013 and promotion to the post Superintendent Level-II with effect from 3rd December, 2002 and then, as Assistant Registrar with effect from 25th January, 2014 by fixing his seniority accordingly and as per the gradation list dated 26th April, 2001. Precisely the above relief has been sought for by the Petitioner with a direction to O.P.No.1 to grant him all consequential service and pecuniary benefits as he is entitled to.

3. Heard Mr. C. Nayak, learned counsel for the Petitioner and Mr. P.K. Muduli, learned AGA for the Opposite Parties.

4. Mr. Nayak contends that the juniors of the Petitioner below him in the gradation list dated 26th April, 2001 have been promoted to the post of Superintendent Level-II by notification dated 3rd December, 2012 ignoring his seniority and he was promoted only from 30th June, 2006 despite a direction of this W.P.(C) No.8610 of 2015

Court in W.P.(C) No.15607 of 2005 and overlooking the fact that he was exonerated from the charge of interpolation of records which is unjustified. According to Mr. Nayak, promotion of the Petitioner to the respective posts rather should have been given effect to from 3rd December, 2002 when the principal charge against him was set aside. Mr. Nayak would further contend that the adverse entry in the CCR in respect of the Petitioner was never communicated and only after good entries for the required years were received by 2006, promotion was allowed with effect from 30th June, 2006 and not from the anterior date i.e. 3rd December, 2002 and as regards non-communication of adverse entry vis-à-vis the year 2004, it was admitted by O.P.No.1 through an affidavit dated 30th August, 2021 further disclosing the fact that several juniors had been promoted to the post of Superintendent Level-II prior to 2006. While advancing the argument that the Petitioner should have been given promotion from 2002, Mr. Nayak cited following decisions of the Supreme Court in the case of ***High Court of Judicature, Patna Registrar General v. Sham Deo Singh and others (2014) 4 SCC 773*** and ***Sukdev Singh v. Union of India and others (2013) 9 SCC 566*** by contending that adverse entries in CCR vis-à-vis the Petitioner stood wiped off by subsequent promotion and the fact that the adverse entry for the year 2004 could not have prevailed upon O.P.No.1 while denying promotion, when such entry was not duly communicated to him. Thus, according to the contention of Mr. Nayak, the promotion of the Petitioner was not considered with effect from 3rd December, 2002 but from a later date though he was otherwise eligible, more particularly, when the charge of interpolation of records could not be finally sustained.

5. On the other hand, Mr. Muduli contends that the Petitioner was made to face a departmental action in the year 1999 and when the DPC was held on 2nd December, 2002 for promotion to fill up 21 posts of Superintendent Level-II, he was not considered since the departmental action was then pending and that apart, repeated complaints had been received against him from the Advocates, while he was working as the Senior Assistant during the year 1989-90 apart from the fact that the CCRs for preceding three years (period of 1998-2001) regarding his performance was not up to the mark, particularly when, the promotion is to be considered on the basis of merit with due regard to seniority. Mr. Muduli contends that 21 Senior Assistants were promoted to the posts of Superintendent Level-II on 3rd December, 2002 and in the year 2004, the departmental proceeding was concluded and penalty was imposed, however, pursuant to the direction in W.P.(C) No.15607 of 2005, a lesser punishment instead of reversion was awarded by stopping one without cumulative effect and thereafter, his seniority was refixed in the cadre of Senior Assistant on 29th June, 2011 and since there was no post of Superintendent Level-II was available, the Government was moved for creation of a temporary post, whereafter, in 2013 a supernumerary post was created to accommodate him and accordingly, promotion was allowed on 6th December, 2013 but with effect from 30th June, 2006 which was in compliance of the order passed in W.P.(C) No.15607 of 2005. Lastly, on the merits of the claim of the Petitioner, Mr. Muduli contended that promotion to a higher post is not a matter of right by virtue of seniority alone which has to be with due regard to merit and in

that regard, he placed reliance on following decisions in *State Bank of India v. Mohammad Mynuddin (1987) 4 SCC 486*; *All India Backward Classes and Minorities Welfare Association v. Union of India 1988 (SUPP.) SCC 500*; *Haryana State Electronic Development Corporation Ltd. v. Seema Sharma (2009) 7 SCC 311*; and *U.V. Mahadkar v. Subash Anand Chandan and others (2016) 1 SCC 536*. So according to Mr. Muduli, the Petitioner was not considered for promotion on account of the disciplinary proceeding and repeated complaints being received against him from the Advocates and that his performance was found not satisfactory during the relevant period and therefore, it was refused but finally, he was promoted to the post of Superintendent Level-II in 2013 with effect from 30th June, 2006 which is absolutely in accordance with law.

