

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

**WPC(OA) No.563 of 2016**

In the matter of an application under Section 19 of the  
Administrative Tribunal Act, 1985.

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**Damayanti Sahu**

....

**Petitioner**

*-versus-*

**State of Odisha & Others**

....

**Opposite Parties**

**For Petitioner :** M/s.P.K.Mishra & K.L.Kar.

**For Opp. Parties :** Addl. Government Advocate  
Mr. R.N.Mishra.

**PRESENT:**

**THE HONBLE JUSTICE BIRAJA PRASANNA SATAPATHY**

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Date of Hearing:29.07.2022 and Date of Order:05.08.2022  
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***Biraja Prasanna Satapathy, J.***

1. This matter is taken up through Hybrid Mode.
2. Heard Mr.P.K.Mishra, learned counsel for the Petitioner and Mr. R.N.Mishra, learned Additional Government Advocate for the State.
3. The Petitioner has filed the Present Writ Petition with the following prayer:-

- (i) That since the applicant was denied promotion illegally by utilizing subsequent proceedings both departmental and criminal even though she was found suitable by the D.P.C held on 28.04.2007 for promotion to the rank of Class-II gazette (Group-B) Headmistress and that since in the meantime vide judgment dated 20.01.2015 at Annexure-11, she has been acquitted from criminal case, Hon'ble Tribunal may be pleased to direct the Respondents to promote the applicant to the rank of Class-II Gazetted Headmistress pursuant to finding of DPC at Annexure-4 with effect from the date of promotion order at Annexure-6 issued in favour of her juniors with all service and financial benefits.
- (ii) The Hon'ble Tribunal may be pleased to direct the Respondent to disburse the arrears of pay accrued in promotional post and other entitlements within a time to be stipulated.
- (iii) Grant any other relief(s) the Hon'ble Tribunal deems fit and proper in the ends of justice".

**4.** It is submitted that the Petitioner with having requisite qualification was appointed as Headmistress where he joined on 17.01.2000. It is further submitted that in the gradation list of Headmaster / Headmistress published by the Government in the ST & SC Development Department on 07.02.2005, the Petitioner was placed at Sl. No.29 with his date of joining on 17.01.2000.

**5.** Mr. P.K.Mishra, further submitted that taking into account his placement in the gradation list issued under Annexure-3, the Petitioner was also found eligible for his promotion to the rank of Class-II Gazetted (Group-B) by the D.P.C in its proceeding of the meeting held on 28.04.2007 under Annexure-4 in U.R. Category.

**6.** Mr. Mishra submitted that instead of issuing necessary order of promotion in favour of the petitioner in

terms of the recommendation of the DPC, the Opposite Party No.1 vide office order dated 21.06.2007 under Annexure-5 placed the petitioner under suspension on the ground of her involvement in Berhampur Vigilance P.S. Case No.02 dated 28.03.2007.

**7.** It is submitted that vide another notification issued on 21.06.2007 itself, the persons recommended by the DPC in its proceeding under Annexure-4 were promoted to the post of Class-II Gazetted (Group-B).

**8.** Mr. Mishra submitted that by the time, the DPC recommended the case of the petitioner for her promotion, no charge-sheet was submitted in the said vigilance proceeding initiated against the petitioner on 28.03.2007 nor the charge sheet was also submitted by the time, the petitioner was placed under suspension vide order dated 21.06.2007 under Annexure-5 and the order of promotion issued in favour of other recommended candidates on 21.06.2007 vide Annexure-6.

**9.** It is submitted that since the charge sheet in the aforesaid vigilance case was only submitted on 16.08.2007, the authorities should have acted upon the recommendation by giving promotion to the petitioner while issuing such order of promotion vide order under Annexure-6.

**10.** Mr. Mishra further submitted that after placing the petitioner under suspension vide order under Annexure-5, a proceeding was initiated against the petitioner on 19.02.2008 under Annexure-7 on the self-same allegation, for which the vigilance proceeding was already initiated on 28.03.2007.

