

(2022) 07 OHC CK 0126
In the Orissa High Court
Case No : Writ Petition (C) No. 15636 Of 2021

Bijaya Kumar Acharya

APPELLANT

Vs

Utkal University, Vani Vihar, Bhubaneswar And Anr

RESPONDENT

Date of Decision : 21-07-2022

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 309, 311
Orissa Universities Act, 1989 — Section 22

Citation : (2022) 07 OHC CK 0126

Hon'ble Judges : Dr. S.K. Panigrahi, J

Bench : Single Bench

Advocate : Samir Kumar Mishra, Bijay Kumar Dash

Final Decision : Disposed Of

Judgement

Dr. Justice S.K. Panigrahi, J

1. This matter is taken up through hybrid mode.
2. Heard Learned Counsel for the Petitioner and Learned Counsel for the Opposite Party.
3. The present petition has been filed, challenging the missive No.33865/2019 dated 16.12.2019; whereby the Petitioner assails the direction of the Opposite Party No.2 in rejecting his claim for regularization of his service in promotional post of Senior Assistant w.e.f 12.09.1997 along with all consequential service benefits.
4. Shorn of unnecessary details, the substratum of the matter presented before this court remains that the petitioner had applied for the post of 'Junior Assistant' and faced the requisite screening test and he was appointed to the said post on temporary basis vide letter no.784/88 dated 18.01.1988,
5. The service of the Petitioner was regularized against the substantive post w.e.f 09.03.1989 vide Letter No. A/3421/89 dated 16.03.1989. The order of

regularization provided that the petitioner is entitled to all service benefits from the date of regularization of his service and not from the date of appointment.

6. The petitioner was granted Proforma promotion to the post of Senior Assistant on officiating basis vide letter dated 12.09.1997 for working with sincerity and dedication and to the satisfaction of the authorities. There was no instance when the petitioner was subjected to face any sort of punitive measure during his service period. Hence, the petitioner prays for quashing the letter dated 16.12.2019/ Annexure- 7 and consequential service benefits from 12.09.1997.

7. It is argued on behalf of learned counsel for the Petitioner that the opposite parties without assigning any reason temporarily withdrew the promotion of the petitioner from the post of Senior Assistant vide letter no.2218/2001 dated 12.01.2001. The Petitioner was neither noticed nor was given opportunity of hearing before passing such order.

8. Further, the learned counsel for the Petitioner submitted that the Petitioner was again granted temporary promotion to the post of Senior Assistant after two and half years vide letter dated 05.07.2003. Subsequently, the petitioner made representations before the Registrar, Utkal University regarding fixation of seniority w.e.f 12.01.2001, but the same was rejected on the ground that it did not contain any merit for consideration.

9. Per Contra, the learned counsel for the Opposite Parties submitted that upgradation of 22 Junior Assistant posts in P.G. Department to Senior Assistants and the elevation of the petitioner from Junior Assistant to Senior Assistant was in clear violation of Section 22 of the Orissa Universities Act, 1989. Hence, the upgradations were subsequently withdrawn by the order of Chancellor as they were not in conformity with the relevant provisions of the Orissa Universities Act.

10. Having heard the learned counsel for the parties and on perusal of the record of the case, this Court finds force in the submissions made by the learned counsel for the petitioner. The short question that arises in this petition for consideration is that whether the Opposite Parties were justified in cancelling the promotion order of the petitioner by which he was promoted to the post of Senior Assistant from the post of Junior Assistant.

11. Learned counsel for the petitioner vehemently submitted that the University as well as the State was not justified in cancelling the petitioner's promotion order as it was an admitted case that the petitioner was working as a Junior Assistant and in addition to duties assigned to this post, he was also performing the duties of Senior Assistant as per directives of the office. The submissions of the petitioner have a potent force since the order of reversion has a negative and penal consequences. If a person is reverted to a previous rank, it amounts to forfeiture of pay or loss of seniority which must be considered in the context of his substantive ranking.

12. Moreover, the petitioner worked on the promotional post from 12.09.1997 till

12.01.2001 as the promotion order was subsequently withdrawn. However, he was again promoted to the post of Senior Assistant after a gap of two and half years and discharged his duties as the Senior Assistant from 05.07.2003. The petitioner performed the duties assigned to the promotional post and worked diligently as and when required. The petitioner has been unnecessarily made afflicted by musical chair syndrome. The subsequent justification given by the University authority regarding the non-approval of the State Government which led to the withdrawal of promotion cannot be held to be legally sustainable.

