

ORISSA HIGH COURT: CUTTACK

WPC (OAC) No.4738 of 2015

(An application under Article 226 and 227 of the Constitution of India)

AFR Bipra Charan Mallick Petitioner

-Versus-

State of Odisha & others Opp. Parties

Advocate(s) appeared in this case :-

For Petitioner	:	M/s. Sashi Bhusan Jena & S. Behera, Advocates
For Opp. Parties	:	Mr. H.K. Panigrahi, Additional Standing Counsel

CORAM

JUSTICE SASHIKANTA MISHRA

JUDGMENT

27th April, 2022

SASHIKANTA MISHRA, J. The petitioner has filed the present application seeking a direction to the opposite party authorities to grant him promotion with retrospective effect from the date he was recommended for promotion by

the Central Selection Board, 2008.

2. The brief facts of the case are that the petitioner was initially appointed as a Constable in the year 1980. He was promoted to the post of Asst. Sub-Inspector of Police in the year 1996. While working as such under the IIC of Chauliaganj Police Station, Cuttack, the petitioner availed leave for 20 days w.e.f. 30.04.2008 by submitting necessary application. However, because of his illness, the petitioner could not join in his duty after expiry of the period of leave as he was admitted to the City Hospital on 04.07.2008 and discharged on 15.07.2008 after undergoing surgery. The petitioner claims to have intimated this fact to the authorities by submitting applications on 23.05.2008 and 30.06.2008. Despite such intimation, the petitioner was placed under suspension w.e.f. 30.06.2008. On 01.07.2008, the petitioner submitted a medical certificate of the doctor under whom he was undergoing treatment. While the matter stood thus, a disciplinary proceeding was initiated against the petitioner by the DCP, Cuttack vide Proceeding No. 4 of

2008 as per the order dated 18.07.2008. The charge was served on him asking him to submit preliminary explanation by 10.08.2008 pointing out that he had availed 20 days earned leave w.e.f. 23.05.2008 but had remained unauthorizedly absent after expiry of the same. The petitioner submitted his preliminary explanation on 10.09.2008 and thereafter, on 20.09.2008 he also submitted his representation to the DCP, Cuttack with prayer to accept his joining report and to revoke the order of suspension enclosing therewith a fitness certificate. In the meantime, as per memo dated 27.09.2008 issued by the DIG of Police (Admn.), the Asst. Sub-Inspectors of Police were deputed to undergo S.I. course of training for a period of four months from 03.11.2008 at Biju Pattnaik State Police Academy (BPSPA), Bhubaneswar. The petitioner was also selected after due medical checkup but his name was not sponsored. As such, the petitioner approached the erstwhile Odisha Administrative Tribunal in O.A. No. 2444 (C) of 2008. By order dated 13.10.2008, the learned Tribunal directed the opposite party no.2 to

take note of the fact that the training for Sub-Inspectors of Police for which the petitioner had been selected is due to commence from 03.11.2008 and if the disciplinary proceeding is not completed by then, the petitioner should be given an opportunity of joining the training course. The aforesaid order of the Tribunal has been enclosed as Annexure-9 to the writ application. However, despite such specific direction, the disciplinary proceeding was not concluded by the stipulated date, as a result of which the petitioner was deprived of his legitimate promotion. On 30.10.2008, the opposite party no.2 passed an order pursuant to the direction of the learned Tribunal mentioning that the petitioner's case was placed before the Central Selection Board held on 11th, 12th and 15th September, 2008 for consideration of his case for promotion to the rank of S.I., but after scrutinizing his service records, the recommendation in his respect was kept in a sealed cover as per G.A. Department Circular dated 18.02.1994, since the departmental proceeding was pending. Accordingly, the petitioner's prayer for

undergoing training was rejected. Subsequently, on 02.01.2010, the second Central Selection Board was also held but the case of the petitioner was not considered. In the meantime, the Disciplinary Proceeding No. 4 of 2008 was dropped and the petitioner was exonerated from the charge. Since the case of the petitioner was not considered for promotion with retrospective effect, he approached the learned Tribunal in O.A. No. 1181(C) of 2010 seeking appropriate relief. Learned Tribunal vide order dated 21.08.2010 directed the opposite party no.2 to take note of the fact of exoneration of the petitioner in the disciplinary proceeding and to open the sealed cover and to implement the recommendation of the DPC within a period of one month. The said order of the Tribunal was not complied with, for which the petitioner filed a contempt petition being C.P. No. 14(C) of 2011, which was disposed of on 05.05.2011 directing the opposite party no.2 to open the sealed cover and to act as per recommendation of the Central Selection Board. Since no action whatsoever was taken, the petitioner filed another contempt petition being