**11.** Mr. Mishra further submitted that after initiation of the proceeding on 19.02.2008, the Petitioner was reinstated in her service vide order dated 29.05.2008 under Annexure-8.

**12.** It is also submitted that while in the vigilance proceeding the Petitioner was ultimately acquitted vide judgment dated 21.01.2015, the Departmental proceeding was also disposed of on 20.05.2016.

**13.** Mr. Mishra also submitted that during pendency of the Vigilance Proceeding as well as the Departmental Proceeding, the Petitioner retired from service w.e.f. 31.01.2012 on attaining the age of superannuation.

**14.** Mr. Mishra accordingly submitted that in spite of his acquittal in the vigilance proceeding and in the Departmental Proceeding, when the petitioner was not given promotion by opening the sealed cover, she has filed the present writ petition with the prayer as indicated hereinabove.

**15.** Mr. Mishra further submitted that since by the time the DPC recommended her case for promotion on 28.04.2007 under Annexure-4, no charge sheet was submitted in the vigilance proceeding initiated on 28.03.2007, the Petitioner should have been given promotion basing on the said recommendation as in absence of submission of the charge sheet, no proceeding was there in the eye of law.

**16.** Mr. Mishra further submitted that only to deprive the Petitioner the benefit of promotion in terms of the said recommendation, the Opposite Party No.1 with mala fide intention placed the Petitioner under suspension vide order

dated 21.06.2007 under Annexure-5 and vide another order issued on the some date under Annexure-6, other persons recommended by the DPC were given the benefit of promotion.

**17.** Mr. Mishra also submitted that even after her acquittal in the vigilance proceeding on 21.01.2015 and the exoneration in the departmental proceeding on 20.05.2016, the petitioner was not extended with the promotion by opening the sealed cover.

**18.** Mr. Mishra also submitted that the Vigilance Proceeding as well as the Departmental Proceeding were also initiated on the self-same allegation and in view of her acquittal in the vigilance proceeding as well as the closure of the disciplinary proceeding, the petitioner is eligible and entitled to get promotion from the date her juniors were given promotion vide order dated 21.06.2007 under Annexure-6 with all service of financial benefits.

**19.** Mr. Mishra in support of the aforesaid claim relied on the decision of the Hon'ble Apex Court rendered in the case of **Union of India vs. K.V.Janakiramana** reported in **A.I.R 1991-SC-2010**.

Paragraph 6 &7 of the judgment is quoted hereunder:-

*“6. On the first question, viz., as to when for the purposes of the sealed cover procedure the disciplinary/criminal proceedings can be said to have commenced, the Full Bench of the Tribunal has held that it is only when a charge-memo in a disciplinary proceedings or a charge sheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point. The contention advanced by*

*the learned counsel for the appellant-authorities that when there are serious allegations and it takes time to collect necessary evidence to prepare and issue charge-memo/charge-sheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc. does not impress us. The acceptance of this contention would result in injustice to the employees in many-cases. As has been the experience so far, the preliminary investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/ charge sheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it should not take much time to collect the relevant evidence and finalize the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employee under the relevant rules, and the suspension by itself permits a resort to the sealed cover procedure. The authorities thus are not without a remedy. It was then contended on behalf of the authorities that conclusions nos. 1 and 4 of the Full Bench of the Tribunal are inconsistent with each other. Those conclusions are as follows: "(1) consideration for promotion, selection grade, crossing the efficiency bar or higher scale of pay cannot be withheld merely on the ground of pendency of a disciplinary or criminal proceedings against an official; ( ) ..... (4) the sealed cover procedure can be resorted only after a charge memo is served on the concerned official or the charge sheet filed before the criminal court and not before . ' ' There' is no doubt that there is a seeming contradiction between the two conclusions. But read harmoniously, and that is what the Full Bench has intended, the two conclusions can be reconciled with each other. The conclusion no. 1 should be read to mean that the promotion etc. cannot be withheld merely because some disciplinary/criminal proceedings are pending against the employee. To deny the said benefit, they must be at the relevant time pending at the stage when charge-memo/charge-sheet has already been issued to the employee. Thus read, there is no inconsistency in the two conclusions. We, therefore, repel the challenge of the appellant- authorities to the said finding of the Full Bench of the Tribunal.*

