
(2009) 01 OHC CK 0026

In the Orissa High Court

Sri Subash Chandra Das

APPELLANT

Vs

Registrar (Amn.), Orissa High Court and Others

RESPONDENT

Date of Decision : 22-01-2009

Acts Referred:

Citation : (2009) 107 CLT 601 : (2009) 1 OLR 671 Supp

Hon'ble Judges : B.S. Chauhan, C.J.; B.N. Mahapatra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

B.S. Chauhan, C.J.—This Writ Petition has been filed for issuing direction to the Respondents to give promotion to the Petitioner as Chief Judicial Magistrate/Addl. District Judge and District Judge with effect from the date Opposite Party Nos. 4 and 5 had been promoted on the said posts i.e. C.J.M.; Ad hoc A.D.J. under the special scheme; and Regular A.D.J. in the senior branch of Orissa Superior Judicial Services with all consequential benefits.

2. The facts and circumstances giving rise to the case are that Petitioner was appointed as Munsif on probation vide notification dated 2.6.1980 and confined on the said post vide notification dated 26.7.1985. Petitioner claims to have been promoted vide Order Dated 30.1.1989 as O.J.S. Class-I (Jr.) and subsequently as Subordinate Judge on 10.8.1990. Petitioner was put under suspension during the Departmental Proceedings between 1996-1998 and during this period large number of persons junior to him had been promoted as Chief Judicial Magistrates ignoring the claim of the Petitioner. On the representation made by the Petitioner, he was also promoted as Chief Judicial Magistrate vide Order Dated 1.6.2000. Since then, Petitioner had been making representations to promote him as C.J.M. with retrospective effect i.e. from the date when Respondent Nos. 4 and 5, who had been juniors to him were given promotion and also grant consequential benefits of promotion on higher posts accordingly. As no such reliefs had been granted, Petitioner has filed this present Writ Petition.

3. The Petitioner in person submitted that he had been promoted as Subordinate Judge vide Order Dated 10.8.1990 (Annex-2) and during his suspension between 1996-98, large number of persons had been promoted as Chief Judicial Magistrates ignoring his claim. Therefore, he was entitled to be appointed as Chief Judicial Magistrate from the date his juniors had been appointed/promoted; he had been a victim of malice of three District Judges under whom he had served as they had been asking the Petitioner to do many illegal things which he could not do, thus he failed to oblige them. They had been very vindictive having grudge against the Petitioner. Therefore, his CCRs after 1995-96 had been spoiled by the respective District Judges. Further, Petitioner claims that once he has been promoted as Chief Judicial Magistrate, even if there was any adverse entry in his CCR, the same had to be ignored and he could have been promoted as Ad hoc Addl. District Judge in Fast Track Court; and subsequently as District Judge. Hence the petition deserves to be allowed.

4. On the other hand, Mr. Khuntia, Learned Addl. Government Advocate opposed the petition contending that earlier matter was heard on 22.12.2008 when the Petitioner was represented by Sri Dora, Learned Senior Counsel of this Court. The entire service record was summoned to examine as to whether the Petitioner was entitled for promotion on the basis of his service record. The Service Record was examined in the presence of his Counsel and the case was adjourned on the request of his Counsel to prepare the case in the light of adverse entries in his CCRs. When the matter was listed on 24.12.2008, the Petitioner appeared in person and sought adjournment as he wanted to argue his case personally. It is submitted by Mr. Khuntia that the service record of the Petitioner was not found to be satisfactory, therefore, question of granting promotion to the Petitioner could not arise. The Petitioner had not been promoted in substantive capacity even as C.J.M. He had been given promotion to the Orissa Superior Judicial Service on ad hoc arrangement. On the basis of the performance on the post of Chief Judicial Magistrate, Respondent Nos. 4 and 5, who had been promoted in substantive capacity were given promotion to the post of Addl. District Judges first in the Fast Track Courts, as officiating and subsequently in regular cadre on 4.8.2003. The Petitioner cannot be permitted to claim relief in such a vague manner without substantiating his averments. Petitioner filed the additional affidavit on 20.01.2009 making scandalous allegations of mala fides against several superior officers. The said allegations cannot be taken into consideration as none of the said Officers has been impleaded as a Respondent herein. More so, all these allegations are after thought. The Petitioner has already been given compulsory retirement in the year 2007. For that he has also filed a Writ Petition. The petition is liable to be dismissed.

