

(2012) 02 OHC CK 0001

In the Orissa High Court

Case No : Writ Petition (Civil) No. 24906 of 2011

Dr. Durga Prasanna Choudhury

APPELLANT

Vs

State of Orissa and others

RESPONDENT

Date of Decision : 17-02-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 309

Orissa Civil Services (Criteria for Promotion) Rules, 1992 — Rule 3

Orissa Superior Judicial Service Rules, 1963 — Rule 10, 4, 5, 9, 9(1)

Citation : (2012) 02 OHC CK 0001

Hon'ble Judges : V. Gopala Gowda, J;Aruna Suresh, J

Bench : Division Bench

Judgement

V. Gopala Gowda, C. J.

1. Petitioner, who is functioning as Director of Orissa Judicial Academy in the cadre of District Judge of the Orissa Superior Judicial Service (Senior Branch), is before this Court seeking for issuance of a writ of mandamus directing the opposite parties 1 and 2 to extend the benefit of promotion to the post of Additional District Judge (District Judge Cadre) and to the post of Selection Grade District Judge with effect from the date the next juniors to him got the benefit of promotion to the said post as well as Selection Grade District Judge urging various facts and legal contentions. Petitioner has further sought for a direction to opp.parties 1 and 2 to place him above the opposite parties 3 to 13 in the Gradation List/ Civil List of the year 2006 prepared and circulated by opposite party no. 2.

2. The brief facts, which are relevant for the purpose of appreciating the rival factual and legal contentions urged on behalf of parties to find out as to whether the petitioner is entitled to the relief as sought in this writ petition, are as follows:

3. Petitioner was recruited through a competitive examination conducted by the Orissa Public Service Commission and selected for appointment to the post of erstwhile Munsif, now designated as Civil Judge (Junior Division) on probation

vide Law Department Notification No. 16132 dated 10th September, 1982 and this Court's notification No. 615/ H. dated 28th September, 1982 and joined in the said post on 11th October, 1982 forenoon under the judgeship of Cuttack. He had completed the probation period successfully and posted as J.M.F.C., Bhadrak in the erstwhile judgeship of Balasore vide this Court's notification No. 941-A and 942-A dated 22nd December, 1982. The position of the petitioner as per the gradation list published by the competent authority on the basis of merit assigned to him by the Orissa Public Service Commission was at Sl.No. 170 of the Civil List of 1984. Opposite parties 3 to 13 were also recruited in the same year by the Orissa Public Service Commission and were placed below him in the merit list since their positions in the Civil List/ Gradation list of the year 1984 find place at Sl.Nos.171, 173, 175, 177, 178, 179, 182, 183, 185, 186 and 187. Therefore, opposite parties 3 to 13 were juniors to the petitioner so far as his seniority in service is concerned. Petitioner was promoted to Class-I (Junior) post, i.e., in the post of Sub-Divisional Judicial Magistrate vide notification No. 50 dated 30.01.1989. He was placed senior to the aforesaid opposite parties 3 to 13 in the cadre of Orissa Judicial Service, Class-I (Junior). The same is reflected in the Civil List published in the year 1992. Petitioner along with the opposite parties 3 to 13 were promoted to the post of Subordinate Judge, now designated as Civil Judge (Senior Division) with effect from 14th November, 1994 on the basis of seniority-cum-merit. Opposite parties 3 to 13 were promoted to the post of Subordinate Judge subsequent to that of the petitioner. In the Gradation list/ Civil list prepared by this Court in the year 2002, the name of the petitioner finds place at Sl.No. 24 whereas the opposite parties 3 to 13 were placed below the petitioner, i.e., at Sl.Nos.25 to 39.

4. The next promotion from the post of Civil Judge (Senior Division) is Orissa Superior Judicial Service (Junior Branch) i.e., the post of Chief Judicial Magistrate, which is in the cadre of Senior Civil Judges. The Orissa Superior Judicial Service Rule, 1963 (hereinafter to be called as "Rules, 1963") was governing the field. Rule 10 of the said Rules, 1963 prescribes that the recruitment to the Junior Branch of the service shall be made from amongst the Subordinate Judges. Petitioner was promoted to the post of Chief Judicial Magistrate vide this Court's notification No. 517(A) dated 7th September, 2001 whereas the opposite parties 3 to 13 were promoted to the said post subsequent to that of the petitioner. The seniority list of Chief Judicial Magistrate reflected in the Gradation List/ Civil List of 2002 also indicates the placement of the petitioner in the said list at a higher position to that of opposite parties 3 to 13. Therefore, it clearly shows that petitioner was given promotion to the next higher post considering his merit as well as seniority and has been assigned in the Civil List prepared and circulated by this Court and therefore, petitioner was enjoying the promotional benefits without any difficulty.