C.P. No. 153(C) of 2012 for violation of the previous orders. During pendency of the aforementioned contempt petition, the DCP vide letter no. 5291 dated 22.10.2011, enclosed as Annexure-14 to the writ petition, passed an order that he would count the petitioner's seniority in the rank of S.I. of police from the date of his selection by the Central Selection Board and will be placed in the State Gradation List as prepared by the Central Selection Board in the order of position assigned to him provided he passes the final examination of BPSPA, Bhubaneswar successfully and that he would be granted annual increment after being declared passed in the S.I. course of training as per Rule 28(2) of the Government in Home Department Resolution dated 27.05.2006. The said order was not communicated to the petitioner as long as he was in service. In the meantime, the petitioner has retired from service on attaining the age of superannuation. The grievance of the petitioner is that for no fault of his, he was deprived of his legitimate claim for promotion despite being recommended by the Central Selection Board.

3. Despite sufficient notice, no counter affidavit was filed by the State-opposite parties. Learned State Counsel preferred to make oral arguments based on materials on record.

4. Heard Mr. S. Behera, learned counsel for the petitioner and Mr. H.K. Panigrahi, learned Addl. Standing Counsel for the State.

5. It is argued by Mr. Behera that once the petitioner was exonerated from the charge in the disciplinary proceeding, it was incumbent upon the concerned authorities to act as per the recommendation of the Central Selection Board and to give him promotion w.e.f. the date his batchmates were granted promotion as per the list prepared by the Central Selection Board. It is further submitted that despite repeated orders of the learned Tribunal, the opposite party no.2 in particular did not act, as a result of which the petitioner, despite being recommended for promotion was deprived of the benefit.

Mr. Behera has referred to the G.A. Department Office Memorandum dated 18th February, 1994 which lays

down the sealed cover procedure. Referring to para-6 of the said office memorandum it is contended by Mr. Behera that it is the duty of the authority to open the sealed cover immediately after conclusion of the disciplinary proceeding and in case the officer is completely exonerated then the due date of his promotion will be determined with reference to the findings of the screening committee kept in the sealed cover and with reference to the date of promotion of his next junior on the basis of such findings. Mr. Behera further submits that in case of complete exoneration, the officer will also be paid the arrears of salary and allowance.

Mr. Behera has also relied upon the decision of the Hon'ble Supreme Court in the case of **Union of India vs. K.V. Jankiraman**, reported in AIR 1991 SC 2010, wherein it has been clearly stated that if the employee is completely exonerated in the disciplinary proceeding, he has to be given the benefit of salary of higher post along with the other benefits from the date on which he would have normally been promoted but for the disciplinary

proceedings. According to Mr. Behera the delay in conclusion of the disciplinary proceedings in the instant case cannot be attributed to the petitioner in any manner whatsoever and therefore, he is entitled to be retrospectively promoted and granted all financial and other benefits.

6. Per contra, Mr. H.K. Panigrahi, has submitted that after passing of the order granting promotion to the petitioner, by order dated 20.10.2011 with effect from the date of his joining, the S.I. course of training of BPSPA, Bhubaneswar, the contempt filed by the petitioner was dropped on the submission made by the petitioner's counsel that the order of the Tribunal has been complied with. Therefore, it is not open to the petitioner to turn around and take a contrary plea at this stage that the order of the tribunal was not complied with.

7. I have considered the rival contentions as noted above carefully. The relevant facts of the case are not disputed, inasmuch as the petitioner was selected for promotion to the post of S.I. of police and was directed to

undergo training by the Central Selection Board, 2008. However, he was not actually deputed to attend such training. That apart, the recommendation of the Central Selection Board was kept in sealed cover because of the pendency of the Disciplinary Proceeding No.4 of 2008. It further appears that the petitioner was honourably exonerated from the charge and the disciplinary proceeding was dropped. Such being the position, it was incumbent upon the authorities to open the sealed cover and to act as per the recommendations of the Central Selection Board. A reference to the G.A. Department resolution dated 18.02.1994 referred to by Mr. Behera clearly lays down the procedure in such cases. Paragraph-6 of the said office memorandum, as relied upon by Mr. Behera is relevant and is quoted hereinbelow.

