

**IN THE HIGH COURT OF ORISSA AT CUTTACK**

**W.P.(C) No. 33216 of 2021**

***Dr. Malay Kumar Pradhan*** .....

***Petitioner***  
*Mr. A.K. Biswal, Advocate*

***-versus-***

***State of Odisha and another*** .....

***Opposite Parties***  
*Mr. B.P. Tripathy, AGA*

**CORAM:  
JUSTICE A.K.MOHAPATRA**

**ORDER**  
**07.12.2022**

**Order No.**

09. 1. Heard Mr. A.K. Biswal, learned counsel appearing for the Petitioner and B.P. Tripathy, learned Additional Government Advocate appearing for the State-Opposite Parties.
2. This writ petition has been filed by the Petitioner seeking a direction to the Opposite Parties to promote him to the rank of Joint Director of Factories and Boilers Level-II in terms of the DPC recommendation dated 20.08.2019 on the ground that he is the senior most suitable candidate available for the post, irrespective of pendency of vigilance proceeding against him for last twelve years and further prayer for grant of all consequential service and financial benefits in the light of the law laid down by this Court vide order dated 7.7.2021 in W.P.(C) No.17624 of 2021 under Annexure-6

3. It is submitted by the learned counsel for the Petitioner that on being selected, the Petitioner joined as Inspector of Factories & Boilers under the Government of Odisha on 29.01.1993. Further, considering the performance of the Petitioner, he was promoted to the post of Deputy Director of Factories & Boilers as per Notification dated 26.08.2009 of the Government of Odisha in Labour & Employment Department. While the matter stood thus, the Opposite Party No.1 vide letter No.2014 dated 26.3.2019 circulated tentative gradation list in the cadre of Deputy Directors of Factories and Boilers.

4. It is further submitted that in the said tentative gradation list, the name of the Petitioner was placed at Serial No.1 and that the next promotion of post for the Petitioner is the Joint Director of Factories and Boilers Level-II. However, to fill up one vacancy in the post of Joint Director of Factories and Boilers Level-II, a meeting of Selection Board was convened on 20.08.2019 to consider the eligible candidates for promotion to the post of Joint Director of Factories and Boilers Level-II on the basis of the gradation list issued by the Department on 26.3.2019. Since the Petitioner's name appears in the Serial No.1 in the gradation list, learned counsel for the Petitioner emphatically submits that the Petitioner is ultimately

eligible for consideration and, as such, he should have been appointed against the said post.

5. It is further contended that the name of the Petitioner along with two other persons, namely, Satya Narayan Sethi and Abani Kanta Naik were also considered by the Selection Board. It is needless to mention here that Satya Narayan Sethi and Abani Kanta Naik are juniors to the Petitioner. Furthermore, the Selection Board while recommending the above two persons for promotion to the post of Joint Director of Factories and Boilers Level-II, kept the recommendation in respect of the Petitioner in a sealed cover due to pendency of SBP (Vig.) Case No.13 of 2009 and corresponding departmental proceeding No.59/ESI dated 3.1.2013. Mr. Biswal further contends that while the other two persons, who were admittedly juniors, having been promoted, took charge of their promotional post whereas the Petitioner is still continuing against the old post under the Director of Factories and Boilers.

6. In the context of the departmental proceeding No.59 dated 3.1.2019, it is further contended by the learned counsel for the Petitioner that the same was challenged before the Tribunal in O.A. No.1234 of 2019 for quashing of the departmental proceeding. In the said O.A., the Tribunal passed an interim order directing the

Opposite Parties that till the conclusion of the departmental proceeding, the DPC shall not be held to consider the promotion to the post of Joint Director of Factories and Boilers Level-II without leave of the Tribunal. Such order was challenged before this Court by one S.N. Sethi by filing W.P.(C) No.9005 of 2019 before a Division Bench and the Division Bench of this Court stayed the order of Tribunal dated 28.3.2019.

7. Since the interim order passed by the Division Bench of this Court could not be vacated, the Petitioner approached the Hon'ble Supreme Court by filing S.L.P. No.19152 of 2019 which was disposed of on 19.8.2019 by giving liberty to the Petitioner to approach this Court for early hearing of the matter without merit on the issue involved in the S.L.P.