5. It is also averred in the writ petition that petitioner carries a good service record to his credit and no adverse communication has been conveyed to him by this Court at any point of time. It is further emphasized that with due permission

of this Court, petitioner submitted a thesis for acquiring Ph.D qualification and was awarded with a Ph.D degree in Law by Utkal University in the year 1999 and therefore, petitioner was having additional qualification such as LL.M and Ph.D Degree in law to his credit. When the petitioner was continuing in the said post with the same ranking in the Gradation List/ Civil List, i.e. higher ranking to that of opposite parties 3 to 13, the said officers though junior to him in the respective cadres of erstwhile Munsif {Civil Judge (Junior Division)} and in the post of Chief Judicial Magistrate were promoted to the post of Additional District Judge in the cadre of Orissa Superior Judicial Service (Senior Branch) (District Judge Cadre) ignoring the rightful claim of the petitioner without any rhyme or reason. It is his case that he possessed an unblemished career/ service record and without giving due weightage to the seniority and merit, opposite parties 3 to 13, who were juniors to him, have been given benefit of promotion to the next higher post, i.e., in the District Judge cadre Vide Home Department notification dated 29.8.2005. Though the petitioner made a query in the matter, but was not able to know the reason of non-consideration of his case for promotion. However after eleven months of the promotion of his juniors, he was promoted to the post of Additional District Judge (Fast Track Courts) vide Home Department Notification No. 30644 dated 22nd July, 2006 and this Court's notification No. 467/A dated 22nd of August, 2006 and joined in the said post at Nayagarh on 4th September, 2006 forenoon. Further, he has stated that on enquiry he came to know that about 17 nos. of regular posts of Additional District Judges were made available to be filled up by promotion from Orissa Superior Judicial Service (Junior Branch). However, opposite parties 3 to 8 were given the benefit of promotion to regular Additional District Judge post and opposite parties 9 to 11 were given promotion to the post of Ad hoc Additional District Judge and opposite parties 12 and 13 were given promotion to the post of Ad hoc Additional District Judge (Fast Track Courts), but petitioner though was senior to them, was ignored and was not given promotion to the regular post in the cadre of District Judge. Hence, he filed the writ.

6. A detailed statement of counter is filed by opposite party no. 2 sworn in by the Special Officer (Admn.) of this Court traversing the petitioner's claim. The recruitment, appointment and seniority list of the erstwhile Munsif {Civil Judge (Junior Division)} and Sub-Judge {(Civil Judge (Senior Division)) and Chief Judicial Magistrate are not in dispute. It is also not in dispute that the opposite parties 3 to 13 have been promoted to the post of Additional District Judge and Ad hoc Additional District Judge (Fast Track Courts) depriving the said promotional benefits to the petitioner taking into consideration the Annual Confidential Reports for the periods from 1999 to 2003. It is also further stated that the Committee has taken into consideration the grade assigned to the ACR rating of an officer in the following manner.

(a)

Outstanding

5

(b)

Very good

4

(c)

Good

3

(d)

Average

1

(e)

Poor

0

It is also admitted that the said procedure was only adopted for that year, i.e., 2005 and not earlier to that or subsequent to that period and further referred to certain aspects which are not germane to the issue regarding the conduct of the officer as the same do not reflect in the Annual Confidential Report. The said fact is evident from the subsequent action on the part of the High Court in promoting him to the same post in September, 2006 and there is no record that promotion to the post along with opposite parties 3 to 13 has been either denied or has been deferred.

7. Mr.J.K. Rath, learned Senior Counsel by filing a comparative chart showing the names of the officers, their AC.Rs. maintained during the year 1999 to 2004, submits that opposite party no. 3 (Smt.V.Jayashree), opp.party no. 12 (Shri G.P.Sahoo) and opp.party no. 13 (Shri D.Chaulia), whose service record as per the remarks made by the Recommending Authority, namely, the Port Folio Judge and the remarks made by the Accepting Authority in the A.C.Rs. of 2001 is "average" like that of the petitioner and they have been promoted on the basis of the evaluation of performance by adopting the credit assigned to the A.C.R. rating for five years, i.e., from 1999 to 2003, which was neither provided in the Rules, 1963 nor was followed prior to that period or subsequent thereto but only at the time of considering the case of the petitioner and opposite parties 3 to 13 for promotion to the cadre of District Judge was applied. Therefore, according to the petitioner, the said procedure followed by the Promotion Committee dated 20.07.2005 is not legal and valid and is in violation of Article 14 and 16 of the Constitution of India. Further, it is stated that no departmental proceeding or vigilance case or criminal case was pending against the petitioner at the time of