7. *The Full Bench of the Tribunal, while considering the earlier Memorandum dated 30th January. 1982 has, among other things, held that the portion of paragraph 2 of the memorandum which says "but no arrears are allowed in respect of the period prior to the date of the actual promotion" is violative of Articles 14 and 16 of the Constitution because withholding of salary of the promotion- al post for the perked during which the promotion has been withheld while giving other benefits, is discriminatory when compared with other employees' who are not at the verge of promotion when the disciplinary proceedings ' were initiated against them. The Tribunal has, therefore, directed that. on exoneration. full salary should be paid to such employee which he would have on promotion if he had not been subjected to disciplinary proceedings. We are afraid that the Tribunal's reference to paragraph 2 of the Memorandum is incorrect. Paragraph 2 only recites the state of affairs as existed on January 30, 1982 and the portion of the Memorandum which deals with the relevant point is the 'last sentence of the first sub-paragraph after clause (iii) of paragraph 3 of the*

Memorandum which is reproduced above. That sentence reads as follows: "But no arrears of pay shall be payable to him for the period of notional promotion preceding the date of actual promotion". This sentence is preceded by the observation that when the employee is completely exonerated on the conclusion of the disciplinary/court proceedings, that is, when no statutory penalty, including that of censure, is imposed, he is to be given a notional promotion from the date he would have been promoted as determined by the Departmental Promotion Committee. This direction in the Memorandum has also to be read along with the other direction which follows in the next subparagraph and which states that if it is found as a result of the proceedings that some blame attaches to the officer then the penalty of censure at least, should be imposed. This direction is in supersession of the earlier instructions which provided that in a case where departmental disciplinary proceedings have been held, "warning" should not be issued as a result of such proceedings. There is no doubt that when an employee is completely exonerated and is not visited with the penalty even of censure indicating thereby that he was not blame worthy in the least, he should not be deprived of any benefits including the salary of the promotional post. It was urged on behalf of the appellant-authorities in all these cases that a person is not entitled to the salary of the post unless he assumes charge of the same. They relied on F.R. 17(1) of the Fundamental Rules and Supplementary Rules which reads as follows: "F.R. 17(1) Subject to any exceptions specifically made in these rules and to the provision of sub-rule (2), an officer shall begin to draw the pay and allowances attached to his tenure of a post with effect from the date when he assumes the duties of that post, and shall cease to draw them as soon as he ceases to discharge those duties: Provided that an officer who is absent from duty without any authority shall not be entitled to any pay and allowances during the period of such absence." It was further contended on their behalf that the normal rule is "no work no pay". Hence a person cannot be allowed to draw the benefits of a post the duties of which he has not discharged. To allow him to do so is against the elementary rule that a person is to be paid only for the work he has done and not for the work he has not done. As against this, it was pointed out on behalf of the concerned employees, that on many occasions even frivolous proceedings are instituted at the instance of interested persons, sometimes with a specific object of denying the promotion due, and the employee concerned is made to suffer both mental agony and privations which are multiplied when he is also placed Under suspension. When, therefore, at the end of such sufferings, he comes out with a clean bill, he has to be restored to all the benefits from which he was kept away unjustly. We are not much impressed by the contentions advanced on behalf of the authorities. 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. It is for this reason that F.R. 17(1) will also be inapplicable to such cases. We are, therefore, broadly in agreement with the finding of the Tribunal 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. Life being complex, it is not possible to anticipate and enumerate exhaustively all the circumstances under which such consideration may become necessary. To ignore however, such circumstances when they exist and lay down' an inflexible rule that in every case when an employee is exonerated in disciplinary/ criminal proceedings he should be entitled to all salary for the intervening period is to undermine discipline in the administration and jeopardise public interests. We are, therefore, unable to agree with the Tribunal that to deny the salary to an employee would in all circumstances be illegal. While, therefore, we do not approve of the said last sentence in the first sub-paragraph after clause (iii) of paragraph 3 of the said Memorandum, viz.. "but no arrears of pay shall be payable to him for the period of notional promotion preceding the date of actual promotion", we direct that in place of the said sentence the following sentence be read in the Memorandum: "However, whether the officer concerned will be entitled to any arrears of pay for the period of notional promotion preceding the date of actual promotion, and if so to what extent, will be decided by the concerned authority by taking into consideration all the facts and circumstances of the disciplinary proceeding/criminal prosecution. Where the authority denies arrears of salary or part of it, it will record its reasons for doing so." To this extent we set aside the conclusion of the Tribunal on the said point".*