8. After disposal of the S.L.P. by the Hon'ble Supreme Court on 19.8.2019, W.P.(C) No.9005 of 2019 was taken up by this Court and disposed of by declaring that the writ petition has become infructuous since the DPC has already taken place on 20.8.2019. Thereafter, the Petitioner approached before this Court by filing fresh writ petition bearing W.P.(C) No.14997 of 2019 and this Court vide order dated 29.4.2019 disposed of the same with a direction to the Opposite Parties to comply the order as directed by the Tribunal

vide order dated 28.3.2019 within a period of four weeks and to communicate the result to the Petitioner.

9. It is further submitted by the learned counsel for the Petitioner that the departmental proceeding was closed pursuant to direction passed by this Court vide order dated 24.6.2021 in CONTC No.4804 of 2020.

10. With regard to pendency of vigilance case before the Court of Special Judge (Vigilance), Sambalpur, which was registered under the Prevention and Corruption Act, 1988, arising out of Sambalpur Vigilance P.S. Case No.13 of 2009, corresponding to G.R. Case No.13 of 2009 and CTR Case No.27 of 2014. It is stated that same is still pending for trial. However, after filing of the charge sheet cognizance was taken way back on 21.6.2014. While the trial was not taking place in the vigilance case initiated against the Petitioner, the Petitioner again approached this Court by filing CRLMC No.1407 of 2019 and this Court after hearing the counsels for the parties vide order dated 1.10.2019 directed for transfer of the aforesaid Vigilance Case from the Court of the Special Judge (Vigilance), Sambalpur to the Court of Special Judge (Vigilane), Dhenkanal and it was further directed to conclude the same expeditiously, preferably within a period of six months.

11. Learned counsel for the Petitioner at this juncture further submits that despite such unambiguous order passed by this Court, the trial in the vigilance case has although started, the progress of the trial is very slow. It is further contended that out of a total of 95 prosecution witnesses, only 19 witnesses have been examined so far. Further, in view of the pendency of the aforesaid vigilance case, the DPC had adopted a procedure of sealed cover while considering the promotion of the Petitioner to the higher post. Learned counsel for the Petitioner in this context relied upon the decision of the Hon'ble Supreme Court in the case of *State of Punjab and Ors. -v.- Chaman Lal Goyal, reported in (1995) 2 SCC 570; State of Odisha and Ors. -v.- Purna Chandra Das & Ors. (W.P.(C) No.22560 of 2015 decided on 29.08.2016; Chakradhar Prasad Gantayat -v.- Commissioner-cum-Secretary to Government of Odisha, Works Department (W.P.(C) No.10919 of 2021 decided on 02.12.2021).*

12. Mr. Biswal, learned counsel for the Petitioner further submits that against the order of the Hon'ble Single Bench in the case of *Chakradhar Prasad Gantayat* (supra), State has preferred a writ appeal bearing W.A. No.321 of 2022 and vide order dated 17.5.2022, a Division Bench of this Court in para-4 of the order dated 17.5.2022 has passed the following interim order:-

*“Let the Petitioner be promoted on ad hoc basis in terms of the impugned judgment with notional benefits before the next date, subject, on course, to the decision of the present appeal as well as the outcome of the criminal trial.”*

13. Learned counsel for the Petitioner also relied upon a decision of the Division Bench of this Court in the case of ***State of Odisha & Anr. -v.- Smt. Sanjita Das & Ors., reported in 2016 (II) ILR-CUT-808*** and also in the case of ***State of Odisha & Ors. v. Somnath Sahoo, reported in 2016 (II) ILR-CUT-989*** in support of his contentions.

14. Referring to all the aforesaid judgments of the Honb'le Supreme Court as well as of this Court, learned counsel for the Petitioner submits that the Petitioner has been deprived of his legitimate right to be considered for promotion and be promoted to the next higher rank. Further, it is stated that the Petitioner has been subjected to discrimination by the Opposite Parties as he was not given promotion and persons junior to him have been given promotion to the post of Joint Director of Factories and Boilers Level-II. Therefore, referring the judgments mentioned above, the learned counsel for the Petitioner submits that the authorities be directed to open the sealed cover and give promotion to the Petitioner on ad hoc basis which will be subject to the outcome of the pending criminal trial against the Petitioner.