consideration of his case for promotion to the next higher post, i.e., Additional District Judge in the District Judge cadre and besides, no adverse remark has ever been communicated to him. Therefore, the petitioner was eligible to be considered for promotion to the post of Additional District Judge. It is further stated that the petitioner has been arbitrarily denied promotion by the said Committee by not recommending the case of the petitioner considering the ACR of the year 2001, which was recorded by it contrary to the recommendation made by the recommending authority, viz. Judge in-charge despite the fact that the recommending authority has recommended for promotion of the petitioner (to the post of Additional District Judge). Non-consideration of his claim and denying promotion to him on the basis of the recordings made in the ACR by the Committee contrary to the reporting officer and the recommending authority as "average", without there being any material by resorting to an alien procedure of grade assigned to the A.C.R. rating of an officer, is bad in law.

8. Further, it is contended by Mr.Rath, learned Senior Counsel that as per Rule 9 of the Rules, 1963, since suitability of an officer of Junior Branch is required to be adjudged for promotion to the Senior Branch Service, the service records/ Annual Confidential Report pertaining to Junior Branch period is only required to be assessed for the purpose of finding out the most suitable candidate to be promoted. The petitioner and opposite parties 3 to 13 were promoted to the post of Chief Judicial Magistrate, i.e., from the cadre of Junior Branch of the service in the year 2001. Thereafter, the service record/ Annual Confidential Report of the petitioner vis-?-vis the aforesaid opposite parties 3 to 13 had to be examined after 2001 and not before that for the purpose of finding out most suitable person for promotion to the Senior Branch of the Service. Therefore, according to the petitioner, the entire process of promotion of the petitioner and others is a deviation to the statutory provisions provided under the Orissa Civil Service (Criteria for Promotion) Rule, 1992 (hereinafter to be referred to as "Rules, 1992") read with Rules, 1963 on the part of the Committee, which has been accepted by the Full Court without considering the relevant aspects and denial of promotion to the petitioner, who stands higher ranking than opposite parties 3 to 13, is bad in law and the procedure followed by the Committee is also bad in law and liable to be interfered with. Further, the petitioner during the course of argument prays to quash the endorsements communicated to him while rejecting his representations dated 9th March, 2007 and 22nd December, 2009 stating that he is not entitled for promotion to the post of Additional District Judge from the date his juniors have been promoted and placing him in the appropriate place in the Gradation List/ Civil List. Though no such prayer has been made, learned counsel for the petitioner further seeks to quash the procedure adopted by the Committee in evaluating the merit of the petitioner without there being any adverse remark against him and granting the same relief to the juniors and similarly placed persons with that of the petitioner and not following the Rules, 1992 read with Rules, 1963 and following the procedure for evaluating the merit of the petitioner and depriving his legitimate right of promotion, which is in

violation of Articles 14 and 16 of the Constitution of India and therefore, the petitioner is entitled for the relief.

9. Mr.R.K. Mohapatra, learned Government Advocate places reliance upon the decision of the Supreme Court in Shiba Shankar Mohapatra and Others Vs. State of Orissa and Others, wherein the apex Court has held that seniority list which remains in existence for 3 to 4 years unchallenged, should not be disturbed and in case some one agitates the issue of seniority beyond this period, he has to explain the delay and laches in approaching the adjudicatory forum by furnishing satisfactory explanation. He further places reliance upon the decision of the Supreme Court in M.V. Thimmaiah and Others Vs. Union Public Service Commission and Others, wherein the Supreme Court has held as follows :

...Normally, the recommendations of the Selection Committee cannot be challenged except on the ground of mala fides or serious violation of the statutory rules. The courts cannot sit as an Appellate Authority to examine the recommendations of the Selection Committee like the court of appeal. This discretion has been given to the Selection Committee only and courts rarely sit as a court of appeal to examine the selection of the candidates nor is the business of the court to examine each candidate and record its opinion...

10. The accepting authority of the Annual Confidential Report, namely, the Promotion Committee has not recommended for his promotion on the basis of the remarks made by it for the years 1999, 2000 and 2001 as "average" and also accredit the rating marks awarded to the officers whose case fell for consideration on various aspects indicated above.

