

(2010) 10 OHC CK 0026

In the Orissa High Court

Case No : O.J.C. No. 4403 of 1996, W.P. (C) No. 7848 of 2004, B.A. No"s. 38
and 81 of 1998

Nrushinga Charan Barik and Others

APPELLANT

Vs

Nachiketa Das and Others

RESPONDENT

Date of Decision : 25-10-2010

Acts Referred:

Baitarani Gramya Bank Staff Service Regulations, 1980 — Regulation 13(2)
Constitution of India, 1950 — Article 14, 16(1), 16(2), 226, 227

Citation : (2011) 111 CLT 419 : (2011) 1 OLR 866 Supp

Hon'ble Judges : P. Mohanty, J;B.P. Ray, J

Bench : Division Bench

Judgement

B.P. Ray, J.—Since the prayers made in the writ applications & in the second appeals are inter (inked with each other, those cases are heard together & are disposed of by this common Judgment.

2. The Writ Petition in O.J.C. No. 4403 of 1996 has been filed under Articles 226 & 227 of the Constitution of India challenging the order of promotion under Annexure-8 by which the Opp. Parties 1 to 7 were promoted to the post of Senior Manager/Area Manager in Baitarani Gramya Bank & the Petitioners have prayed for issue of necessary directions to the Bank to promote the Petitioners to the post of Area Manager/Senior Manager with effect from 13.2.1990 on which date, the Opp. Parties 1 to 7 were initially promoted under Annexure-4 to the rank of Area Manager/Senior Manager.

3. The case of the Petitioners in O.J.C. No. 4403 of 1996 is that the Petitioners & Opp. Parties 1 to 7 were directly recruited in a batch in the year 1981 as Officers in Baitarani Gramya Bank, (in short, "the Bank") which is a Regional Rural Bank. Under Regulation 13(2) of Baitarani Gramya Bank Staff Service Regulations, 1980 the inter se seniority of the officers directly recruited in a batch to any grade is reckoned with reference to the rank allotted to them at the time of recruitment. In other words, the inter se seniority of such officers is determined

with reference to the rank allotted to them at the time of recruitment. The Petitioners & Opp. Parties 1 to 7 were appointed as officers in the Bank in the year 1981. The seniority list of the officers was published on 31.12.1987 under Annexure-1 which indicates the seniority position of the parties. In the seniority list the names of the Petitioner Nos. 1, 2, & 3 find place at Sl. Nos. 6, 5, 2 respectively & the name of the intervening Petitioner H.P. Das, who was impleaded as a party vide Order Dated 30.7.1998 finds place at Sl. No. 13. On the contrary, the names of Opp. Party Nos. 1 to 7 find place at Sl. Nos. 1, 4, 16, 20, 22, 34 & 56 respectively of the gradation list.

4. According to the Petitioners, Government of India in the Ministry of Finance issued a letter dated 16.10.1987 under Annexure-2 in which all the Regional Rural Banks (in short, "R.R. Bs") were requested to fill up the posts of Area Manager/Senior Manager which is a promotional post to be filled up 100% by promotion only from one source & the method to be adopted to effect such promotion was seniority-cum-merit basis. The letter further envisages promotion by seniority with due consideration to minimum merit/fitness. The letter further states that fitness implies that no disciplinary proceeding was either contemplated or pending & the officer concerned has neither been reprimanded nor any adverse remark has been communicated.

As a corollary to the letter under Annexure-2 the Central Government published a further notification under Annexure 3 dated 28.9.1988 prescribing the rule for filling up of the post of Area Manager/Senior Manager. Rule 7(a) of the Rules provides that the promotional post of Area Manager shall be filled 100% by promotion from amongst the confirmed officers of the Bank & the promotion would be on the basis of seniority-cum-merit. Rule 7(b)(ii) provides the eligibility whereas Rule 7(c) provides the mode of selection which states inter alia that interview & assessment of performance report for preceding 3 years is to be taken into account while making selection. It appears after the aforesaid rule came into existence, the Bank undertook the process of recruitment for the post of Area Manager/Senior Manager in the year 1990. Consequent upon such exercise, the Opp. Parties 1 to 7 were promoted to the rank of Area Manager in Annexure-4 dated 13.2.1990. The promotion order under Annexure-4 came to be assailed before this Court in O.J.C. No. 1619 of 1990. This Writ Petition was disposed of by judgment dated 8.2.1993, copy of which has been enclosed as Annexure-5. Relying upon the judgment dated 4.9.1992 rendered in O.J.C. No. 556 of 1989 this Court directed as follows:

We pass similar order here by directing Opp. Parties 1 & 2 to reopen the question of promotion to the post of Area Manager & thereafter to act in accordance with the direction given in the aforesaid O.J.C. Necessary steps as indicated would be taken within a period of three months from today & the orders to be passed pursuant to the fresh recommendation of the Selection Committee shall be in accordance with the direction given in the aforesaid O.J.C.

The aforesaid order was later modified vide Order Dated 25.3.1993 in Misc. Case

No. 1734 of 1993 with the following direction:

While considering the cases afresh, all materials on record will be taken note of by the Selection Committee, & if there was any adverse entry against the Petitioners & the Opp. Parties which had been communicated, those would be considered also, if they relate to a period prior to the one on which the first selection had been made.

5. After the aforesaid orders were passed, the Bank has passed the order under Annexure-6 stating that the Petitioners could not qualify for promotion by the Selection Committee. Challenging the said orders, the Writ Petitioners filed 3 separate Writ Petitions in O.J.C. Nos. 7619, 7624 & 7482 of 1993 which were disposed of by a common Order Dated 6.10.1994 by directing the Bank that the new Selection Committee which has considered the matter pursuant to the order passed in O.J.C. No. 1619 of 1990 should reconsider the matter again on the basis of the interview as well as the assessment of performance & the process was directed to be completed within a period of 3 months. Accordingly, the Bank has reconsidered the matter again pursuant to direction of this Court & passed an order afresh under Annexure-8 dated 23.2.1996 directing promotion of the Opp. Parties 1 to 7 to the rank of Senior Manager/Area Manager. Thus, the Bank has affirmed the earlier order of promotion under Annexure-4 by which the Opp. Parties 1 to 7 were promoted to the rank of Senior Manager/Area Manager. This order under Annexure-8 has been impugned in this writ application by the Petitioners, who were denied promotion to the rank of Area Manager/Senior Manager.

6. The Bank has filed a counter affidavit stating that fresh selection was undertaken pursuant to the direction of this Court passed in O.J.C. Nos. 7619, 7624 & 7482 of 1993 & the Petitioners failed to secure minimum marks & as such the Petitioners were ineligible to be promoted to the promotional post. It is further stated that out of 100 marks, 70 marks were earmarked for appraisal of the performance & 30 marks were allotted for viva-voce. The minimum eligible marks for promotion was 40% i.e. an incumbent in order to be eligible to be promoted is required to secure 28 marks out of 70 marks for appraisal of the performance & 12 marks out of 30 marks allotted for the interview. Accordingly, it is stated that the Petitioners have failed to secure the minimum marks inasmuch as it is stated that the Petitioners have secured less mark than the minimum marks provided for the purpose. Therefore, it is asserted that the action of the Bank in refusing promotion to the Petitioners can not be faulted.

7. The Petitioners have filed a rejoinder to the counter affidavit filed by the Bank indicating therein that no guidelines have been prescribed by the NABARD to enable the Bank to lay down guidelines & fix allocation of marks for promotion. The fixation of minimum marks as indicated in the counter affidavit was without jurisdiction & authority of law. In support of such contention the Petitioners have enclosed a circular issued by the NABARD to the R.R. Bs in which it is stated at column 4 that the guidelines issued on allocation of marks for promotion of staff

to various categories of pots in the Regional Banks by letter dated 11.5.1988 have been withdrawn & kept in abeyance vide letter dated 18.7.1988. By filing an additional counter affidavit the Bank has made an endeavour to contend that Rule 7(c) of the Rules under Annexure-3 which we have noticed earlier provides that while making selection, interview & assessment of performance report for the preceding three years period has to be taken into account.