13. In absence of any adverse entries or/and record of the petitioner and further, in absence of any allegation made against the petitioner for suppressing any material information, this Court does not find any justification on the part of the University to have recalled the promotional order of the petitioner on the basis of some lapses in following the criteria said to have been alleged after a long lapse of time. It is further alleged that the said order of reversion has been passed sans any prior approval of the Department of Higher Education, Government of Odisha which fails to match realistically with the verbal surface available in the Counter affidavit.

14. It is further submitted by the learned counsel for the petitioner that many persons who are similarly placed with the petitioner have been granted similar relief sought by the petitioner. The petitioner has been discriminated in the present case though there are no readily identifiable reasons for such action. When equality of opportunity prevails, according super advantages to the similarly placed persons hits the root of Article 14 of the Constitution of India. When formal equality of opportunity is granted by the Constitution of India is unsettled in the present case, the adoption of pick and choose approach which is a clear cut restrictive by the authority making it amenable to challenge.

Further, depriving him is both reasonable and pre-emptive of opportunity of hearing smacks arbitrariness and administrative unfairness which is constitutional anathema. Save in real urgency where public interest does not brook even the minimum time needed to give a hearing. In this connection, reference may be made to the Supreme Court decision in *Parshotam Lal Dhingra v. Union of India* 1958 AIR 36, S.R. Das, C.J. wherein it has been observed:

"If the Government servant has right to a particular rank, then the very reduction from that rank will operate as a penalty for he will then lose the emoluments and privileges of that rank. if, however, he has no right to particular rank his reduction from an officiating higher rank to his substantive lower rank will not ordinarily be a punishment. But the mere fact that the Government has, by contract, express or implied, or under the rules, the right to reduce him to a lower post does not mean that an order of reduction of a servant to a lower post or rank cannot in any circumstances be a punishment. The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences. Thus if the order entails or provides loss of his seniority

in his substantive rank or the stoppage or postponement of his future chances of promotion, then that circumstance may indicate that although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules, in truth and reality the Government has terminated the employment as and by way of penalty. The use of the expression 'terminate' or 'discharge' is not conclusive. In spite of the use of such innocuous expressions, the Court has to apply the two tests mentioned above, namely, (1) whether the servant had a right to the post or the rank, or (2) whether he has been visited with evil consequences of the kind hereinbefore referred to ? If the case satisfies either of the two tests then it must be held that the servant has been punished and the termination of his service must be taken as a dismissal or removal from service or the reversion to his substantive rank must be regarded as a reduction in rank and if the requirements of the rules and Art. 311, which give protection to Government servants have not been complied with, the termination of the service or the reduction in rank must be held to be wrongful and in violation of the constitutional right of the servant."

From the aforesaid observation of the Apex Court, it can be inferred that if the order of reversion entails the postponement of the Government servant's future chances of promotion, then, such reversion must be only after compliance with the provisions of Art. 311 of the Constitution. Similar sentiment has been echoed in the case of *P.C. Wadhwa v. Union of India* 1964 AIR 423 which may be observed as follows:

"In the case before us the appellant has not merely suffered a loss of pay which was inevitable on reduction in rank but he has also suffered loss of seniority as also postponement of future chances of promotion of the senior scale. A matter of this kind has to be looked at from the point of view of substance rather than of form. It is indeed true, as was pointed in *Parshotam Lal Dhingra's* case, that the motive operating on the mind of the Government may be irrelevant; but it must also be remembered that in case where Government has by contract or under the rules the right to reduce an officer in rank, Government may nevertheless choose to punish the officer by such reduction. Therefore, what is to be considered in a case of this nature is the effect of all the relevant factors present therein. If on a consideration of those factors the conclusion is that the reduction is by way of punishment involving penal consequences to the officer, even though Government has a right to pass the order of reduction, the provisions of Art. 311 of the Constitution are attracted and the officer must be given a reasonable opportunity of showing cause against the action proposed to be taken against him. Our conclusion is that in the present case the appellant was reverted by way of punishment, but he was given no opportunity of showing cause against the action proposed to be taken against him. Therefore, the order of reversion, dated November 3, 1958 was in violation of the provisions of Art. 311 of the Constitution."

In the case of *Roshan Lal Tandon v. Union of India* 1968 SCR (1) 185, the Supreme Court observed:

"It is 'true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. In other words, the legal position of a government servant is more one of status than of contract. The hall-mark of status is the attachment to a legal relationship of rights and duties imposed by the public 'law and not by mere agreement of the parties. The emolument of the Government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee. It is true that Art. 311 impose constitutional restrictions upon the power of removal granted to the President and the Governor under Art. 310. But it is obvious that the relationship between the Government and its servant is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties. The duties of status are 'fixed by the law and in the enforcement of these duties society has an interest."