**20.** Per contra, Mr. R.N.Mishra, learned Addl. Government Advocate made his submission in absence of any counter filed by the State-Opposite Parties.

**21.** Mr. Mishra submitted that since by the time DPC recommended the case of the Petitioner for her promotion on 28.04.2007, the Petitioner was already implicated in the vigilance proceeding, which was initiated on 28.03.2007, no illegality was committed by the Opposite Party in not extending the benefit of the promotion in terms of the said recommendation.

**22.** Mr. Mishra further submitted that the Petitioner at no point of time staked her claim for such promotion even after his acquittal in the vigilance proceeding on 21.03.2015 and the consequential closure of the disciplinary proceeding on 20.05.2016. The Petitioner only made such a claim by filing the present writ petition on 29.05.2016.

**23.** Mr. Mishra accordingly submitted that in view of the recommendation made under Annexure-4 and acquittal of the petitioner in the vigilance proceeding and closure of the disciplinary proceeding, the Petitioner is only entitled to get the benefit of notional promotion and she is not entitled to get the financial benefit for the period from 21.06.2007 to 31.01.2012.

**24.** Heard learned counsel for the Parties.

**25.** Perused the materials available on record.

**26.** This Court after going through the same finds that by the time the DPC recommended the case of the petitioner for her promotion on 28.04.2007 and the order of promotion issued on 21.06.2007, since the petitioner was not charge sheeted in the vigilance proceeding initiated on 28.03.2007, the Petitioner should have been extended with the benefit of the promotion on 21.06.2007. This Court is also of the view that in order to deprive the petitioner the benefit of such promotion, Opposite Party No.1 placed the petitioner under suspension on 21.06.2007 and issued the order of promotion in favour of other recommended candidates on the same date vide order under Annexure-6. This Court also finds that both the Vigilance Proceeding and the Disciplinary Proceeding were initiated on self-same charges and the petitioner was not only acquitted in the

vigilance proceeding but also she was exonerated from the charges in the Departmental Proceeding vide order dated 21.01.2015 and 20.05.2016 respectively.

**27.** Therefore, this Court taking into account the entirety of the materials available on record and the submissions made by the learned counsel for the parties, as well as the decision as cited (supra), held the petitioner entitled to get the benefit of promotion w.e.f. 21.06.2007 with all service and financial benefits as due and admissible.

**28.** While holding so, this Court directs the Opposite Parties to sanction and release all the service and financial benefits as well as the retirement benefits on revision of the pension in favour of the petitioner. This Court directs the Opposite Parties to extend all those benefits as directed hereinabove in favour of the petitioner within a period of four months from the date of receipt of this order.

**29.** With the aforesaid observations and directions, the WPC(OA) stands disposed of.

**(Biraja Prasanna Satapathy)**  
**Judge**

Orissa High Court, Cuttack  
Dated the 5<sup>th</sup> of August, 2022/Subrat