8. Both the Second Appeals bearing S.A. Nos. 38 & 81 of 1998 have been filed challenging the Judgment & decree passed in T.S. No. 4 of 1989 by the Civil Judge (Jr. Division), Baripada. Both the appeals have arisen out of the suit filed by the intervening Petitioner-Haripada Das. The Plaintiff-Haripada Das had filed the suit for declaration that the seniority list prepared by the Bank on 7.2.1988 be declared illegal. The Trial Court by judgment dated 25.3.1996 decreed the suit on contest against the Bank & held that the seniority list prepared by Bank on 7.12.1988 was illegal & further the Bank was directed to prepare a fresh seniority list of the concerned batch of officers on the basis of the date of joining & length of service. On appeal by the Bank, the Appellate Court modified the judgment of the Trial Court to the extent that the seniority list which was declared illegal was upheld, but the direction for preparation of fresh seniority list on the basis of the date of joining & length of service was set aside. The Appellate Court further directed that the same shall be done in accordance with the direction of this Court passed in O.J.C. No. 1619 of 1990. In view of such order passed by the Appellate Court, the Bank as well as Haripada Das has filed the aforesaid second appeals.

9. The intervening Petitioner-Haripada Das in O.J.C. No. 4403 of 1996 has also filed another Writ Petition in W.P.(C) No. 7848 of 2004 for quashing the seniority list under Annexure-3, which itself states that the said seniority list shall abide by the results of the aforesaid second appeals.

10. We have heard Learned Counsel appearing for the parties at length & also Sri Haripada Das, who has appeared in person. We have also carefully perused the records & materials available on record.

11. After hearing the parties, we are of the considered view that the controversy revolves around the methodology adopted while effecting promotion to the rank of Senior Manager/Area Manager from the rank of officers. At the outset, we may state that in promotion normal principles are either merit-cum-seniority or Seniority-cum-merit. Seniority-cum-merit means that given the minimum necessary merit requisite for efficiency of administration, the senior though less meritorious shall have priority, whereas in the criterion merit-cum-seniority, the merit plays a dominant role. When applying the principle of seniority-cum-merit for the purpose of promotion what is required to be considered is inter se seniority of the employees, who are eligible for consideration. Such seniority is normally determined on the basis of length of service, but as between the employees appointed on the same date & having the same length of service, it is generally determined on the basis of their placement in the select list for

appointment. Such determination of seniority confers certain rights & the principle of seniority-cum-merit gives effect to such right flowing from seniority. Therefore, it cannot be said that in the matter of promotion on the basis of seniority-cum-merit, seniority has no role where the employees eligible for promotion were appointed on the same date & for the same length of service & promotion has to be made on a comparative assessment of merit of such officers. The criterion of seniority-cum-merit in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration, the seniors even though less meritorious shall have priority & a comparative assessment of merit is not required to be made. This principle has been enunciated by the Apex Court in the case of B.V. Sivaiah and Others etc. Vs. K. Addankl Babu and Others etc., .

12. The aforesaid judgment of the Supreme Court has placed reliance on the earlier Judgments of the Apex Court reported in AIR 1976 SC 400, State of Mysore and Another Vs. Syed Mahmood and Others, The State of Mysore and Anr. v. Syed Mahmood and Ors. In N.M. Thomas (supra) it was held in paragraph 38 that with regard to promotion the normal principles are either merit- cum-seniority or seniority-cum-merit. Seniority-cum-merit means that given the minimum necessary merit requisite for efficiency of administration, the senior though the less meritorious shall have priority. This will not violate Articles 14, 16(1) & 16(2). In the case of Sayed Mahmood (supra) in paragraph 4 it was held that where the promotion to the post of seniority-cum-merit, the officer cannot claim promotion as a matter of right by virtue of his seniority alone. If he is found unfit to discharge the duties of the higher post, he may be passed over & an officer junior to him may be promoted.