6. In fact, O.P. Nos.1 to 3 filed a counter affidavit denying the assertion of the Petitioner. It has been stated therein that the disciplinary proceeding was concluded with a punishment of reduction in rank to the next lower grade and the period of suspension was treated as such but pursuant to the direction in W.P.(C) No.15607 of 2005, wherein, the findings of the departmental proceeding were challenged and the first charge was set aside, the disciplinary authority considering the other charge awarded penalty of stoppage of one increment without cumulative effect and thereafter, on account of direction in M.C. No.17027 of 2012, the consequential promotion and re-fixation of seniority vis-à-vis the Petitioner was considered and having due regard to the CCRs, he was promoted to the next level, however, with effect from 30th June, 2006 and as such, said decision cannot

be faulted with. In response to the counter affidavit, a rejoinder was filed by the Petitioner reiterating the claim that denial of promotion was illegal and it should have been from 3rd December, 2002 when his juniors were promoted. In the meantime, pursuant to the direction of this Court, the Opposite Parties filed an affidavit dated 13th August, 2021 and deposed that from time to time many juniors indeed received promotion prior to 2006 and in so far as adverse entry of 2004 in the CCR is concerned, the same was not communicated to the Petitioner. With the above pleadings on record, the rival contentions of the parties are to be considered to take a decision as to, whether, promotion of the Petitioner should have been from 3rd December, 2002 with all consequential benefits instead of 30th June, 2006.

7. There is no denial to the fact that some of the juniors of the Petitioner did receive promotion on 2nd December, 2002 the date on which DPC was held for filling up of 21 posts of Superintendent Level-II and that the departmental proceeding was concluded and thereafter on 20th November, 2004, the Petitioner was awarded a punishment of reversion to the lower post on time scale and the period of suspension from 19th July, 1999 to 20th September, 1999 was treated as such. It is also made to understand that a DPC was held on 1st February, 2005 to fill up 13 more posts of Superintendent Level-II but the case of the Petitioner was not considered as by that date, he had already been reverted to the lower cadre pursuant to the decision of the disciplinary authority dated 20th November, 2000 and that apart, he did not have good entries in the preceding three years. As further admitted, the Petitioner was exonerated from the first

charge of interpolation of records by this Court in W.P.(C) No.15607 of 2005 and thereafter, in compliance of the direction contained therein, the punishment was reduced to stoppage of one increment without cumulative effect and at last on 29th June, 2011 his seniority was refixed in the cadre of Senior Assistant and as there was no vacancy in the cadre of Superintendent Level-II, a supernumerary post was created by Government's order dated 30th October, 2013 for the said purpose and then only he could be accommodated by a promotion on 6th December, 2013 with effect from 30th June, 2006. Mr. Muduli submits that the Petitioner's promotion was not considered in the year 2002 and 2005 since on the first occasion, the disciplinary proceeding was pending and during the second time, when the DPC was held, he had already been reverted and did not have good entries in the preceding years. According to Mr. Muduli, promotion was rightly denied to the Petitioner and it was considered only when CCRs found to be satisfactory for three successive years. As it appears, promotion of the Petitioner to the next level was not considered due to pendency of the department proceeding when DPC was held in 2002 and likewise it was deferred in 2005 and again in 2006 when DPC was held to fill up 9 posts of Superintendent Level-II and only after the major charge was set aside in W.P.(C) No.15607 of 2005 and the case was remanded to the disciplinary authority to take a decision for imposing appropriate punishment on the second charge and punishment of stoppage of one increment was awarded, his promotion was taken up after refixation of seniority in 2011 and later to the creation of a supernumerary post in 2013. In fact, on 6th December, 2013, the Petitioner was promoted to the post of