5. We have considered the rival contentions made by the Learned Counsel for the parties and perused the record.

6. It is evident from the record that Petitioner had been appointed on probation vide notification dated 2.6.1908 and confirmed on the said post vide Order Dated

26.7.1985. The Petitioner was promoted vide Order Dated 30.1.1989 (Annex-1) to officiate temporarily in the cadre of O.J.S. Class-I (Jr.). The Order Dated 10.8.1990 (Annex-2) also revealed the same factual position that he was temporarily promoted to officiate in O.J.S. Class-I (Jr.) . When he raised the grievance of his non-promotion on the post of Chief Judicial Magistrate after being exonerated in the Departmental Proceedings in 2000 vide representation dated 5.5.1999 he was promoted as Chief Judicial Magistrate vide Order Dated 1.6.2000 temporarily to officiate in the Junior Branch of the Orissa Superior Judicial Service with effect from the date he joined the post in the cadre. Subsequent thereto, Petitioner made several representations for promotion to the post of Chief Judicial Magistrate with retrospective effect i.e. from the date when Respondent Nos. 4 and 5, who had been juniors to him had been promoted and to grant promotion subsequently on higher posts accordingly.

7. Admittedly, today the Petitioner is not in service as he has been given compulsory retirement. There is no order granting promotion to the Petitioner on the post of C.J.M. in substantive capacity. The promotion talks of temporarily to officiate. The Petitioner in person is not able to satisfy the Court as to under what circumstances he could claim promotion on higher post without having been promoted substantively on the lower post or he could claim parity with Respondent Nos. 4 and 5, who stood promoted in substantive capacity long back. Petitioner never raised any grievance about his temporary promotion. He joined the post without protest.

8. A temporary promotee does not have right to the post because by its very nature, it is a stop gap arrangement until a regular appointment/ promotion is made. Therefore, in the sense, officiating appointee/ promotee holds a very precarious tenure and, therefore, becomes liable to be reverted to the post he substantively holds to make room for a regular appointee/promotee, pending which his appointment/ promotion was resorted to. Such appointment/promotion is made for a special or particular purpose and it continues till that purpose is over. He is liable to be reverted on the availability of a person holding a lien on the post i.e. selection of a regular incumbent or other exigencies of public service. Such an incumbent carries only a limited right and cannot stake any claim to the post. (Vide S.P. Vasudeva Vs. State of Haryana and Others, ; Kuldeep Chand Sharma and Anr. v. Delhi Administration and Anr. 1978 (2) SLR 379 ; and S.K. Verma and Others Vs. State of Punjab and Others, .

9. In State of Orissa and Another Vs. Dr. Pyari Mohan Misra, the Hon''ble Apex Court upheld the reversion of the officer therein and held that reversion was justified as he was holding the higher grade post on ad hoc basis and his mere prolongation on the said post would not ripen into a regular service to claim substantive status.

10. In Ramakant Shripad Sinai Advalpalkar Vs. Union of India and others, , the Apex Court, explaining the concept of ad hocism, observed as under:

The person continues to hold his substantive lower post and discharges the duty of a higher post, essentially is a stop-gap arrangement.

11. Similar view has been reiterated in *Selvaraj Vs. Lt. Governor of Island, Port Blair and Others*, ; *A.K. Sarma and Another Vs. Union of India* Another, ; and *Sreedam Chandra Ghosh Vs. State of Assam and others*, , observing that such an incumbent can claim, at the most, the salary of the higher post and nothing beyond it.

12. In *State of Uttar Pradesh and Another Vs. Kaushal Kishore Shukla*, , the Apex Court has categorically held as under:

Under the service jurisprudence a temporary employee has no right to hold the post and his services are liable to be terminated in accordance with the relevant service rules and the terms of contract of service.

13. The Supreme Court in *Parshotam Lal Dhingra Vs. Union of India (UOI)*, , has held that "A person can be said to acquire a lien on a post only when he has been confirmed and made permanent on that post and not earlier" and further held that "a Government servant holding a post temporarily does not have any right to hold the said post."

14. A temporary employee has no right to hold the post and his services are liable to be terminated without assigning any reason either under the, terms of the contract providing for such termination or under the relevant statutory rules regulating the terms and conditions of temporary servants. Similarly, in *Ravindra Kumar Misra Vs. U.P. State Handloom Corpn. Ltd. and Another*, ; *Triveni Shankar Saxena Vs. State of U.P. and others*, ; *Commissioner, Food and Civil Supplies, Lucknow, U.P. and Another Vs. Prakash Chandra Saxena and Another*, ; *Ram Chandra Tripathi Vs. U.P. Public Services Tribunal IV and Others*, ; *Madhya Pradesh Hasta Shilpa Vikas Nigam Ltd. Vs. Devendra Kumar Jain and Others*, ; and *Kaushal Kishore Shukla (supra)*, the Apex Court has categorically held that incumbent to a post who has been given appointment on temporary basis, has no right to hold the post and he is not entitled for any opportunity of hearing before his services are dispensed with as his termination does, not amount to forfeiture of any legal right.