13. Learned Counsel for the Petitioners has also placed reliance on a judgment rendered by a Division Bench of this Court reported in Vol. Soumendra Nath Das and Others Vs. Rushikulya Gramya Bank and Another, wherein it was held that where the process of promotion is guided by a set of rules, which do not provide for fixation of bench mark, the fixation of bench mark is in violation of the rules governing the field. The Division Bench has placed reliance on the decision of the Supreme Court reported in B.V. Sivaiah and Others etc. Vs. K. Addankl Babu and Others etc., . The Division Bench taking note of the law enunciated by the Apex Court in B.V. Sivaiah's case held that prescription of bench mark was in violation of the promotion policy of the government of India & the rules governing the field.

14. In the aforesaid background let us examine the correctness of the method adopted by the Bank while effecting promotion to the rank of senior Manager/ Area Manager in the touch stone of the law laid down by the Apex Court as well as this Court referred to above. The Bank in its counter has not disputed the position of the Petitioners vis-a-vis the Opp. Parties in the seniority list. The only stand taken in the counter affidavit filed by the Bank was that the Petitioners have failed to secure the minimum marks both in appraisal & also in the

interview. In support of such contention Bank has placed reliance on) the circular under Annexure-A/8 issued by NABARD. A perusal of the circular under Annexure-A/8 does not show that any minimum mark has been prescribed while making assessment of the performance of an individual employee. On the contrary, the Petitioners have brought on record the circular dated 24.2.1996 enclosed to the rejoinder which states at column 4 that the guidelines issued by the NABARD vide its circular dated 11.5.1988 in regard to allocation of marks for promotion of staff to various categories of posts have been withdrawn & kept in abeyance. Confronted with the circular under Annexure-9, the Bank has filed an additional counter affidavit justifying its contention that the bank was correct in fixing the cut off marks in both appraisal & interview & reliance is placed on the circular under Annexure- B/8 issued by the Bank itself. The circular in Annexure- B/8 appears to have been issued by the sponsoring Bank stating that for appraisal there would be 70 marks & for interview there would be 30 marks & thus the total mark comes to 100. The said circular in Annexure-B/8 also nowhere provides a cut off marks much less 40% of the marks to be secured by a candidate for being found fit for promotion to the post of Senior Manager/Area Manager.

15. On an analysis of the aforesaid materials, it does not appear to us that nowhere it is provided that an incumbent is required to secure 40% of the marks earmarked for performance appraisal & for interview. To put it differently, there is no requirement of law that an incumbent in order to be promoted is required to secure minimum 40% of marks in the appraisal system as well as in the interview. Therefore, in our considered view, the Bank has failed to justify the stand taken by it in the counter affidavit that 40% of the marks allotted for appraisal as well as in the interview is the prescription to find an incumbent suitable for promotion. As such, we have no hesitation in coming to the conclusion that the Bank is wholly unjustified in prescribing 40% mark as a cut off mark in both appraisal systems as well as in interview to hold the Petitioner suitable for promotion. We keep it on record that we do not find fault with the marks allotted for performance appraisal & interview but at the same time, we do not approve the action of the Bank in prescribing the minimum qualifying mark for promotion in question. Such method, according to us, is neither prescribed in the rule nor in circular issued by the Bank &, therefore, the Bank has acted in contravention of law in prescribing the minimum qualifying marks for the purpose.

16. Having coming to the aforesaid conclusion that the Petitioners were denied promotion since the Petitioners failed to secure the minimum qualifying marks as fixed by the Bank, we hold that the Bank has considered the entire promotion as per the criterion merit-cum- seniority which the rules do not prescribe. Undisputedly, the criterion for promotion to the post of Senior Manager/Area Manager is seniority- cum-merit which procedure has not been adhered to by the Bank while effecting promotion. Therefore, promotion to the post of Senior Manager/Area Manager postulates that given the minimum necessary merit

requisite for promotion for efficiency of administration, the senior even though less meritorious shall have priority & comparative assessment of merit is not required to be made. Therefore, the entire promotion process undertaken is dehors the rules. Keeping in view the law governing the field which we have noticed in the preceding paragraphs, we have no hesitation in coming to the conclusion that the impugned promotion offends the principle of seniority-cum-merit.