11. Mr. Mohapatra has also placed reliance to the Full Bench decision of this Court in Ramesh Prasad Mohapatra v. State of Orissa and others, 1980 (49) CLT 442 regarding the aspects to be taken into consideration for evaluating the Annual Confidential Report for the purpose of promotion. The Full Bench of this Court in paragraph 10 observed thus:

..... When the question of promotion arises, the consideration becomes very different. The totality of the service record is taken into account for judging comparative merit and for that purpose the total effect of service is taken into account. No reasoning is necessary to support the proposition that between an officer with a clean record throughout and another with a bad record in the beginning for several years and equal record with the other officer for the subsequent period, that officer who has a clean record throughout would stand a better chance of promotion.

Further, he has vehemently contended that taking note of Rule 9 of the Rules, 1963 read with Rules, 1992, when the Committee has assessed the Annual Confidential Reports of the relevant period of the officers for the purpose of examining the claim for promotion to the post of Additional District Judge, the same need not be interfered with by this Court in exercise of its judicial review power. Therefore, he submitted that no case is made out by the petitioner for

grant of reliefs as prayed. Hence, he has prayed for dismissal of the writ petition.

12. Mr. D. Mohapatra, learned counsel appearing for opposite party no. 7, Mr. S.K. Patnaik, appearing for opp.party no. 8, Mr.S.K.Das for opp.party no. 11 and Mr. A.R. Swain for opp.party no. 10 while adopting the submissions made by the learned Government Advocate submit that no relief is sought for against the aforesaid opposite parties to quash their appointments by way of promotion.

13. With reference to the aforesaid rival factual and legal contentions, this Court is required to examine.

(i) whether the petitioner is entitled for the relief by issuing a direction to opposite party no. 2 to extend the benefit of promotion to the post of Additional District Judge (District Judge cadre) and grant of Selection Grade with effect from the date the next juniors to him got promotion to the said cadre and to the Selection Grade District Judge post ?

(ii) whether the petitioner is entitled for the relief of quashing the endorsements issued by the High Court rejecting his representation though no prayer in this regard is made ?

(iii) Whether the writ petition has to be dismissed on the ground of delay and laches ?

(iv) What order?

14. The first point is required to be answered in favour of the petitioner for the following reasons.

15. The Orissa Superior Judicial Service Rules, 1963, (hereinafter to be referred to as "Rules, 1963") framed under Article 309 of the Constitution of India was governing the field for appointment to the post of Additional District Judge. Rule 5 of the said Rules provides that recruitment to the Senior Branch of the service is to be made (a) by way of direct recruitment; and (b) by promotion of officers from Junior Branch of the service. Rule 9(1) of the said Rules prescribes that whenever a vacancy in the Senior Branch of the service is decided to be filled up by way of promotion, the Government shall fill up the same after due recommendation of this Court in accordance with sub-Rule (2). Sub-rule (2) provides that the High Court shall recommend for appointment to such vacancy, an officer of the Junior Branch of the service who in the opinion of the High Court is the most suitable for the purpose of appointment to the post of Additional District Judge by way of promotion, provided that if for any reason, Government is unable to accept the recommendation as aforesaid, they may call for further recommendations from the High Court to fill up the vacancy. From a conjoint reading of the Rules, 1963, it is evident that vacancies in the Senior Branch are to be filled up by way of promotion on the basis of the recommendation made by the High Court from amongst the most suitable persons and accordingly, the Government is to issue appointment orders. If the service record of an officer in the Junior Branch of the service is unblemished and he has the due seniority in

the cadre and all through he has been given his due promotion without any hindrance, such officer can be treated as the most suitable person for promotion to the Senior Branch of the Service. Since the petitioner fulfills such conditions, he ought to have been promoted to the Senior Branch of the service as there were 17 vacancies in the said cadre in the year 2005 when his juniors were promoted. The seventeen persons who were promoted to the post of Additional District Judges out of whom two persons were senior to the petitioner and some other persons have retired on attaining the age of superannuation excepting eleven persons (opposite parties 3 to 13), who are arrayed as opposite parties in these proceedings were promoted to the Senior Branch of the Service being juniors to the petitioner ignoring his rightful claim. On perusal of the Rules, 1963, we find that the words "the most suitable" are not defined. The practice and procedure which has been followed by this Court for adjudging an officer most suitable for the purpose of promotion to the Senior Branch of service from the year 1963 till the promotion given to the juniors of the petitioner, i.e., opposite parties 3 to 13, i.e., in the year 2005 had to be followed. The petitioner, who has got periodical promotion from the cadre of erstwhile Munsif (Civil Judge (Junior Division)) to the Sub-Judge {Civil Judge (Senior Division)} and from the post of Sub-Judge {(Civil Judge (Senior Division))} to the post of Chief Judicial Magistrate, due consideration was given to the seniority as well as merit of the petitioner on the recommendation made by the High Court from time to time and at no point of time his juniors have superseded the petitioner in any promotional post.

