

(1989) 11 OHC CK 0010

In the Orissa High Court

Case No : Original Jurisdiction Case No. 1160 of 1989

Shuvansu Kumar Mohanty

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 17-11-1989

Acts Referred:

Constitution of India, 1950 — Article 16, 235

Orissa Superior Judicial Service Rules, 1963 — Rule 15(3), 15(4)

Citation : (1990) 69 CLT 634

Hon'ble Judges : G.B. Patnaik, J;A.K. Padhi, J

Bench : Division Bench

Advocate : Bijan Ray, for the Appellant; Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

G.B. Patnaik, J.—The Petitioner who is a member of the cadre of the Orissa Superior Judicial Service (Senior Branch) and was holding a post in the Selection Grade of the relevant point of time has filed this writ application challenging the promotion of opposite parties 3 and 4 to the Super Time-Scale, though they were admittedly juniors to the Petitioner in the cadre.

2. The Petitioner was holding a post in the Senior Branch of Orissa Superior Judicial Service with effect from 28-4-1978 and he was promoted to a post in the Selection Grade on 1-11-1985. On 1-11-1986, a vacancy arose in the Super Time-Scale of the cadre on superannuation of the senior-most member of the cadre Sri V. Gopalaswamy, at present an Honorable Judge of this Court. On that date Petitioner's position in the cadre of Superior Judicial Service was No. 5. Sri J. M. Mahapatra, who was No. 2 in the cadre voluntarily retired from service with effect from 14th of April, 1986, as he was appointed as a member, State Administrative Tribunal. Sri Mahapatra is also now an Honourable Judge of this Court. After superannuation of Sri V. Gopalaswamy (as he then was), the Petitioner's position in the cadre became No. 3. There were two posts in the Super Time-Scale and of these two posts, one was being held by Sri J. Das, who

has since been elevated to this High Court and who was No. 1 in the cadre. The second man in the cadre was Sri V.V.R. Sharma who was occupying an ex-cadre post having been appointed as the Chairman, Arbitration Tribunal. By notification dated 25th. of September, 1987, said Sri Sharma was also promoted to the Super Time-Scale of the Service with effect from 1-11-1986, but since Shri Sharma was holding an ex-cadre post having been appointed as the Chairman, Arbitration Tribunal, under the Orissa Superior Judicial Service Rules, another man from the cadre was to be promoted. Though the Petitioner was No. 3 in the cadre just next to Sri Sharma, but he was not promoted to the Super Time-Scale and, on the other hand, Sri Bighneswar Mahapatra was promoted to the Super Time-Scale with effect from 1-11-1986 under the self-same notification dated 25th of September, 1987. Sri Mahapatra also on that date was holding an ex-cadre post being the Second Motor Accidents Claims Tribunal. Therefore, Sri Niranjana Sengupta, who was holding a post in the cadre being District and Sessions Judge, Mayurbhanj, was promoted to the Super Time-Scale with effect from 1-11-1986 and the Petitioner was not promoted. Sri Mahapatra and Sri Sengupta were admittedly juniors to the Petitioner and in the meantime have retired. As the juniors of the Petitioner were promoted to the Super Time-Scale under the notification dated 25th. September, 1987 (Annexure-I), the Petitioner made a representation to the High Court but the said representation was rejected. The Petitioner thereafter filed the writ application.

3. The Petitioner asserts that the promotion to Super Time-Scale is usually made on the basis of Seniority and in the past on all occasions officers have been promoted to Super Time-Scale mainly on the basis of Seniority and there has been no deviation at any point of time. It has also been asserted in the writ application that the Petitioner's record in the Superior Judicial Service for more than 15 years is without any blemishes and there has been no communication of any adverse entry to him at any point of time. The two Honourable Judges of this Court had given very good reports in the Character Roll of the Petitioner while the Petitioner had served under them when they were in the Superior Judicial Service. Even the Hon'ble Chief Justice during his inspection of the Petitioner's Court in February, 1987, had been pleased to record that the Petitioner's performance did not require any Comment. In view of such unblemished record of the Petitioner, there was no justifiable reason to ignore his case for promotion to the Super Time-Scale when his juniors were promoted. The Petitioner further asserts that he believes that a confidential inquiry was purportedly made by Hon'ble the Chief Justice and it is on account of some adverse remarks made by Hon'ble Chief Justice in the said report in respect of which the Petitioner had no opportunity to know and meet, the Petitioner was denied the promotion and such uncommunicated confidential report cannot form the basis of the decision to deny promotion to the Petitioner. The Petitioner also has averred in the writ application that under Rule 15(4) of the Orissa Superior Judicial Service Rules, 1963, it is the Governor who has power to pass the order of promotion and since the impugned notification had not been passed by the Governor but by the Court

itself, the said notification is contrary to the Rules and accordingly cannot be sustained.