15. It is further contended by the learned counsel for the Petitioner that it is not known as to when criminal trial would come to an end keeping in view the fact that 19 witnesses out of 95 prosecution witnesses have been examined so far. It is further contended that earlier a writ petition being W.P.(C) No.33216 of 2021 was filed by the Petitioner before a coordinate Bench of this Court and the coordinate Bench, after hearing the learned counsel for the Petitioner, vide order dated 28.10.2021 disposed of the matter by directing the Opposite Party No.1 to give promotion to the Petitioner to the rank of Joint Director of Factories and Boilers Level-II. However, the promotion of the Petitioner shall be subject to the ultimate outcome of the vigilance proceeding and further it has been clarified that the promotion that would be given shall not confer equity on the Petitioner in the event, he ultimately loses the vigilance proceeding and further promotion of the Petitioner shall not also confer any right to claim consequential benefits.

16. The aforesaid order dated 28.10.2021 passed by this Court in W.P.(C) No.33216 of 2021 was challenged before the Division Bench of this Court in a Writ Appeal No.1002 of 2021 by the State on the ground that no opportunity was granted to the Appellant-State to file reply to the writ petition before disposing of the matter.

Accordingly, the Division Bench of this Court on the aforesaid limited ground while setting aside the order passed on 28.10.2021 remanded the matter back to the assigned Single Judge Bench and the matter has been directed to be taken up for final hearing.

17. After the matter was remanded, a counter affidavit has been filed on behalf of the Opposite Party No.1. On perusal of the counter affidavit, it appears that the Opposite Parties in paragraphs-12 and 13 have taken a stand that the G.A. Department issued a notification vide Office Memorandum dated 17.6.2021 clarifying the position in the context of promotion of Government servants against whom disciplinary proceedings are pending and the said notification dated 17.6.2021 has been filed as Annexure-E/1 to the counter affidavit. Relying upon the said memorandum, it is stated that on the date of DPC, if any disciplinary proceeding/criminal proceeding is pending, then the recommendation of DPC/Selection Board shall be kept in a sealed cover. It is further submitted that on the earlier occasion while the Single Judge disposed of the writ petition he has not taken into account the aforesaid Office Memorandum and went on to give a direction to give promotion to the Petitioner to the post of Joint Director of Factories and Boilers Level-II.

18. Similarly, in para-14 of the counter affidavit, the judgment of the Hon'ble Apex Court in the case of ***Union of India -v.- K.V. Janakiraman, reported in (1991) 4 SCC 409*** has been referred to and in the said context, it was stated by the Government Counsel that during the pendency of the criminal case/disciplinary proceeding, if the promotion is given, it would stand as a reward to the Petitioner notwithstanding his misconduct for the period when the disciplinary proceeding/criminal case was pending at the time of DPC was convened. It is also stated that if on the date of DPC charge sheet is submitted in a criminal case, then the sealed covered procedure is to be adopted.

19. In para-15 of the counter affidavit, the judgment of the Honb'le Supreme Court in the case of ***State of Punjab -v.- Chamanlal Goyal, reported in (195) 2 SCC 570*** has been referred to and it is sated that the ratio in *Chamanlal Goyal's* case would not apply to the facts of the present case, as in the said case, only a disciplinary proceeding was pending where inquiry was not concluded and moreover, there was no criminal case involved in the said reported case. However, in the said paragraph, the judgment of this Court in the case of ***State of Odisha -v.- Somanath Sahu*** (W.P.(C) No.19909 of 2015 disposed of on 05.10.2016) and ***State -***

**v.- Anil Kumar Sethi** (W.P.(C) No.22393 of 2015 disposed of on 26.04.2017) has also been referred to and it has been stated that the ratio laid down therein has no application to the present case.

