
(2010) 11 OHC CK 0049

In the Orissa High Court

Case No : O.J.C. No's. 5921, 5922 and 7798 of 2000

Man Mohan Mishra and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 23-11-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 16, 16(1), 16(4)
Recruitment to Senior Branch Rules, 1979 — Rule 11, 13, 5(3)

Citation : (2011) 1 ILR (Ori) 41

Hon'ble Judges : L. Mohapatra, J;Aruna Suresh, J

Bench : Division Bench

Final Decision : Allowed

Judgement

L. Mohapatra, J.—Inter se seniority between the Petitioners and opposite party No. 5 in O.J.C. No. 5922 of 2000 is the dispute involved in this writ application. Opposite party No. 5 approached the Orissa Administrative Tribunal, Bhubaneswar in O.A. No. 1685 of 1998 claiming seniority over althea Petitioners in the post of OAS Class-I (Junior Branch) and consequently OAS Class-I (Senior Branch). The said Original Application having been allowed, the present Petitioners who were Respondents 7, 8, 9, 11 to 90, 102 and 106 in the said Original Application have filed this writ application challenging the judgment of the Tribunal passed in the said Original Application. Since all the three writ applications have been filed challenging the judgment of the Tribunal, they were taken up for hearing and disposed of in this common judgment.

2. Facts leading to filing of the Original Application by opposite party No. 5 before the Tribunal are that in the year 1976 the Petitioners were selected and appointed as direct recruit general candidate officers of Orissa Administrative Service (OAS) Class-II and they joined in July 1979. Opposite party No. 5 was appointed against a reserved category post being a Scheduled Tribe candidate on the basis of a special recruitment held for Scheduled Castes/Scheduled Tribes by the Orissa Public Service Commission to OAS Class-II and accordingly he joined

as OAS Class-II Officer on 13.8.1982. On 30.5.1992 even though opposite party No. 5 was junior to all the Petitioners in the cadre of OAS Class-II, he was promoted to OAS Class-I (Junior Branch) on ad hoc basis as a reserved category candidate against the Roster point in the said promotional post. The said promotion of opposite party No. 5 from OAS Class-II to OAS Class-I (Junior Branch) was subject to the result of O.A. Nos. 1015 of 1989, 976 of 1990 and 1389 of 1990 pending before the Orissa Administrative Tribunal then. Even though all the Petitioners were senior to opposite party No. 5 in the cadre of OAS Class-II, they were promoted to OAS Class-I (Junior Branch) in the year 1995-96 and by then opposite party No. 5 was still working as an Officer in the OAS Class-I (Junior Branch). On 9.9.1996, a provisional Gradation list of OAS Class-I (Junior Branch) Officers as on 1.7.1996 was prepared on the basis of date of joining in OAS Class-I (Junior Branch). In the said Gradation list, the opposite party No. 5 was placed at serial No. 41. While the matter stood thus, on 27.12.1996, O.A. Nos. 1015 of 1989, 976 of 1990 and 1389 of 1990 were disposed of by the Tribunal with a direction that the 176 promotes of OAS Class-II of the year 1980-81 be placed below the direct recruits of OAS Class-II of 1977 batch. In pursuance of the said judgment of the Tribunal, on 14.1.1997, a fresh Gradation List of OAS Class-I (Junior Branch) Officers as on 1.12.1996 was prepared specially taking into consideration the judgment of the Hon"ble Supreme Court in R.K. Sabharwal and others Vs. State of Punjab and others, , Union of India and others etc. Vs. Virpal Singh Chauhan etc., and Ajit Singh Januja and others Vs. State of Punjab and others, and the Petitioners who were promoted to OAS Class-I (Junior Branch) later than opposite party No. 5 were placed above opposite party No. 5 and in the Gradation List prepared on 14.1.1997, the name of opposite party No. 5 figured at serial No. 196 below all the Petitioners. On 3.2.1997, the State Government through the G.A. Department submitted a proposal before the OPSC for relaxation of the qualifying experience of 144 Officers in OAS Class-I (Junior Branch) for promotion to OAS Class-I (Senior Branch. OPSC vide letter dated 3.6.1997 accepted the proposal of the Government to relax the qualifying experience of two years in OAS Class-I (Junior Branch) for promotion to OAS Class-I (Senior Branch). After obtaining the concurrence of OPSC, the Government of Orissa in G.A. Department relaxed the provision contained in Rule 5(3) of the OAS Class-I (Recruitment to Senior Branch) Rules, 1979 in exercise of power under Rule 13 thereof. The judgment passed by the Tribunal in the aforesaid three Original Applications was assailed before the Hon"ble Supreme Court and the Gradation List dated 5.5.1997 prepared for OAS Class-I (Junior Branch) Officers was also questioned before the Hon"ble Supreme Court. The Civil Appeals were dismissed on 10.7.1997. In view of the relaxation in Rule 5 of the aforesaid Rules, the Petitioners along with Ors. were promoted to OAS Class-I (Senior Branch) on 15.7.1997. Challenging such promotion as well as the placement in the Gradation List of OAS Class-I (Junior Branch), opposite party No. 5 filed the present Original Application before the Tribunal praying for the following reliefs:

- (1) Restoration of seniority of opposite party No. 5 as it was appearing in the provisional Gradation List under Annexure-2 to the Original Application;
- (2) To quash the revised Gradation List in Annexures-3 and 4 to the Original Application;
- (3) To quash the promotion of all the Petitioners to OAS Class-I (Senior Branch);
- (4) To direct the State authorities to promote him to OAS Class-I (Senior Branch) from the date his juniors were promoted and also to give all financial and other service benefits. Indian Law Reports, Cuttack Series [2011] The said Original Application having been allowed by the Tribunal on 21.6.2000, the present writ application has been filed challenging the same.

3. The following are the undisputed facts involved in this case:

- (1) Opposite party No. 5 was junior to all the Petitioners as OAS Class-II Officer;
- (2) Opposite Party No. 5 was promoted to OAS Class-I (Junior Branch) on ad hoc basis as a reserved category candidate against a Roster point on 30.5.1992 much prior to the Petitioners who were promoted in 1995-96 to OAS Class-I (Junior Branch) as general candidates;
- (3) All the Petitioners were promoted to OAS Class-I (Junior Branch) when the opposite party No. 5 was still continuing as an Officer in OAS Class-I (Junior Branch);
- (4) While all the Petitioners and opposite party No. 5 were working as Officers in OAS Class-I (Junior Branch) Rule 5(3) of the OAS Class-I (Recruitment to Senior Branch) Rules, 1979 was sought to be relaxed in exercise of power under Rule 13 thereof and the qualifying experience of two years in Class-I (Junior Branch) was sought to be relaxed for the purpose of promotion to OAS Class-I (Senior Branch). The said proposal was concurred by OPSC;
- (5) In view of the above relaxation in the qualifying experience of two years of service, all the Petitioners got promotion to OAS Class-I (Senior Branch) earlier to opposite party No. 5;
- (6) Though initially a Gradation list of Officers belonging to OAS Class-I (Junior Branch) had been prepared on 1.7.1996 on the basis of date of joining in OAS Class-I (Junior Branch), subsequently it was modified relying on the judgment of the Hon'ble Supreme Court in the above three cases. In the Gradation list of 1.7.1996 opposite party No. 5 had been shown senior to all the Petitioners whereas in the Gradation list of 14.1.1997, opposite party No. 5 figured at serial No. 196, below all the Petitioners.