17. In the case of *State of Haryana Vs. Piara Singh and Others* (1992) 3 SCR 826, the Supreme Court was considering the sustainability of certain directions issued by the High Court in the light of various orders passed by the State for the absorption of its ad hoc or temporary employees and daily wagers or casual labour. The Court started by saying:

"Ordinarily speaking, the creation and abolition of a post is the prerogative of the Executive. It is the Executive again that lays down the conditions of service subject, of course, to a law made by the appropriate legislature. This power to prescribe the conditions of service can be exercised either by making rules under the proviso to Article 309 of the Constitution or (in the absence of such rules) by issued rules/instructions in exercise of its executive power. The court comes into the picture only to ensure observance of fundamental rights, statutory provisions, rules and other instructions, if any governing the conditions of service"

In *Ashwani Kumar and others v. State of Bihar and others* 1996 Supp. (10) SCR 120, the Supreme Court was considering the validity of confirmation of the irregularly employed. The Supreme Court observed:

"In this connection it is pertinent to note that question of regularization in any service including any government service may arise in two contingencies. Firstly, if on any available clear vacancies which are of a long duration appointments are made on ad hoc basis or daily-wage basis by a competent authority and are continued from time to time and if it is found that the incumbents concerned

have continued to be employed for a long period of time with or without any artificial breaks, and their services are otherwise required by the institution which employs them, a time may come in the service career of such employees who are continued on ad hoc basis for a given substantial length of time to regularize them so that the employees concerned can give their best by being assured security of tenure. But this would require one precondition that the initial entry of such an employee must be made against an available sanctioned vacancy by following the rules and regulations governing such entry. The second type of situation in which the question of regularization may arise would be when the initial entry of the employee against an available vacancy is found to have suffered from some flaw in the procedural exercise though the person appointing is competent to effect such initial recruitment and has otherwise followed due procedure for such recruitment. A need may then arise in the light of the exigency of administrative requirement for waiving such irregularity in the initial appointment by a competent authority and the irregular initial appointment may be regularized and security of tenure may be made available to the incumbent concerned. But even in such a case the initial entry must not be found to be totally illegal or in blatant disregard of all the established rules and regulations governing such recruitment."

In the case of Secretary, State Of Karnataka v. Umadevi And Others Appeal (civil) 3595-3612 of 1999, the Supreme Court iterated:

"One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."

20. Additionally, it is pertinent to understand that irrespective of the validity of the promotion, the University authority in question has to provide its employee a chance of hearing before issuing an order for withdrawal of the promotion. This

ratio was iterated by Punjab and Haryana High Court in the case of Devender Kumar Bansalv. Haryana School Foundation Board W.P (C) 6037 of 2020 wherein the Court observed:

“Even if, the respondents felt that the promotion granted to the petitioner has not been so done legally and validly and it deserved to be withdrawn, then rules of natural justice required that at least an opportunity of being heard should have been afforded to the petitioner getting his version. Passing the reversion order in such a manner cannot be justified by any stretch of imagination.

Merely by saying that petitioner had managed to get order with regard to his promotion does not shield the respondents from explaining as to why allegedly wrong promotion was granted to the petitioner. The officers and other authorities of respondents were not expected to be so much ignorant, naïve and novice so as to pass order granting promotion to the petitioner without due application of mind, unmindful of the requirement of the basic publication and without considering the pros and cons of their action. If that order was to be reversed, then at least an opportunity of being heard should have been provided to the petitioner. Acting in the manner in which the respondents have done cannot be justified by any stretch of imagination. The petitioner has been brought down from the promoted post to his earlier post clearly causing prejudice to him.”

21. From the conspectus of factual matrix, this court is unable to accede to the submission of the opposite parties. The principles of natural justice and procedural fairness cannot be given go by in such a light and casual manner, rather they call for due compliance. Further, the petitioner has been met with discriminatory approach by the authority by choosing some of the similarly placed persons excluding him. It is difficult to resist a conclusion that the averments made by the petitioner smacks the absence of impeccably fair and fairly administered approach which is undoubtedly criticisable. Therefore, the impugned order is liable to be set aside by way of acceptance of the present Writ Petition, which is so done accordingly. The Writ Petition is allowed. There shall be no order as to costs.

.....