20. On the basis of the aforesaid submissions and pleading, learned Additional Government Advocate submitted that the judgment relied upon by the learned counsel for the Petitioner is not applicable to the facts of the present case. He further submits that in view of the law laid down in the case of *K.V. Janakiraman* (supra), the authority has rightly adopted the sealed cover method while considering the promotion of the present Petitioner and, as such, no fault can be found with the departmental authorities. In such view of the matter, learned Additional Government Advocate submits that no promotion can be given to the Petitioner at this juncture. Therefore, he would not be entitled to any relief as sought for in the present writ petition and, as such, the same be dismissed.

21. Having heard the learned counsel for the Petitioner as well as the learned Additional Government Advocate appearing for the State-Opposite Parties and upon consideration of the factual background of the present case, this Court has no doubt with regard to the eligibility of the Petitioner inasmuch as the Petitioner after due consideration has been placed at Serial No.1 of the gradation list

which is not disputed by the Opposite Parties-Authorities. Therefore, at the time when the DPC was required to consider and recommend suitable candidates to the post of Joint Director of Factories and Boilers Level-II, the Petitioner was the most suitable and senior most candidate for promotion. Further, this Court has no hesitation at all to hold that the DPC/Selection Board has followed the right procedure by adopting the sealed cover method in view of the law laid down by the Hon'ble Supreme Court in the case of *K.V. Janakiraman* (supra). Therefore, upto that stage no fault can be found with the departmental authorities in following the sealed cover procedure in view of the admitted factual position that the vigilance case is pending against the Petitioner. However, the vigilance case which is pending against the present Petitioner was initiated in the year 2009 after initiation of the proceeding, the charge sheet was filed and cognizance was taken in the year 2014, i.e. five years after the initiation of the proceeding.

22. Thereafter, since the trial did not commence for a long time, the Petitioner had approached this Court and by order of this Court, the vigilance case was transferred from Sambalpur to Dhenkanal and after expiry of a period of almost 13 years from the date of initiation of proceeding, this Court observed that only 19 witnesses have been

examined out of 95 witnesses. Hence, by no stretch of imagination, it could be predicted that said proceeding is likely to be concluded in the near future. However, the departmental proceeding which was initiated against the Petitioner has been dropped in the meantime.

23. At this juncture, this Court feels that the only hurdle for the Petitioner to get promotion is the pending vigilance case against him. The contention of the learned Additional Government Advocate that the case of the Petitioner cannot be considered in view of Office Memorandum dated 17.6.2021 issued by the G.A. Department, Government of Odisha on the ground that the said Office Memorandum only permits granting promotion in such cases where disciplinary proceeding is pending against the Government employee and further the same does not take care of a scenario where a criminal case is pending against the Government employee. Thus, the same can be at best be said to be an executive instruction. It is apt to mention that the Office Memorandum dated 18.2.1994 issued earlier contained a provision for giving promotion to Government employees where criminal cases are pending against them subject to certain conditions which was modified by Office Memorandum dated 1.11.1997 of the G.A. Department and the window that was given to the Government employees having

criminal cases against their name for promotion was taken away. Further, the Office Memorandum dated 1.11.1997 of the G.A. Department has been modified by Office Memorandum dated 17.6.2021 under Annexure-E/1. All these executive instructions were issued with the intention to ensure expeditious disposal of proceedings to facilitate timely promotion of Government servants subject to quarterly review of the disciplinary proceeding as has been prescribed in G.A. & P.G. Department Memorandum.

24. This Court upon careful scrutiny of all the Memorandum is of the considered view that all those are executive circulars only to implement the guidelines issued by the Hon'ble Supreme Court in *K.V. Janakiraman case* (supra). Therefore, this Court has no hesitation to hold that the same are not binding in nature at best those are directory in nature so far the departmental authorities are concerned. So to such circulars does not have the pleasure of a statue. In the instant case, it appears that criminal proceeding which was initiate in the year 2009 and is pending for almost 13 years and moreover after expiry of 13 years only 19 witnesses out of 95 witnesses have been examined so far. Therefore, the Petitioner cannot be made to suffer for the delay in conclusion of the proceeding pending before a criminal court. Such a scenario was

never visualized while laying down the law on the subject. To take care of the emerging scenario, this Court on number of occasions have adopted the principle by directing the departmental authorities to give ad hoc promotion to the employee which shall be subject to the final outcome of the criminal proceeding. Moreover, a Government employee in course of his employment has some legitimate expectation like promotion etc. Therefore, he cannot be forced to wait indefinitely to get the promotion because of delay in conclusion of the criminal proceeding. There is also a likelihood of this technique could be used as a tool against a person to stale his/her promotion which he/she is otherwise entitled to as per law.