4. The question for determination is that the opposite party No. 5 having been promoted to the post of OAS Class-I (Junior Branch) much earlier to all the Petitioners, whether the Gradation list in respect of Officers working in OAS Class-I (Junior Branch) should have been prepared on the basis of date of joining or on

the basis of the aforesaid three Supreme Court decisions. The other question to be determined is as to whether the Petitioners having been promoted to OAS Class-I (Junior Branch) while the opposite party No. 5 was continuing in the said post of OAS Class-I (Junior Branch) even though earlier promoted, the Petitioners can claim seniority over opposite party No. 5 as Officers in OAS Class-I (Junior Branch). The last question to be determined is whether the State had any authority to relax the requirement of two years of service as an officer of OAS Class-I (Junior Branch) for the purpose of promotion to OAS Class-I (Senior Branch).

5. The first two questions to be determined are interlinked. Undisputedly opposite party No. 5 was promoted from OAS Class-II to Class-I (Junior Branch) as a reserved category candidate against the Roster point much prior to all the Petitioners. Opposite party No. 5 was promoted to OAS Class-I (Junior Branch) on 30.5.1992 whereas all the Petitioners were promoted to OAS Class-I (Junior Branch) as general candidates in 1995-96. Therefore, on the basis of the date of joining as an Officer of OAS Class-I (Junior Branch) the first Gradation list had been prepared on 1.7.1996. When the opposite party No. 5 was continuing as an Officer of OAS Class-I (Junior Branch), all the Petitioners were promoted to OAS Class-I (Junior Branch). Relying on this fact, Shri Sanjit Mohanty and Shri Jagannath Patnaik, the learned Senior Counsel appearing in two of the cases and the learned State Counsel appearing in the case filed by the State submitted that in view of the judgment of the Hon'ble Supreme Court in the case of *Ajit Singh and Others Vs. The State of Punjab and Others*, otherwise known as *Ajit Singh-2* case, the Petitioners have to be treated as senior to opposite party No. 5. Shri C.A. Rao, the learned Counsel appearing for opposite party No. 5 referring to the very same judgment and to the provisions contained in the Orissa Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Rules, 1976 submitted that the opposite party No. 5 having been promoted to OAS Class-I (Junior Branch) earlier than the Petitioners against a reserved vacancy, he is to be treated as senior to all the Petitioners. The Constitution Bench decision of the Hon'ble Supreme Court in the case of *Ajit Singh-2* was also placed before the Tribunal and the Tribunal picked up certain paragraphs from the said judgment, interpreted the same in favour of opposite party No. 5 and allowed the Original Application. Since the entire dispute revolves around the law laid down by the Hon'ble Supreme Court in *Ajit Singh-2* case, it is necessary for us to refer to the said judgment and find out as to whether the claim of opposite party No. 5 is justified or not. *Ajit Singh Januja* and some Ors. were working against the post of Superintendent Grade-1, Superintendent Grade-II and Assistant in Punjab Indian Law Reports, Cuttack Series [2011] Civil Secretariate, Chandigarh. They were members of the cadre of Punjab Civil Secretariat. The grievance made in the writ petition filed by them was that the policy for reservation in respect of candidates belonging to Scheduled Castes and Backward Classes, was being implemented by the State Government in a manner, because of which the members belonging to the Scheduled Castes and