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Superintendent Level-II with effect from 30th June, 2006 after creation of a supernumerary post. The Court does not find any error in the decision of O.P.No.1 since because earlier promotions in 2002, 2005 and 2006 were denied by the Petitioner for obvious reasons as he had been subjected to a disciplinary proceeding and was reverted and even had no good CCRs for three consecutive years preceding the year in which the DPC was held and finally, it was allowed only when good CCRs were found in favour of him. In so far as the promotion to the higher post vis-à-vis an employee/officer is concerned, it is governed by the Orissa High Court (Conditions of Service of Staff) Rules, 1963 (hereinafter referred to as 'the Rules'). As per Rule 6(2) of the Rules, promotion to the various posts in the High Court staff shall be made on the basis of merit with due regard to seniority. It is contended by Mr. Muduli that when the above provision stipulates that promotions shall have to be primarily on the basis of merit with due regard to seniority, the case of the Petitioner is in accordance with the aforesaid criteria. The Petitioner was admittedly facing departmental proceeding in charges of interpolation of records and disobedience and even some complaints from Advocates had been received against him, notwithstanding the fact that the first charge was not established and the punishment stood substituted with stoppage of increment without cumulative effect, the promotion in any case was required to be considered in accordance with Rule 6(2) of the Rules which allows promotion on the basis of merit with due regard to seniority. No doubt, some juniors of the Petitioner were promoted in a phase wise manner but then by that time, he was

not found eligible/suitable for the reasons stated and therefore, the promotion had either to be deferred or denied.

8. With regard to promotion matters, the Supreme Court in ***Md. Mynuddin*** (supra) held that a decision on promotion should not ordinarily be interfered with unless it is vitiated by malafide or bias and an officer cannot claim right to promotion even when remarks in his confidential reports found to be satisfactory. It has been further held therein that an officer whose promotion has been considered on several occasions but every time found not fit, in absence of allegation of malafide, bias or arbitrariness, intervention by the Court is uncalled for. It is further held by the Apex Court in the above decision that any interference under Articles 226 or 32 of the Constitution of India would be to the extent that instead of directing promotion straight away may only issue directions to the authorities to consider the same. In the instant case, in M.C. No.17027 of 2012, this Court by order dated 11th December, 2012 directed to consider the promotion of the Petitioner as he was exonerated of the first charge and accordingly, it was allowed in 2013 but from 2006 as he had to have good entries in CCRs at least for three consecutive years. In such view of the matter, the Court finds no error for having allowed the promotion with effect from 30th June, 2006. Further, in the considered view of the Court, the Petitioner even though exonerated from the first charge that by itself was not sufficient to consider his promotion from 2002 onwards. That apart, in view of Rule 6(2) of the Rules promotion is always to be considered on merit of course regard being had to seniority. In ***U.V. Mahadkar*** (supra), the Supreme Court held that while

exercising jurisdiction considering a matter of promotion, the power of judicial review is limited and decision thereon should not be interfered with without any arbitrariness being proved. It was further held therein that in case of merit-cum-seniority, merit would be given preference over seniority and it is only when, seniormost candidate has no merit and/or is not found suitable merely because of seniority, authority has to select a meritorious candidate. In the above case, the Apex Court reiterated the principle of merit-cum-seniority as approved in one of its earlier decisions in the case of ***Sant Ram Sharma v. State of Rajasthan AIR 1967 SC 1910***. The distinction between ‘merit-cum-seniority’ and ‘seniority-cum-merit’ was lucidly explained by the Supreme Court in ***Haryana State Electronics Development Corporation Limited and others v. Seema Sharma and others (2009) 7 SCC 311***, wherein, it has been observed that the principle of merit-cum-seniority puts greater emphasis on merit and ability and where promotion is governed by it, seniority plays a less significant role, however, seniority is to be given weightage when merit and ability more or less are equal among the candidates who are to be promoted and on the other hand, in so far as the principle of seniority-cum-merit is concerned, it gives greater importance to seniority and promotion to a senior cannot be denied unless the person concerned is found unfit to discharge the duties of higher post and for that, the totality of the service record of the employee has to be evaluated for promotion and while concluding so, reaffirmed the view expressed in ***Jagatigowda C.N. v. Cauvery Gramin Bank AIR 1996 SC 2733***. As to the present case, if the relevant provision, such as, Rule 6(2) of the Rules is gone through, it would convey that merit

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would be the upper most consideration over and above seniority and therefore, the principle of merit-cum-seniority shall apply. The Petitioner though was senior as per the gradation list dated 26th April, 2001, since he was not eligible and even found not suitable on merit promotion was deferred and denied. That apart, the Petitioner did not have three good CCRs and when he acquired it, his promotion was considered and seniority was refixed and promotion was allowed from 30th June, 2006. Taking into account the facts and circumstances of the case and position of law discussed herein before, the decision on promotion of the Petitioner cannot be said to be unjustified.

