
(1978) 08 OHC CK 0009

In the Orissa High Court

Case No : Original Jurisdiction Case No. 70 of 1976

Gangadhar Swain

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 17-08-1978

Acts Referred:

Citation : (1978) 46 CLT 632

Hon'ble Judges : R.N. Misra, J;B.K. Ray, J

Bench : Division Bench

Advocate : L. Rath, for the Appellant; Additional Government Advocate and G.A.R. Dora, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, J.—Petitioner as also opposite parties 4 to 10 are employees in the establishment of the Superintending Engineer, Mechanical Circle, Hirakud (opposite party No. 3). The administration of the Hirakud Dam Organisation was transferred from the control of the Central Government to the State Government of Orissa with effect from 1-4-1960 and the Mechanical Circle was constituted to be in administrative control thereof. Opposite parties 4 to 10 had been appointed as lower division assistants long before the Petitioner who came to be appointed to that post on 29-12-1961. Admittedly there are no statutory rules regulating promotion of lower division assistants to higher posts or fixation of their inter se seniority and these aspects have been regulated by administrative instructions issued from time to time. On 21-12-1949 (Annexure-4) the state Government in the Works Department had issued a Circular letter prescribing the procedure for appointment and promotion of lower division assistants attached to the Accounts section of the P.W.D. Divisional and Sub-Divisional Officers. Therein it was laid down that there should be an accounts examination in which all lower division clerks attached to the Circle, Divisional and Sub-Divisional Offices should pass before they are considered eligible for promotion to posts of upper division clerks in the Divisional Officers of which 80 per cent should be filled by promotion from

among qualified lower division clerks and the balance 20 per cent by direct recruitment of candidates having at least Intermediate qualification. Notwithstanding the aforesaid Circular, promotion had been granted to posts of upper division clerks in contravention thereof. Admittedly the 1949 Circular had no application to the Hirakud Dam Project as until 1-1-1960 its administration vested in the Central Government. On 22-4-1961 (Annexure-6), the State Government in the Works Department wrote to the Chief Engineer of the Hirakud Dam Organisation:

.... After careful consideration of the hardship caused to those clerks who have rendered long period of officiating service, Government have decided that the permanent lower division clerks officiating in or holding temporary posts of upper division clerks, head clerks, first assistants and head assistants of following categories should be exempted from passing the Accounts examination as a special case....

With the exception of the above categories of temporary and officiating upper division clerks, head clerks etc. as mentioned in para 1 above, others will have to pass the Accounts examination in 3 clear successive chances from the date of issue of this order failing which they should be reverted to lower division....

On 15th of May, 1962, a further administrative instruction was issued under Annexure-7 where guideline in the matter of fixation of seniority of Accounts Clerks of Public Works Department in upper division posts was dealt with and it was stated:

It has further been decided that unpassed hands in the Lower division or any particular grade in upper division should not be allowed promotion to higher grade until they pass the accounts test and qualify for promotion and promotion should be confined to passed hands only according to their seniority and merit. No promotion given to unpassed hands after the Government order No. 12306(5) dated 22-4-1961 will be recognised by Government for any purpose,

Opposite Parties 4 to 10 were promoted to the post of upper division clerks on 7-9-1961. i.e. subsequent to the Government instructions contained in the letter dated 22-4-1961 (Annexure-6). Petitioner came to be appointed to Government service for the first time on 29-12-1961 as a lower division clerk. He passed the accounts examination on 31-8-1963 and was promoted as upper division clerk on 1-5-1964. Opposite parties 4 to 10 passed the accounts examination between 1964 and 1967, i.e. long after they were promoted In contravention of the Government instruction

under Annexure-6 and notwithstanding the clarification under Annexure-7. they were given seniority over the Petitioner. Petitioner represented to Government against the placement of opposite parties 4 to 10 over him and Government under Annexure-18 dated 15-9-1975 rejected the representation saying:

In view of the above circumstances, it has been decided by Government that the

7 U.D.Cs. (opposite parties 4 to 10) who were promoted as such on 7-9-1961 should be senior to Sri G.D. Swain (Petitioner)....

Petitioner assails the said order on his representation and has asked for declaration that he is senior to the said opposite parties. He relies upon the executive instructions in Annexures 6 and 7 in support of his contention.

2. Opposite parties 1 to 3 have filed a counter affidavit through the Deputy Secretary to Government in the Irrigation and Power Department and the stand in Annexure-18 has been supported. Opposite parties 4 to 10 have filed a counter affidavit supporting their placement above the Petitioner. Petitioner has filed several rejoinders.

3. The short question for consideration is as to whether the opposite parties 4 to 10 who had admittedly been promoted even before the Petitioner was recruited to the post of lower division clerk would be senior to the Petitioner notwithstanding the fact that at the time of promotion they were not qualified and they acquired their qualification long after the Petitioner became qualified.

4. There is no dispute that in the grade of lower division clerks, opposite parties 4 to 10 are senior to Petitioner. There is also no dispute that the opposite parties were promoted to the post of upper division clerks even before Petitioner was recruited into service as a lower division clerk. The sole ground on which Petitioner challenges the promotion and consequential seniority of the opposite parties is on the basis of the two Government letters of 1961 and 1962. It is not disputed that under Annexure-6 dated 22-4-1961, the Administrative Department directed that the guideline provided in the Government letter dated 21-12-1949 should be applied in regard to passing of the accounts examination; indicated the cases where exemption from passing the examination was to be allowed; required the officiating upper division clerks not covered by exemption to pass the accounts examination in three clear successive chances from 1961 and on failure to so pass were to be reverted. On 15th of May, 1962, instructions regarding fixation of seniority of passed accounts clerks in upper division posts were issued. Therein it was indicated that unpassed hands in any particular grade in upper division should not be allowed promotion to higher grade until they passed the accounts test and qualified for promotion and promotion should be confined to passed - hands only according to their seniority and merit. No promotion given to unpassed hands after the issue of the Government order of 22-4-1961 would be recognised by Government for any purpose. Strong reliance has been placed on this Instruction.

5. Opposite parties 4 to 10 were promoted almost fifteen years before the writ petition was filed. It would certainly not be appropriate to interfere with promotions accorded fifteen years back. Contravention was of a Government Circular. Government have allowed the opposite parties to continue and after specified application of their mind to the dispute raised by the Petitioner with reference to these opposite parties over the question of seniority, they have

found the opposite parties to be senior to the Petitioner. Since it is not the Petitioner's case that there has been contravention of any mandatory provision in a statutory rule, we are prepared to accept the stand of the State that from the fact that the opposite parties have been allowed to continue, it must be assumed that an exception has been made in the case of these opposite parties. If the promotion granted to the opposite parties is not to be assailed at this stage, we see no justification also to deprive these opposite parties of their claim to seniority. Petitioner was promoted on 1-5-1964 as an upper division clerk, i.e. about three years after the opposite parties were promoted. Keeping these facts in view, we are inclined to agree with the submission advanced by counsel for opposite parties that there is no justification in law or equity to interfere with the order under Annexure-18.

6. The writ application is devoid of merit and has got to be dismissed. We, however, make no order for costs.

B.K. Ray, J.

I agree.

Writ application dismissed.