Backward Classes were holding posts in excess to their reservation quota. This was not only prejudicial but detrimental to their right for being considered for promotion to higher grade. Their case having been dismissed by the Full Bench of the Punjab & Haryana High Court on 23.8.1989, they approached the Hon"ble Supreme Court in several Civil Appeals. All those appeals were decided in a common judgment, reported in *Ajit Singh Januja and others Vs. State of Punjab and others*, . The Hon"ble Supreme Court in the said case observed that the members of Scheduled Castes or Backward Class who have been appointed/promoted on basis of the policy of reservation and system of roster cannot claim promotion against general category posts in the higher grade, on basis of their seniority in the lower grade having been achieved because of the accelerated promotion or appointment by applying the roster. The equality principle requires exclusion of the factor of extra weight age of earlier promotion to a reserved category candidate because of reservation alone, when he competes for further promotion to a general category with a general category candidate, senior to him in the panel. The Court held in paragraph-16 of the judgment that the rule of reservation gives accelerated promotion, but it does not give the accelerated "consequential seniority". If a Scheduled Caste/Scheduled Tribe candidate is promoted earlier because of the rule of reservation/roster and his senior belonging to the general category candidate is promoted later to that higher grade, the general category candidate shall regain his seniority over such earlier promoted Scheduled Caste/Scheduled Tribe candidate. Even after disposal of the said case by the Hon"ble Supreme Court, three interlocutory applications were filed for clarification by the State of Punjab and the said three interim applications were decided by a Constitution Bench of the Hon"ble Supreme Court reported in AIR 1999 SC 3479 . The Hon"ble Supreme Court in the case of *Jagdish Lal and others Vs. State of Haryana and others*, having taken a view contrary to *Ajit Singh Januja I*, it became necessary to file the said three interim applications. In the case of *Union of India v. Virpal Singh* the Hon"ble Supreme Court held that it was permissible for the Railways to say that reserved candidates who get promotion at the roster points would not be entitled to claim seniority at the promotional level as against senior general candidates who got promoted at a later point of time to the same level. It was further held that it would be open to the State to provide that as and when the senior general candidate got promoted under the rules, whether by way of a seniority rule or a selection rule to the level to which the reserved candidate was promoted earlier, the general candidate would have to be treated as senior to the reserved candidate (the roster point promotee) at the promotional level as well, unless, of course, the reserved candidate got a further promotion by that time to a higher post. The last part of the observation of the Hon"ble Supreme Court was described as the "catch up" rule. Similar view was also expressed in *Ajit Singh Januja I* case as stated earlier. In the case of *Jagdish Lal v. State of Haryana* (supra) a view contrary to *Virpal* and *Ajit Singh-1* was taken and it was held that the general rule in the Service Rules relating to seniority from the date of continuous officiation which was applicable to candidates promoted under the

normal seniority/selection procedure would be attracted even to the roster point promotes as otherwise there would be discrimination against the reserved candidates. The Bench also observed that the right to promotion was a statutory right while the rights of the reserved candidates under Article 16(4) and Article 16(4A) were fundamental rights and in that behalf, it followed *Ashok Kumar Gupta and Another Vs. State of U.P. and Others*, .

6. In view of the conflicting decision as stated above, the Constitution Bench was called upon to decide the question involved by way of clarification in the three interlocutory applications filed in *Ajit Singh Jajuna-2* case. Having gone through the entire judgment of *Ajit Singh Januja-2* case, we feel it necessary to quote some of the relevant paragraphs of the judgment. While answering the question as to whether the right to be considered for promotion is a mere statutory right or a fundamental right, the following observations were made by the Hon''ble Supreme Court in paragraphs-27 and 28 of the judgment which are quoted below: "In our opinion, the above view expressed in *Ashok Kumar Gupta* and followed in *Jagdish Lal* and other cases, if it is intended to lay down that the right guaranteed to employees for being "considered" for promotion according to relevant rules of recruitment by promotion (i.e. whether on basis of seniority or merit) is only a statutory right and not a fundamental right, we cannot accept the proposition. We have already stated earlier that the right to equal opportunity in the matter of promotion in the sense of a right to be "considered" for promotion is indeed a fundamental right guaranteed under Article 16(1) and this has never been doubted in any other case before *Ashok Kumar Gupta* right from 1950. Indian Law Reports, Cuttack Series [2011] Articles 16(4) and 16(4A) do not confer any fundamental right to reservation: We next come to the question whether Article 16(4) and Article 16(4A) guaranteed any fundamental right to reservation. It should be noted that both these Articles open with a nonobstante clause - "Nothing in this Article shall prevent the State from making any provision for reservation....There is a marked difference in the language employed in Article 16(1) on the one hand and Article 16(4) and Article 16(4A). There is no directive or command in Article 16(4) or Article 16(4A) as in Article 16(1). On the face of it, the above language in each of Articles 16(4) and 16(4A), is in the nature of an enabling provision and it has been so held in judgments rendered by Constitution Benches and in other cases right from 1963." While considering the question of reservation and effect of roster point of reservation, the Hon''ble Supreme Court in the said judgment held as follows:

It must be noted that whenever a reserved candidate goes for recruitment at the initial level (say Level I), he is not going through the normal process of selection which is applied to a general candidate but gets appointment to a post reserved for his group. That is what is meant by "reservation". That is the effect of "reservation". Now in a case where the reserved candidate has not opted to contest on his merit but has opted for the reserved post, if a roster is set at Level I for promotion of the reserved candidate at various roster points to level 2, the reserved candidate if he is otherwise at the end of the merit list, goes to Level 2

without competing with general candidates and he goes up by a large number of places. In a roster with 100 places, if the roster points are 8, 16, 24 etc. at each of these points the reserved candidate if he is at the end of the merit list, gets promotion to Level 2 by sidestepping several general candidates. That is the effect of the roster point promotion. It deserves to be noticed that the roster points fixed at Level 1 are not intended to determine any seniority at Level I between general candidates and the reserved candidates. This aspect we shall consider again when we come to Mervyn Coutindo and Others Vs. Collector of Customs, Bombay and Others, lower down. The roster point merely becomes operative whenever a vacancy reserved at Level 2 becomes available. Once such vacancies are all filled, the roster has worked out. Thereafter other reserved candidates can be promoted only when a vacancy at the reserved points already filled arises. That was what was decided in R.K. Sabharwal and others Vs. State of Punjab and others,

The most important question relates to seniority of roster promotes. Answering the said question, the Hon"ble Supreme Court in paragraphs-42, 43 and 48 of the judgment observed as follows: We shall here refer to two lines of argument on behalf of the reserved candidates. Ajit Singh was an appeal from the judgment of the Full Bench of the Punjab and Haryana High Court in Jaswant Singh v. Secretary to Govt., Punjab Education Department (1989) 4 SLR 257: (1990 Lab IC 559). In that case, reliance was placed by the reserved candidates on a general Circular dated 19.7.69 issued by the Punjab Government which stated that the roster point promotions would also confer seniority. In fact, while dismissing the writ petitions filed by the general candidates the High Court declared that the State was obliged to count seniority of the reserved candidates from the date of their promotion as per the Circular dated 49 19.7.69. The judgment of the Full Bench was reserved by this Court in Ajit Singh in the appeal filed by the general candidates. That resulted in the setting aside of the above declaration regarding seniority of roster point promotes as stated in the Punjab circular dated 19.7.69. But before us, reliance was placed by the reserved candidates as was done in Jagdish Lal and others Vs. State of Haryana and others, upon the general seniority Rule contained in various Punjab Service Rules applicable in the Civil Secretariat, Education, Financial Commissioner, etc. Departments which Rules generally deal with method of recruitment, probation, seniority and other service conditions. All these Rules provide a single scheme for recruitment by promotion on the basis of seniority cum-merit and then for seniority to be determined in the promotional post from the date of "continuous officiation", whenever the promotion is as per the method prescribed in those Rules. It is on this seniority rule relating to "continuous officiation" at the promotional level that reliance was placed before us by the reserved candidates, as was done in Jagdish Lal. Question is whether roster points promotes can rely on such a seniority rule?