4. A counter affidavit has been filed on behalf of opposite party No. 1 being sworn to by the Deputy Secretary to the Government of Orissa, Home Department. It has been stated in the said counter affidavit that notwithstanding Rule 15(4) of the Rules, in view of the judgment of the Supreme Court in the case of *State of Assam v. Kusheswar Saikia*, Civil Appeal No. 358 of 1969) disposed of on 17-10-1969, the question of promotion of a District Judge has to be decided by the High Court and consequently, the notification promoting opposite Parties 3 and 4 had been made by the High Court of Orissa.

5. On behalf of the Registrar of the Orissa High Court (opposite party No. 2), a counter affidavit has been filed being sworn to by the Special Officer (Administration). The stand of opposite party No. 2 in the counter affidavit in that mere seniority has never been the criterion far less the sole criterion for promotion to the Super Time-Scale though by coincidence the promote might have been a senior-most officer. With regard to the assertion of so-called confidential inquiry made by the Chief Justice is concerned, it has been averred in the counter affidavit :

... the very purpose of the confidential enquiry might be defeated if the delinquent officer is allowed to take part in the enquiry. Inasmuch as the result of the enquiry weighs with the Court in a just and fair way the Petitioner's knowledge of the result of enquiry is irrelevant. Non-communication of the report of enquiry to the Petitioner does not amount to violation of the principles of natural justice....

It has further been averred that promotion cannot be claimed as a matter of right. With regard to Sub-rule (4) of Rule-15 of the Rules, it has been stated that the said provision is ultra vires Article 235 of the Constitution and therefore, the Court is exercising its power of promoting officers to the Super Time-Scale by informing the State Government. It has also been stated that though the Court has proposed amendment to the Rules, but the amendment has not been carried out but in view of the legal position, the State Government has never objected to the promotional orders being issued by the Court.

6. The Petitioner had made an application, calling for several documents from the custody of opposite party No. 2 and this Court felt that only the Character Rolls of Petitioner and opposite parties 3 and 4 the Full Court decision pursuant to which the notification under Annexure-1 had been issued and the Confidential Inquiry Report, if any, made by the Chief Justice should be produced and accordingly those document have been produced in this proceeding.

7. Mr. Ray, the learned Counsel for the Petitioner, in reiterating his stand taken in the writ application, raises the following contentions in assailing the promotion of opposite parties 3 and 4 who are admittedly juniors to the Petitioner:

(i) Since the Petitioner's allegation that in the past promotion to the post of Super Time-Scale has been made on the basis of seniority and there has been no deviation at any point of time has not been controverted in the counter affidavit, the impugned order promoting opposite parties 3 and 4 ignoring the Petitioner's claim for promotion is vitiated and accordingly must be quashed;

(ii) In view of the unblemished record of the Petitioner, the only document which has weighed in not giving promotion to the Petitioner is the so-called confidential report made by Hon'ble the Chief Justice and admittedly the said report not having been communicated to the Petitioner and the Petitioner not having been given an opportunity to explain, any adverse comment that has been made against the Petitioner could not have been considered for over looking the Petitioner's promotion to the Super Time-Scale and on this ground alone the order of promotion of opposite parties 3 and 4 is liable to be set aside and the Petitioner is entitled to be promoted with effect from 1-11-1986 when the vacancy in the Super Time-Scale occurred.

(iii) The order of promotion under Annexure-1 having been issued by the Court it contravenes Rule 15(4) of the Orissa Superior Judicial Service Rules and the same is accordingly liable to be quashed.

The learned Government Advocate appearing for the Court, on the other hand, contends that promotion to a Super Time-Scale cannot be claimed as a matter of right since under the Rules promotion is not based on seniority alone. The Petitioner having been considered for promotion and having been found to be not of outstanding merit his promotion was denied and, therefore, there has been no constitutional infirmity in not promoting the Petitioner and promoting his juniors (opposite parties 3 and 4). It is also urged that there has been no infirmity in taking into consideration the confidential report made by Hon'ble the Chief Justice while considering the question of promotion merely because the said report had not been communicated to the Petitioner. The learned Government Advocate also contends that even if in the past promotion to the Super Time-Scale has been given usually to the senior-most person in the cadre, but such promotion has been given on a finding that the said person is of outstanding merit and, at any rate, in view of the statutory provision, seniority could not be the basis for promotion to a Super Time-Scale.