9. Mr. Nayak laid much emphasis on the affidavit filed by the Opposite Parties dated 13th August, 2021 by contending that there is an admission as to several juniors to the Petitioner being promoted to the post of Superintendent Level-II prior to 2006 and also the adverse entry in 2004 having not been communicated. Mr. Nayak cited a decision of the Supreme Court in ***Sukhdev Singh v. Union of India and others (2013) 9 SCC 566*** since the entry for the year 2004 was not communicated to the Petitioner. In the aforesaid decision, the Apex Court has held that every entry in the ACR, whether poor, fair, average, good, very good or outstanding should be communicated to the employee concerned within a reasonable time and communication of adverse entry only is not enough while overruling its decision in ***U.P. Jal Nigam v. Prabhat Chandra Jain (1996) 2 SCC 363*** and approving the decision in ***Dev Dutt v. Union of India (2008) 8 SCC 725*** and ***Union of India v. Major Bahadur Singh (2006) 1 SCC 368*** which is to the effect

that such communication of each and every entry within a reasonable period has threefold objectives, firstly, it helps the public servant to work harder and achieve more and that improves his work and gives better result; secondly, on being made aware of the entries in ACR, the public servant may submit representation for upgradation of the remarks; and thirdly, communication of every entry in the ACR brings transparency in recording the remarks relating to a public servant and thereby the system functions more in conformity with the principles of natural justice. The instant case is not based on the aforesaid premise. Rather, it has been drawn to the notice of the Court that the Petitioner did not have any adverse entry for the year 2004 and hence, had no occasion to communicate it to him and only after he having received good entries in three preceding years prior to 2006, promotion was allowed and it was with effect from 30th June, 2006. In the aforesaid background of facts, the Court finds that there was no any error or illegality committed by O.P.No.1 for not considering the promotion of the Petitioner from 3rd December, 2002 as he was either not found eligible or suitable and also for having no good CCRs for the period 1998-2001 and that too when, the criteria stands on merit-cum-seniority as per Rule 6(2) of the Rules. That apart, the decision of the Apex Court in the case of ***Sham Deo Singh*** (supra) is distinguishable which is related to the case of denying extension of service of some judicial officers on a decision of the High Court in its administrative side. In view of the said decision, it was held that the extension could not have been denied by the High Court only on the ground of adverse remarks made in one ACR, when the subsequent record being positive wiped out said *W.P.(C) No.8610 of 2015*

remarks/comments for having been ultimately promoted to the post of District Judge with selection grade in that cadre and therefore, the benefit of enhancement of superannuation up to 60 years should have been allowed. However unlike the above case, the present is a matter of promotion which is always based on the performance of an employee and in so far as the Petitioner is concerned, he was subjected to a departmental action on a serious charge of interpolation and although he was later exonerated of the same by a decision in judicial side but considering other aspects of performance and suitability with due regard to merit irrespective of the fact that he had the seniority, promotion to him could not be allowed as he was not found suitable to perform the duties and responsibilities of higher post which was evaluated with reference to the CCRs and other materials. In view of the foregoing discussions, the Court is of the conclusion that O.P. No.1 did not err by not considering the promotion of the Petitioner with effect from 3rd December, 2002 and since promotion was notionally effected from 30th June, 2006, he is not entitled to receive arrear differential salary applying the principle of 'no work no pay'. In fact, the Supreme Court in ***A.K. Soumini v. State bank of Travancore and another (2003) 7 SCC 238*** by referring to its earlier decisions in ***State of Haryana and others v. O.P.Gupta and others (1996) 7 SCC 533***; ***Palaru Ramakrishnaiah v. Union of India 1989 2 SCC 541***; and ***Virendra Kumar, G.M., N. Railways v. Avinash Chandra Chadha (1990) 3 SCC 472*** held and observed that in case of notional promotion, arrear salary cannot be paid to a promotee from the deemed date for having not worked in that capacity by applying the aforesaid rule. To sum up, the relief which has been

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sought for by the Petitioner towards promotional and consequential benefits from 3rd December, 2002 and subsequent entitlements in the senior cadre fixing the pay scale is devoid of any merit.

10. Hence, it is ordered.

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

TUDU