16. To appreciate the submissions made on behalf of the respective parties, we called for the file relating to constitution of Transfer Committee and Promotion Committee by the Full Court from the registry. We have gone through the said file and found that the Full Court in its meeting held on 31.7.2004 resolved as follows :

It is resolved that henceforth matters relating to promotion and transfer and posting of Judicial Officers belonging to Orissa Superior Judicial Officers (SB) shall be first dealt with by two Committees to be constituted by the Chief Justice of the High Court from time to time and such committees shall make appropriate recommendations which will be placed before the Full Court for consideration.

As per the aforesaid resolution of the Full Court, the then Chief Justice of this Court constituted two Committees (i) relating to promotion of Judicial Officers of the cadre of O.S.J.S.(S.B.) and (ii) relating to transfer and posting of Judicial Officers of the cadre of O.S.J.S.(Sr. Branch) on 13.8.2004 consisting of four Judges and again it was reconstituted on 2.11.2004 and thereafter on 4.3.2005 consisting of five Judges. Rule 4 of the Rules, 1963 deals with "Cadre", which states as follows:

4. (1) The cadre of the service shall consist of two branches, namely:
- (i) Superior Judicial Service, Senior Branch; and

(ii) Superior Judicial Service, Junior Branch.

The said Committee considered the case of the petitioner along with opposite parties 3 to 13 for promotion from the cadre of O.S.J.S.(Junior Branch) to the cadre of O.S.J.S. (Senior Branch) on 20.07.2005. The Promotion Committee was not authorized to consider the matter relating to promotion of Judicial Officers belonging to Orissa Superior Judicial Service (Junior Branch) to the cadre of Orissa Superior Judicial Service (Senior Branch). The constitution of the Committee pursuant to the said resolution by the Chief Justice was, therefore, not authorized to effect promotion in respect of officers, i.e., petitioner and opp.parties 3 to 13 belonging to Orissa Superior Judicial Service (Junior Branch). Even construing that it was authorized as per the decision of the Full Court, the recommendation procedure followed by the said Committee accrediting ratings of the Annual Confidential Reports of the officers whose cases were considered for the years from 1999 to 2003 is alien to the well established practice and procedure followed by this Court and the same is contrary to the Rules. The procedure which was adopted by the Committee for assessing the suitability of the officers for promotion taking into consideration the credit assigned to the A.C.R. rating of an officer was as follows:

(f)

Outstanding

5

(g)

Very good

4

(h)

Good

3

(i)

Average

1

(j)

Poor

0

On the basis of the aforesaid rating in the A.C.R. promotion has been given to the petitioner, opp.parties no. 3 to 13 and other officers taking into consideration the remarks for the five preceding years.

17. The Rules, 1992 provides that the Annual Confidential Reports of the eligible candidates for the period of five years preceding the year of consideration for promotion has to be taken into consideration. The recruitment was made in the year 2005 and proceeding five years has been explained in the note to Rule 3 of the Rules, 1992, which inter alia, states that the five years preceding the year in which Officer's performance is in accordance with the relevant Recruitment Rules first evaluated. Therefore, the Annual Confidential Report of the petitioner from 2000 to 2004 had to be considered for adjudging his suitability. On perusal of the record we find that instead of taking the service record of the petitioner from the years 2000 to 2004, the service record from the years 1999 to 2003 has been taken into consideration. We also find that accrediting the ratings of marks in the Annual Confidential Reports followed in respect of the officers for the relevant period was never followed earlier to 2005 and subsequent to that period. Thus, the procedure followed by the Committee is bad in law and denying promotion to the petitioner is a clear case of arbitrary, unreasonable, unfair practice which has been adopted by the Committee in recommending the officers to the cadre of O.S.J.S.(Sr. Branch) as Additional District Judges, Adhoc District Judges and Judges of Fast Track Courts. The aforesaid important aspect of the matter was not noticed by the Full Court while accepting the recommendation of the Committee in not recommending the case of the petitioner for promotion to the post of Additional District Judge in the District Judge cadre though his juniors were considered and promotion has been given to them who were similarly placed.