17. Now the time has come to consider as to what relief the Petitioners are entitled. It appears from the record that no disciplinary proceeding was either pending or contemplated against the Petitioners,. Neither the Petitioners were ever reprimanded nor has any adverse remark been conveyed to them as envisaged in the circular under Annexure-2. The reasoning on which the Petitioners were denied promotion was that the Petitioners failed to secure the minimum marks prescribed for the purpose although we have already held otherwise. Since the Bank had considered the case of the Petitioners for promotion, undisputedly the Petitioners were eligible for promotion, the Petitioners were denied promotion w.e.f. 13.2.1990 on which date the Opp. Party Nos. 1 to 7 were promoted under Annexure-4. Despite directions of this Court in O.J.C. No. 1619 of 1990 as well as in a batch of Writ Petitions one of them being O.J.C. No. 7619 of 1993, there was Improper consideration" for which the Petitioners were denied promotion. We have held that the method resorted to in considering the promotion was improper & therefore, no promotion order passed as a consequence of such improper consideration has to be held illegal, which we hereby do. In our considered view, since the Opp. Parties were promoted in pursuance of such improper & illegal consideration, the promotion so made can not be counted for the purpose of seniority. We also can not loss sight of the fact that the Petitioner? were denied promotion for last 20 years & they have been made to suffer by knocking the door of this Court time & again. Normally we would have remitted the matter to the Bank Authorities to reconsider the matter afresh in the light of the judgment rendered by us, but such direction earlier made by this Court has a little impact. In such circumstances & keeping in view the fact that the Petitioners were not found unfit for promotion, but because of the cut off marks, we direct the Bank-Opp. Party Nos. 8 & 9 to accord promotion to the Petitioners as well as the intervening Petitioner w.e.f. 13.2.1990 in the grade of Senior Manager/ Area Manager. We, accordingly, to make room for the Petitioners, modify the impugned order of promotion in Annexure-8 to the extent that the Opp. Party Nos. 4, 5, 6 & 7 who are at serial Nos. 20, 22, 34 & 56 respectively of the seniority list, their promotion is quashed from the date of initial promotion i.e. 13.2.1990. The period of promotion of these Opp. Parties shall not be counted towards their seniority in the promotion grade. Since the Opp. Party Nos. 4, 5, 6 & 7 had worked in the promotional post for all these years, the salary paid to them shall not be recovered. We have partially quashed the order of promotion keeping in view the fact that the Petitioners & Shri H.P. Das are above the Opp. Party Nos. 4, 5, 6, & 7 in the seniority list. Consequently,

the Petitioners are deemed to have been promoted to the post of Senior Manager/ Area Manager w.e.f. 13.2.1990, but the Petitioners shall not be given any arrear salary. However, their pay shall be notionally fixed in the promotional grade w.e.f. 13.2.1990. So far as promotion of Opp. Party Nos. 1 to 3 is concerned, we do not like to disturb their promotion, though we have held that the procedure adopted is incorrect keeping in view the fact that in normal course they would have been otherwise promoted if the principle of seniority-cum-merit is followed in its proper perspective. Therefore, the Bank is directed to undertake & complete the entire exercise within a period of three months from the date of receipt of a copy of this order. The order of promotion under Annexure-8 is modified accordingly. The Writ Petition in O.J.C. No. 4403 of 1996 is allowed to the aforesaid extent.

18. In view of the order passed in O.J.C. No. 4403 of 1996, it is not necessary to examine the correctness of the Judgment & decree impugned in the second appeal Nos. 38 & 81 of 1998. Accordingly, we direct that the results of the second appeals shall abide by the result of the Writ Petition in O.J.C. No. 4403 of 1996. In view of the above, It is not necessary for us to examine the prayer made in W.P.(C) No. 7848 of 2004, which is accordingly, disposed of.

P. Mohanty, J.

19. I agree