Indian Law Reports, Cuttack Series [2011] It is clear, therefore, that the seniority rule relating to "continuous officiation" in promotion is part of the general

scheme of recruitment by direct recruitment, promotion, etc. - in each of the services in Class I, II and III - and is based upon a principle of equal opportunity for promotion. In our opinion, it is only to such promotions that the seniority rule of "continuous officiation" is attracted" Having considered all the previous decisions on this issue, the Hon"ble Supreme Court in paragraph-56 of the said judgment held that in the case of Jagdish Lal, the Court had arrived at an incorrect conclusion and the said paragraph is quoted below: "The Court in Jagdish Lal delinked Rule 11 from the Recruitment Rules and applied the same to the roster promotes. For the reasons given already in regard to Ajit Singh, we hold that Jagdishlal arrived at an incorrect conclusion because of applying a rule of continuous officiation which was not intended to apply to the reserved candidates promoted at roster points." The most relevant paragraph of the judgment is the observation made in paragraph-76, which is quoted below:

We, therefore, hold that the roster point promotes (reserved category) cannot count their seniority in the promoted category from the date of their continuous officiation in the promoted post, -vis-a-vis the general candidates who were senior to them in the lower category and who were later promoted. On the other hand, the senior general candidate at the lower level, if he reaches the promotional level later but before the further promotion of the reserved candidate - he will have to be treated as senior, at the promotional level, to the reserved candidate even if the reserved candidate was earlier promoted to that level. We shall explain this further under Point 3. We also hold that Virpal and Ajit Singh have been correctly decided and that Jagdishlal is not correctly decided. Points 1 and 2 are decided accordingly.

In the case of M. Nagaraj and Others Vs. Union of India (UOI) and Others, , the "catch-up" rule or concept of "consequential seniority" came for consideration. It was held that the concept of "catch-up" rule or "consequential seniority" are judicially evolved concepts to control the extent of reservation. These concepts cannot be elevated to the status of an axiom like secularism, constitutional sovereignty etc. It cannot be said that by insertion of these concepts, the structure of Article 16(1) stands destroyed or abrogated. It cannot be also said that "equality code" under Articles 14, 15 and 16 is violated by deletion of the "catch-up" rule. It is, therefore, clear that roster point promotes (reserved category) cannot count their seniority in the promoted category from the date of their continuance of officiation in the promoted post vis-?-vis the general candidates who were senior to them in the lower category and were later promoted before the roster point promotee was given further promotion. If the present case is examined on the basis of the aforesaid principle, it will be clear that as an Officer of OAS Class-II, the opposite party No. 5 was junior to all the Petitioners and he was promoted as a reserved category candidate to OAS Class-I (Junior Branch) against a roster point earlier than the Petitioners. While he was continuing as an Officer in OAS Class-I (Junior Branch), all the Petitioners were promoted to OAS Class-I (Junior Branch). Therefore, applying the principles laid down by the Hon"ble Supreme Court in the said judgment it can be safely held

that opposite party No. 5 cannot claim seniority over all the Petitioners as an officer in OAS Class-I (Junior Branch).

7. The next and last question for consideration is as to whether the State Government had any authority to relax the rules for the purpose of giving further promotion to OAS Class-I (Senior Branch). Rule 5(3) of the OAS Class-I (Recruitment to Senior Branch) Rules, 1979 clearly provides that an officer working as OAS Class-I (Junior Branch) can be considered for promotion to OAS Class-I (Senior Branch) provided he has completed two years of service as an Officer in OAS Class-I (Junior Branch). Rule 13 of the said Rules empowers the Government to relax the requirement of two years of service and accordingly a decision was taken to relax the said requirement and concurrence of OPSC was also obtained. There being no dispute about these facts, we are of the view that Rule 13 empowers the State Government to relax the Rules/requirement of two years of service and accordingly the same has been done with concurrence of OPSC and therefore, there is no illegality in such decision. All the Petitioners having been promoted to OAS Class-I (Senior Branch) earlier than the opposite party No. 5 in accordance with their seniority, there is no illegality in such promotion.

8. While examining the impugned judgment of the Tribunal, we found that the relevant portions of the judgment of the Constitution Bench in the case of Ajit Singh-2 had not been taken note of and the Tribunal confused the entire issue and allowed the Original Application. Indian Law Reports, Cuttack Series [2011]

9. Consequently for the reasons stated above, we set aside the impugned judgment of the Tribunal and allow the writ applications.