18. Further, the said Committee was required to take into consideration the Annual Confidential Reports for five years as per the note to Rule 3 of Rules, 1992 on the date of consideration, that means from 2000 to 2004. It is an undisputed fact that as per the record and counter statement, A.C.Rs. for five years, i.e., from 1999 to 2003 had been taken into consideration wherein the said procedure is in contravention of note to Rule 3 of Rules 1992. According to the said note, previous five years period should have been from 2000 to 2004. Further the Annual Confidential Report of the year 1999 was taken into consideration while promoting the petitioner from the post of Sub-Judge to Chief Judicial Magistrate. On the very same A.C.R., the evaluation of marks of the officers whose cases were considered in the manner as aforesaid, was totally impermissible in law for the reason that the Rules do not envisage such procedure. Apart from the said reasoning, the Annual Confidential Report of 2001 has been taken into consideration where the remarks made by the accepting authority, namely, the Promotion Committee is contrary to the remarks made by the recommending authority, namely, the Port Folio Judge, who had the occasion to monitor the functioning of all the Judicial Officers including the petitioner in the Judgeship. The Recommending Authority, namely, the Port Folio Judge while examining the remarks of the Reporting Authority for the year 2001, made an endorsement to the following effect :

May be considered for promotion after perusal of judgments (1st part), Good

(2nd part)

In view of the aforesaid remarks made by the Recommending Authority, there is absolutely no reason to make adverse remark by the Accepting Authority as "average", which is contrary to the Annual Confidential Report made by the Recommending Authority. In the absence of any adverse remark about his performance, integrity, honesty and other relevant factors like knowledge of law etc. and when the very same entry has been taken into consideration for the purpose of giving promotion of the petitioner from the post of Civil Judge (Senior Division) to Chief Judicial Magistrate, the remarks made by the accepting authority is not sustainable in law. Apart from the said reasoning, opposite parties 3, 12 and 13, who were similarly placed as that of the petitioner and who were given the remarks as "average" by the Recommending Authority, have been given promotion to the post of Additional District Judge (District Judge cadre) whereas the case of the petitioner without any rhyme or reason, arbitrarily has not been considered on the basis of rating of A.C.R. as indicated above, which is not permissible in law. The Constitution Bench of the Supreme Court in *S. Pratap Singh Vs. The State of Punjab*, , by referring to the case in *Vatcher v. Paull*, 1915 A.C. 372, at para 6 observed thus :

.....The courts have, on occasions, resolved the difficulty by finding out the dominant purpose which impelled the action and where the power itself is conditioned by a purpose, have proceeded to invalidate the exercise of the power when any irrelevant purpose is proved to have entered the mind of the authority(See *Sadler v. Sheffield Corporation*, 1924-1 CH 483 as also Lord Denning observed in *Fitzwilliam's (Earl) Wentworth Estate Co. v. Minister of Town and Country Planning*, 1951-2 K B 284 at page 307. This is on the principle that if in such a situation the dominant purpose is unlawful then the act itself is unlawful and it is not cured by saying that they had another purpose which was lawful. (emphasis supplied)

19. In view of the aforesaid dictum of the A.C. which is followed by the Supreme Court, we are of the view that consideration of promotion of the petitioner to the post of Additional District Judge (District Judge Cadre) is not in accordance with Rules, 1963 and Rules, 1992. It is an arbitrary action on the part of the Committee in not recommending the case of the petitioner for promotion and granting the benefit to the juniors of the petitioner, namely, opposite parties 3 to 13 and others, which is in clear violation of Articles 14 and 16 of the Constitution of India as rightly urged by Mr.J.K.Rath, learned Senior Counsel, whose submission is well founded and the same must be accepted.

20. It is an undisputed fact that the petitioner was promoted from the cadre of erstwhile Munsif now Civil Judge (Junior Division) to the post of Sub-Divisional Judicial Magistrate and from Sub-Divisional Judicial Magistrate to the cadre of Sub-Judge now Civil Judge (Senior Division) and from the cadre of Sub-Judge to the post of Chief Judicial Magistrate purely on the basis of seniority-cum-merit and his ranking in the Gradation List/ Civil List was above the opposite parties 3

to 13. It is also an undisputed fact that Rule 9(2) of the Rules, 1963 is required to be applied for the purpose of considering the claim of the petitioner and other eligible persons who are below him to fill up the existing vacancies in promotional quota in the posts of Additional District Judge (District Judge cadre).