“6. On the conclusion of the disciplinary case/criminal prosecution, the sealed cover or covers shall be opened. In case the officer is completely exonerated, the due date of his promotion will be determined with reference to the findings of the Screening committee kept in the sealed cover/covers and with reference to the date of promotion of his next junior on the basis of such findings. The Government servant may be promoted, if necessary, by reverting the junior-most officiating person. He may be

promoted notionally with reference to the date of promotion of his junior.

In cases of complete exoneration, the officer will also be paid arrears of salaries and allowances. In other cases, the question of arrears will be decided by the State Government by taking into consideration all the facts and circumstances of the disciplinary/criminal proceedings, but where the Government denies arrears of salary or a part of it, the reasons for doing so shall be recorded.”

8. In the case of **K.V.Jankiraman** (supra), the apex Court has also held that when an employee is completely exonerated meaning thereby that he is not found blameworthy in the least and is not visited with the penalty even of censure, he has to be given the benefit of the salary of the higher post along with the other benefits from the date on which he would have normally been promoted but for the disciplinary/criminal proceedings. However, there may be cases where the proceedings, whether disciplinary or criminal, are, for example, delayed at the instance of the employee or the clearance in the disciplinary proceedings or acquittal in the criminal proceedings is with benefit of doubt or on account of non-availability of evidence due to the acts attributable to the employee etc. In such circumstances, the concerned

authorities must be vested with the power to decide whether the employee at all deserves any salary for the intervening period and if he does, the extent to which he deserves it.

9. In view of the aforementioned ratio, it is clear that once an employee is honourably acquitted or exonerated from the charge, duty is cast upon the concerned authority to restore him to the position, he would have acquired but for the proceeding. In the instant case it is evident that the procedure laid down in the office memorandum dated 18th February, 1994 was not followed and that too despite repeated directions of the learned Tribunal. The sealed cover was not opened nor the petitioner was deputed to attend the training. It is only after filing of the second contempt application before the Tribunal that the concerned authority passed the order under Annexure-14, whereby it was held that the petitioner's promotion will take effect from the date of his joining the S.I.'s course of training at BPSPA,

Bhubaneswar. It goes without saying that such direction or order runs clearly contrary to the office memorandum dated 18th February, 1994 as also the ratio of the apex Court in the case of **K.V.Jankiraman** (supra). Of course, in the meantime the petitioner has retired from his service on attaining the age of superannuation. Therefore, this Court is of the considered view that the ends of justice would be best served if the petitioner is granted promotion with effect from the date his immediate junior in the gradation list was promoted. Further, taking note of the fact that the conclusion of the disciplinary proceeding and opening of the sealed cover was delayed not because of the petitioner but because of the inaction of the opposite party authorities, the petitioner cannot be deprived of his legitimate financial and service benefits.

10. This Court therefore, holds that the petitioner is entitled to be promoted to the post of S.I. of police w.e.f. the date his immediate junior in the gradation list was promoted as per the recommendation of the Central

Selection Board, 2008 and further he shall be paid the salary of the said higher post along with other financial benefits till the date of his retirement.

11. Though it was argued by Mr. Panigrahi that the petitioner not having worked in the promotional post, he is not entitled to any financial benefit but only notional benefit, this Court is unable to accept the same.

In the case of **K.V.Jankiraman** (supra), it was held as follows:

“The normal rule of “no work no pay” is not applicable to cases such as the present one where the employee although he is willing to work is kept away from work by the authorities for no fault of his. This is not a case where the employee remains away from work for his own reasons, although the work is offered to him.”

Therefore, in the instant case, there is no way by which the petitioner can be blamed for not working in the higher post. As already stated, it is entirely due to the inaction of the concerned authorities that the petitioner was deprived of promotion at the relevant time and was therefore, not allowed the benefits such post offered.

12. In the result, the writ petition is allowed. The impugned order under Annexure-14 is hereby quashed. The opposite party authorities are directed to issue a fresh order granting promotion to the petitioner to the post of Sub-Inspector of police as per the recommendation of the Central Selection Board, 2008 with effect from the date his immediate junior was promoted. Further, the petitioner shall be paid the arrear salary and other benefits attached to such promotional post from such date till the date of his superannuation. The above exercise shall be completed within a period of two months from the date of communication of this order or on production of certified copy thereof by the petitioner.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack
The 27th April, 2022/ A.K. Rana