The rival submissions made at the Bar require a careful examination of the relevant provisions of the Rules and its interpretation as well as the law laid down by the Supreme Court and this Court on different contention raised by the parties.

8. So far as the first contention of Mr. Ray, the learned Counsel for the Petitioner, is concerned, it depends upon an interpretation of Rule 15(3) of the Rules which deals with promotion to Super Time-Scale as well as to the Selection Grade. Rule 15(3)(i) and (ii) are quoted herein below in extenso:

15.(3)(i) No officer shall be promoted to the Super Time-Scale grade unless he is

considered to be of outstanding merit.

(ii) Promotion to posts in the Selection Grade in the Service shall be based on seniority, subject to the elimination of the unfit.

The aforesaid provisions unequivocally indicate that the criterion for promotion to a Super Time-Scale is different from the criterion for promotion to a Selection Grade post. So far as promotion to the post in Selection Grade in the Service is concerned, the same has to be made on the basis of seniority subject to the elimination of unfit and thus seniority is of paramount consideration unless the senior-most is held to be unfit. But so far as promotion to a post in the Super Time-Scale grade is concerned, an officer shall not be promoted unless he is considered to be of outstanding merit. Therefore, a positive assessment of his merit has to be made and unless the authority finds him to be of outstanding merit, he is not entitled to be promoted. Rather, there is an embargo on the authority concerned not to promote an officer unless the concerned officer is considered to be of outstanding merit. This being the legal position, the Petitioner cannot claim to be promoted to the Super Time-Scale merely on the basis of his seniority. Consequently, even if there has been no denial in the counter affidavit to the fact that in the past senior persons have been promoted to the Super Time-Scale, yet in view of the statutory rule it must be held that those senior persons had been held to be of outstanding merit and, therefore, they had been promoted. A Government servant has no fundamental right to be promoted to a higher post or scale. But the matter of promotion is undoubtedly one relating to employment within the meaning of Article 16 of the Constitution. Equality of opportunity in matter of promotion enshrined in Article 16 means considering the cases of all employees eligible for promotion. Since promotion under the Rules under consideration to a post in the Super Time-Scale cannot be claimed as a matter of right on the basis of seniority and in view of the fact that the Petitioner's case for promotion was also considered, we do not find any infirmity in the same nor are we in a position to hold that the provisions of Article 16 of the Constitution have been infringed in the present case. In this view of the matter, the first submission of Mr. Ray appearing for the Petitioner fails and is accordingly rejected.

9. Coming to the second submission of the learned Counsel for the Petitioner, it depends upon the question as to whether while considering the question of promotion any uncommunicated adverse remark against the Petitioner had been considered and if so, whether such consideration of an uncommunicated adverse remark vitiates the order of promotion, or not. The Minutes of the Meeting of the Full Court held on 18-9-1987 were produced before us, but the said Minutes do not indicate as to what documents were considered by the Court while promoting opposite parties 3 and 4 and while coming to the conclusion that the Petitioner was found not suitable for promotion to the Super Time-Scale. Usually, when the question of promotion of a Government servant is considered, the performance of the said Government servant as reflected through the entries in the Character

Roll is scrutinized by the concerned authority. Even though it is not permissible for this Court while exercising jurisdiction under Article 226 of the Constitution to assess individual merits of the persons who were promoted vis-a-vis the person who was not promoted, and it is not possible for this Court to find out what particular weight had been given to the merit of a selected officer in comparison with the merit and seniority of senior officer who had not been promoted, yet in view of the assertions made in the writ application, we have perused the Character Rolls of the Petitioner and opposite parties 3 and 4 for ten years prior to the date of promotion of opposite parties 3 and 4. From 1976 till 1975 the Petitioner has been assessed to be a "good officer". For 1979-80 while he was serving under the Government in the Law Department the entry has been made to the effect that his performance is "quite satisfactory". For 1981, while he was also under the State Government the Chief Secretary who was the countersigning officer has rated him to be a "very good officer" and the said remark has been approved by the Court. For 1981-82, while he was still under the Government, the remark was that his performance was "satisfactory". In 1982-83 while the Petitioner was working as a Member. Sales Tax Tribunal, under the Government of Orissa in the Finance Department, the remark in the Character Roll has been that his performance has been "excellent". For 1983-84 also while he was working as Chairman. Sales Tax Tribunal, under the Government, the remark has been that his performance was "satisfactory". Then the Petitioner was posted as District and Sessions Judge, Sambalpur and for the period 29-6-1984 to 31-12-1985, the Court has assessed him to be a "good officer". Thereafter there has been no entry in: the Petitioner's character roll for the period 1-1-1986 to 31-12-1986 during which period, he was continuing as District and Sessions Judge, Sambalpur.