21. Learned Senior Counsel has also placed reliance upon the decision of the Supreme Court reported in *Dev Dutt v. Union of India and others*, AIR 2008 S.C. 2513 (para-39), wherein the apex Court has clearly laid down as follows :

..... fairness and transparency in public administration requires that all entries (whether poor, fair, average, good or very good) in the Annual Confidential Report of a public servant, whether in civil, judicial, police or any other State service (except the Military) must be communicated to him within a reasonable period so that he can make a representation for its upgradation. ...

In the instant case, though an adverse entry like "average" has been made in the Annual Confidential Report of the petitioner during the years 1999, 2000 and 2001, the same has not been communicated and the said entries were made use of by the Committee against the petitioner, which is bad in law. Therefore, the said action is in contravention of the decision of the Supreme Court referred to *supra*.

22. Learned Senior Counsel in support of the aforesaid proposition of law has also placed reliance upon the decision of the Supreme Court in the case of *U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others*, wherein the apex Court held as follows :

..... All what is required by the Authority regarding confidentials in the situation is to record reasons for such down grading on the personal file of the officer concerned, and inform him of the change in the form of an advice. If the variation warranted be not permissible, then the very purpose of writing annual confidential reports would be frustrated. ...

In the present case, the Accepting Authority while recording the Annual Confidential Report as "average" during the year 1999, 2000 and 2001 has not recorded the reasons for so recording, which has not been communicated to the petitioner at any point of time.

23. Non-consideration of the aforesaid relevant facts by the Full Court at the time of accepting the recommendation of the Committee in denying promotion to the petitioner is bad in law. Further on the basis of the very same Annual Confidential Reports within eleven months, the petitioner has been given promotion to the post of Additional District Judge against the vacancy in the absence of a specific mention that promotion will come into effect prospectively either by the recommendation of the Committee or by the Full Court resolution. Therefore, the petitioner's rank should have been placed above the opposite parties 3 to 13. The petitioner was, therefore, justified in giving representations to the High Court for rectification of the same in the year 2007 and again in the

year 2009. Therefore, though the petitioner's rank is above the opposite parties 3 to 13, and the five years A.C.R. should have been taken into consideration from 2000 to 2004, and the adverse entries having not been communicated to the petitioner, non-grant of promotion to the petitioner on the basis of the said adverse entries is arbitrary, unreasonable, unfair, which is violative of Articles 14 and 16 of the Constitution. Therefore, the petitioner is entitled to the relief as prayed by him.

Point No. (ii)

24. We have already discussed elaborately that the procedure followed by the Promotion Committee in denying promotion to the petitioner is bad in law by recording our reasons on point no. (i) and therefore, we have held that the petitioner is entitled for the relief as prayed for by him. Therefore, we have to grant the relief notwithstanding rejection of the representations of 2007 and 2009 by issuing endorsements in the years 2007 and 2011, which are not challenged in this petition. Since the Full Court has accepted the recommendations of the Committee for giving promotions to opp. parties 3 to 13 and others without proper consideration of the case of the petitioner in the light of Rules, 1992 read with Rules, 1963 and also the ACRs and the alien procedure followed by the Committee in accrediting the rating of the ACR of the officers for the first time and denying promotional benefit to the petitioner and granting benefit to his juniors, is bad in law. The said action is arbitrary and unreasonable. The Committee was not authorized by the Full Court to consider the claim of the officers belonging to Orissa Superior Judicial Service (Junior Branch) to promote to the cadre of Officers of Orissa Superior Judicial Service (Senior Branch). The above aspect of the matter has not been re-examined independently either by the Committee or Full Court when the representations of the petitioner were considered and disposed of. Therefore, rejection of the representations of the petitioner by the Committee and Full Court, is also not legal and valid. Hence, the endorsements issued by the High Court while rejecting the representations is bad in law and we have opined that the prayer sought for by the petitioner is justified, is the finding recorded by us while answering the point no. 1 in favour of the petitioner. Therefore, the endorsements issued to the petitioner rejecting the representations are also liable to be quashed and the same are accordingly quashed. Point Nos. (iii) & (iv)

25. Regarding delay, Mr. Mohapatra, learned Government Advocate while placing reliance on the judgment of the Supreme Court in the case of Shiba Shankar Mohapatra (*supra*) submitted that since the petitioner has not explained the inordinate delay in approaching this Court for fixation of his seniority, he is not entitled for the relief claimed.