25. In the case of *Chakradhar Prasad Gantayat* (supra), the order passed by the Single Judge to grant ad hoc promotion subject to conditions prescribed in the order was also challenged before the Division Bench of this Court in writ appeal. A Division Bench of this Court while entertaining the writ appeal, by an interim order, which has been quoted hereinabove, allowed the Petitioner to be given ad hoc promotion with all notional benefits and such ad hoc promotion shall abide by the decision in the writ appeal as well as the outcome of the criminal trial. While considering the case of the Petitioner, this Court is also bothered about the fact that in the event

the Petitioner succeeds in the trial and gets acquitted what would be the scenario? Therefore, denial of promotion on the ground that a vigilance case is pending and more particularly not likely to be concluded in the near future, cannot be used against the Petitioner to deny him promotion, especially when the trial is being dragged for years together for none of Petitioner's fault.

26. On perusal of OCS (CCA) Rules, 1962 wherein Rule-13 provides nature of penalties. Sub-rule (iii-A) of Rule-13 of the OCS (CCA) Rules, 1962 provides withdrawal of promotion as a punishment. Therefore, considering the present matter from that angle also, this Court is of the opinion that withholding of promotion would amount to imposing punishment even without the employee concerned facing a genuine trial. In the context of present case where the promotion has been withheld on the ground that a criminal case is pending for more than a decade denial to give promotion amounts to inflicting punishment, so far the present Petitioner is concerned. Therefore, this Court is of the considered view that it is upto the State Government to come up with a mechanism whereby they can classify the cases by taking into consideration the period of time for which the criminal case is pending and who is responsible for such delay and, accordingly, it is always open for the G.A. &

P.G. Department, Government of Odisha to clarify the position and where the criminal cases are pending for several years, an exception can be carved out for such employees and they may be allowed to be considered for promotion pending finalization of the criminal cases against them.

27. Furthermore, pending finalization of the proceeding, if an employee could be reinstated in service revoking suspension order as has been held by this Court as well as the Hon'ble Supreme Court, then the denial of promotion to such employee pending finalization of such departmental as well as criminal proceeding does not stand to reason. Moreover, even if they are given promotion on periodic review of their cases, such promotion shall always be subject to certain terms and conditions like the same shall be subject to final outcome of the proceeding pending against such employees. Otherwise, neither the same would cause serious prejudice to the right of the Petitioner.

28. In such view of the matter, this Court has no hesitation in holding that denial of promotion to the Petitioner on the ground of pendency of the vigilance case alone shall cause injustice to the Petitioner in the facts and circumstances of the present case. Therefore, this Court directs the Opposite Party No.1-Principal

Secretary to Government of Odisha, Labour & ESI Department, Odisha Secretariat, Bhubaneswar to open the sealed cover and give promotion to the Petitioner to the rank of Joint Director of Factories and Boilers Level-II. However, the promotion of the Petitioner as per direction of this Court shall be subject to the final outcome of the vigilance proceeding referred to hereinabove. It is also directed that the promotion given to the Petitioner to the rank of Joint Director of Factories and Boilers Level-II shall not confer any equity in the event the Petitioner ultimately loses the vigilance proceeding. The Opposite Parties are directed to act upon the recommendation of the DPC and the Petitioner be given promotion within a period of four weeks from the date of communication of this order. It is needless to mention here that on promotion, the Petitioner shall be entitled all consequential benefits.

29. With the aforesaid observation and direction, this writ petition stands disposed of.

**(A.K. Mohapatra)**  
**Judge**

*Debasis*