So far as opposite party No. 3 is concerned, he has been rated as a "good officer". He has been rated as "above average" which is obviously a rank between "good" and "average" for 1976-77. From 26-9-1977 till 11-9-1978 he had worked as Secretary to a Commission of Inquiry and the said Commission of Inquiry has remarked that his zeal to work is somewhat hampered by his delicate health and administrative ability and power of taking responsibility are of average order and his official conduct is very good". For 1979 as well as for 1980 he has been rated as a "good officer by the Court. But for the years 1981 and 1982 he has been rated as an "average officer" by the Court. There is no entry for the year 1983 but for the period 1-1-1984 to 16-7-1985, while he was holding the post of District and Sessions Judge, he has been rated as a "good officer". For 1986-87 while he was working under the Government in the Transport Department, he has been rated as a "very good" officer and for the period 13-12-1986 to 31-3-1987, even though the period is less than four months, yet the remark in the Character Roll is that he is a "good officer".

So far as opposite party No. 4 is concerned, for 1976-77 and 1978 he has been rated as an "average officer" by the Court. For 1979 while he was holding the post of Additional District Judge, Berhampur and then at Cuttack, he has been

rated as an "average officer" by the Court. For the year 1980 while he was holding the post of Inspecting District Judge under the High Court of Orissa,

"he has been rated as a "good officer" by the then Chief Justice. Then for the year 1981-82 while he was holding the post of District and Sessions Judge, Balasore, he has been rated as an "average officer". For the year 1983, he has also been rated as an "average officer" by the Court. From 7-10-1983 till 31-10-1984. he had worked as Second Motor Accidents Claims Tribunal under the Government in the Transport Department. For the said period, no grading has been done but it has been entered in the Character Roll that he was "sincere and conscientious". For the period 31-10-1984 to 31-3-1985 while he was still continuing under the Transport Department, the remark is that he was an "able judicial officer". For the period 25-6-1985 to 14-2-1986, while he was still continuing as the Motor Accidents Claims Tribunal under the Transport Department, the remark in the Character Roll was a fairly competent officer with good background in law". There has been no further entry in the Character Roll.

Subsequent to the promotion of opposite parties 3 and 4 Under Annexure-1, the Petitioner was posted as the Presiding Officer, State Education Tribunal, under the Education Department of the State Government and his Character Roll for the period 12-4-1987 to 31-3-1988 which is available on record indicates that he has been rated to be a "very good officer". For the period 1-4-1988 till 31-3-1989 he has also been rated as a "very good officer". Of course the Character Roll for the subsequent period is of no consequence in the present case.

This being the position of the entries in the Character Rolls of the Petitioner and opposite parties 3 and 4 it is difficult to sustain that on the basis of the entries in the Character Roll, opposite parties 3 and 4 could be held to be of outstanding merit and Petitioner could not be held to be of outstanding merit. So far as the Petitioner is concerned he has been rated to be "very good" for 1979-80 and 1980-81 and than "excellent" in 1982-83 and 1983-84, whereas opposite parties 3 and 4 have been rated mostly as "average officer" or "good officer". In the aforesaid premises, the Petitioner's assertion that the report of the Confidential Inquiry conducted by the Chief Justice had weighed in considering the case of promotion assumes great significance. In the counter affidavit filed by opposite party No. 2 it has not been denied that the so-called confidential report has not at and been considered. On the other hand, a stand has been taken that the Court was justified in taking that report into consideration particularly when the report is by the Chief of the Judiciary of the State. The said report of Hon"ble the Chief Justice was also produced before us and we find that on the basis of an inspection after receiving some anonymous allegation against the Petitioner as District and Sessions Judge, Sambalpur, on 9-2-1987 and 10-2-1987 a confidential report had been made by the Hon"ble Chief Justice on 19-2-1987. A perusal of the report would indicate that most of the allegations were found not to have been proved.

Though on verifying the log book of the staff car it was found that on three dates in December a small run varying from 10 to 12 kilometers per day was shown to be official, it is not known as to what official work the Petitioner had at Bhubaneswar. Since the report is of a confidential nature and had not been given to the Petitioner, we do not think it appropriate to discuss the findings in the said report in detail in this judgment except quoting the recommendation of the Hon"ble Chief Justice. The Hon"ble Chief Justice had written:

... Since the officer is pretty senior" and his past records are perhaps unblemished, I would recommend for issuing a warning only for the irregularities in quest

On consideration of the report in question, we are not in a position to hold that there was anything in the said report so as to consider the Petitioner not to be of outstanding merit under Rule 15(3)(i) of the Rules. However, since it is not for this Court to assess the merit of the persons concerned, and in view of the entries made in the Confidential Character Rolls of the Petitioner and opposite parties 3 and 4 which we have already extracted, and in view of the assertions made in the writ application as well as in the counter affidavit, indicating that the confidential report of the Hon"ble Chief Justice had been considered while deciding the question of promotion, the most important question which arises for our consideration is whether the so called confidential report not Being communicated to the Petitioner can at all be considered and form the basis of the conclusion denying promotion to the Petitioner.