26. The aforesaid submission is refuted by Mr. J. K. Rath, learned Sr. Counsel appearing for the petitioner by referring to the decision of the Supreme Court in *M/s. Dehri Rohtas Light Railway Company Limited Vs. District Board, Bhojpur and District Board, Shahabad and others*, which has also been followed by the

Supreme Court in Royal Orchid Hotels Limited and Another Vs. G. Jayarama Reddy and Others, wherein the Supreme Court at para 27 extracted para 13 from the judgment in Dehri Rohtas Light Railway Co. Ltd(supra) and observed thus:

13. The rule which says that the Court may not enquire into belated and stale claim is not a rule of law but a rule of practice based on sound and proper exercise of discretion. Each case must depend upon its own facts. It will all depend on what the breach of the fundamental right and remedy claimed are and how delay arose. The principle on which the relief to the party on the grounds of laches or delay is defined is that the rights which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed unless there is a reasonable explanation for the delay. The real test to determine delay in such cases is that the petitioner should come to the writ court before a parallel right is created and that the lapse of time is not attributable to any laches or negligence.

He has submitted that delay and laches should not come in the way while exercising the power of judicial review by this Court. He has further submitted that when illegalities and irregularities are committed by the Committee in following the procedure, which is not permissible in law at the time of examining the claim of the petitioner and junior officers and denying promotion to the petitioner on irrelevant consideration, delay and laches do not come in the way for this Court for granting the relief to the petitioner. It is further submitted that there is no delay and laches on the part of the petitioner in ventilating his grievance before this Court as the petitioner has made a representation in the year 2007 and when the same was rejected, he again made another representation in 2009, which has also been rejected on 08.08.2011 (Annexure-4) and soon thereafter, he filed this writ. Thus, it is apparent that the petitioner has been diligently pursuing his case after coming to know that irregularities and illegalities had been committed by the authorities. Hence, it cannot be said that petitioner is not a diligent officer and therefore, delay and laches cannot be attributed to him for denying the relief.

27. Since we have answered point nos.(i) & (ii) against opposite parties 1 and 2 by recording our reasons after coming to the conclusion that not giving promotion to the petitioner along with his juniors and giving promotion to opposite parties 3,12 and 13, who are similarly placed as that of the petitioner to the cadre of Additional District Judge in the year 2005 is in violation of Articles 14 and 16. For the foregoing reasons, it is not necessary for us to direct opposite party no. 2 to reconsider the matter afresh as we have already examined the claim of the petitioner and found that the petitioner is fit for promotion and his case has not been recommended by the Full Court to the Government, which action is unreasonable and arbitrary.

28. For the reasons assigned in answer to point no. 1, we have held that denying promotion to the petitioner by following an alien procedure in awarding marks to

the various aspects of the ACR of the officers, whose claim was considered for promotion, is not permissible in law. As per the Rules, referred to supra and from the record, we found that denial of promotion to the petitioner is bad in law and we are of the view that the petitioner is entitled to promotion and consequential benefits. The ranking of the petitioner and other officers, whose claim was considered, was inter changed on account of accrediting marks awarded to them on the basis of relevant aspects, which is bad in law and, therefore, opp.parties 3 to 13 are also entitled to the relief by placing them in their appropriate place in the gradation list/ civil list.

29. Even assuming that the contentions urged on behalf of the opposite parties that there is delay in approaching this Court from the date of promotion given to opposite parties 3 to 13 while answering the point no. (i) by recording valid reasons, we have recorded a finding that denial of promotion to the petitioner is unjust, unfair and unreasonable. Therefore, this Court has to exercise its judicial review power to undo the justice caused to him. Hence, the contention raised in this regard by the learned Government Advocate and other contesting opposite parties is wholly untenable and is liable to be rejected.

30. In view of the foregoing reasons, we allow the writ petition and issue Rule directing opposite party no. 2 to extend the benefit of promotion to the petitioner to the post of Additional District Judge (District Judge cadre) as well as promotion to the Selection Grade District Judge at par with his juniors with effect from the date on which his juniors have got the above benefits and his rank be placed at the appropriate place in the Gradation List/ Civil List of 2006 with other consequential service benefits within a period of eight weeks. It is made clear that this order shall not adversely affect the opposite parties 3 to 13, who have already enjoyed the benefit of promotion and some of those who have got the Selection Grade District Judge post. However, the seniority of opp.parties 3 to 13 be re-fixed in the cadre of Orissa Superior Judicial Service (Senior Branch) (District Judge cadre) as per their seniority prevailing in the cadre of Orissa Superior Judicial Service (Junior Branch).

31. In the facts and circumstances of the case, there shall be no order as to cost.