10. Such a question came up for consideration before the Supreme Court in the case of Vijay Kumar, I.A.S. Vs. State of Maharashtra and Others, . In that case Senior Time-Scale of pay to the Appellant Vijay Kumar who was a Member of the Indian Administrative Service had been denied on the basis of a confidential report. The Tribunal had come to the conclusion that there was nothing wrong in relying upon the confidential report to deny benefit to the Appellant. Negating the said conclusion, the Supreme Court held:

... It is a settled principle that an uncommunicated adverse report should not form the foundation to deny benefits to a Government servant when similar benefits are extended to his juniors.

...

The denial of Senior Time-scale to the Appellant, in any event is therefore wholly unjustified and arbitrary....

In the case of Dillip Kumar v. State of M.P. and Ors. 1984 (1) S.L.R. 58, it has been held that when the case of a civil servant is considered for promotion, only those adverse remarks are considered which are communicated to the civil servant so that he had an opportunity of making representation explaining those remarks and it is also necessary to place before the authority the favourable remarks or appreciation of services. In the case of Gurdial Singh Fijji Vs. State of

Punjab and Others, , the law on this aspect was laid down in the following terms:

The principle is well-settled that in accordance with the rules of natural justice, an adverse report in a confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstances leading to the report. Such an opportunity is not an empty formality, its object, partially, being to enable the superior authorities to decide on a consideration of the explanation offered by the person concerned, whether the adverse report is justified....

This question had come up before this Court recently in the case of Ramesh Chandra Das v. State of Orissa represented by The Secretary, Law Department, Bhubaneswar and Ors. 67 (1969) C.L.T. 235, wherein an order of compulsory retirement had been assailed. In that case, the adverse entries in the Character Roll had been communicated and the employee had made a representation, but the representation was pending consideration for disposal. It was held that the adverse entries could not have been relied upon by the competent authority in forming the opinion on the question of premature retirement and the said opinion was not sustainable in law.

11. This being the position of law, and in the present case, admittedly the so-called Confidential Report of the Hon"ble Chief Justice dated 19-2-1987 not having been communicated to the Petitioner, even as yet, and admittedly that report having been taken into consideration while denying promotion to the Petitioner, it must be held that the case of the Petitioner for promotion has not been considered in a just and fair way and on the other hand, his case has been disposed of contrary to the principles laid down in Gurdial Singh Fijji" s case, referred to supra. The learned Government Advocate appearing for the Registrar of this Court (Opposite party No. 2) very fairly states that in view of the counter affidavit indicating that the confidential report of the Hon"ble Chief Justice which admittedly had not been communicated to the Petitioner, was taken into consideration while denying promotion to the Petitioner and in view of the law laid down by the Supreme Court, in Vijay Kumar, I.A.S. Vs. State of Maharashtra and Others, , referred to, supra, it would be difficult for him to support the action denying promotion to the Petitioner in the Super Time-Scale. In our considered opinion, therefore, the Petitioner's promotion to the Super Time-Scale was illegally overlooked and his juniors (opposite parties 3 and 4) were promoted to the said Super Time-Scale. The Petitioner was entitled to be promoted to the Super Time-Scale with effect from 1-11-1986 when the vacancy in the said scale occurred and with effect from which date opposite parties 3 and 4 have been promoted. Since opposite parties 3 and 4 have in the meantime superannuated from service, the question of quashing their promotion does not arise. The second contention of Mr. Ray for the Petitioner is accordingly sustained.

12. In view of our conclusion on the second contention, we do not think it necessary to consider the third contention raised by Mr. Ray for the Petitioner.

13. In the net result, therefore, we direct that the Petitioner be given promotion to the Super. Time-Scale with effect from 1-11-1986, the date on which his juniors (opposite parties 3 and 4) had been promoted and the Petitioner would be given all consequential benefits as per rules regulating his service. The writ application is accordingly allowed, but in the circumstances, without any order as to costs.

Smt. A.K. Padhi, J.

I agree.

Writ application allowed.