15. In *Ravi S. Naik and Sanjay Bandekar Vs. Union of India and others*, , the Hon"ble Apex Court held that in such cases even principles of natural justice do not require to be observed.

16. In *Life Insurance Corporation of India and Another Vs. Raghavendra Seshagiri Rao Kulkarni*, , the Apex Court explained the difference of a permanent employee and an employee holding the post on probation and held that the services of a probationer cannot be equated with that of a permanent employee who, on account of his status, is entitled to be retained in service and his services cannot be terminated abruptly without any notice or plausible cause. "This is based on the principle that a substantive appointment to a permanent

post in a public service confers substantive right to the post and the person appointed on that post becomes entitled to have lien on that post." However, interpreting/enforcing the terms of appointment, which provided for discharge of the said probationer from service at any time during the period of probation or extended period of probation, without any notice or without assigning any reason, the Court held that as his termination was in consonance with the terms and conditions of his appointment letter, he cannot be heard raising the said grievance.

17. In *State of Punjab and others Vs. Surinder Kumar and others*, , the Apex Court has held that the Court must seek the adherence to the said terms and conditions of the appointment and there is no reason why terms and conditions incorporated in the appointment letter cannot be enforced in a contract of service. A similar view has been reiterated by the Apex Court in *Hindustan Education Society and another Vs. Sk. Kaleem Sk. Gulam Nabi and others*, ; *Avinash Nagra Vs. Navodaya Vidyalaya Samiti and Others*, ; *Chandra Deo Gautam Vs. State of U.P. and Others*, ; *Nazira Begum Lashkar and Ors. v. State of Assam* AIR 2001 SC 102 ; *Dhananjay Vs. Chief Executive Officer, Zila Parishad, Jalna*, ; *P.D. Aggarwal and Others Vs. State of U.P. and Others*, ; *Ramakant Shripad Sinai Advalpalkar Vs. Union of India and others*, ; *Karnataka State Private College Stop-Gap Lecturers Association Vs. State of Karnataka and Others*, ; *Punjab State Electricity Board and Another Vs. Baldev Singh*, ; 2001 (2) AWC 1291 (SC); *Union of India (UOI) and Others Vs. A.P. Bajpai and Others*, ; *Dhananjay Vs. Chief Executive Officer, Zila Parishad, Jalna*, ; and *Dr. (Mrs.) Chanchal Goyal Vs. State of Rajasthan*, .

18. Similar view has been reiterated by the Hon'ble Apex Court in *Manager (Now Regional Director) R.B.I. Vs. Gopinath Sharma and Another*, ; *Surendra Prasad Tewari Vs. Uttar Pradesh Rajya Krishi Utpadan Mandi Parishad and Others*, and *Indian Drugs and Pharmaceuticals Ltd. Vs. Workman, Indian Drugs and Pharmaceuticals Ltd.*, .

19. Even if an employee continued for a long time, that does not crystallize into any enforceable right nor such an employee can claim any lien over the said post unless he stands regularized. (Vide *Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another*, ; *J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc.*, ; *State of U.P. and Others Vs. Dr. Deep Narain Tripathi and Others*, ; and *Union of India (UOI) and Others Vs. Harish Balkrishna Mahajan*,).

20. We do not find any force in the submission made by the Petitioner as his service record was very good and he should have been promoted in substantive capacity as Chief Judicial Magistrate with effect from the date his junior had been promoted on the said post and consequential benefits of promotion should also have been made.

21. We have examined the Service Record of the Petitioner in presence of his

Counsel and his CCRs are full of adverse entries. The same are as under:

1981: Knowledge of law - needs improvement. General reputation - needs improvement.

1982 : Knowledge of law - needs improvement. The officer lacks judicial out look. He is hasty and some times his Judgments are whimsical.

1983 : Knowledge of law - needs improvement.

1984 : He should exercise judicial discretion properly. Knowledge of law - needs improvement.

1988 : Should maintain punctuality.

1990 : Knowledge of law - needs improvement.

1991 : Out turn - Low. He should work hard and improve his out turn.

1992 : Should work hard and try to be industrious to cope with work.

1993 : Knowledge of law - needs improvement.

1994 : Knowledge of law - needs improvement. General reputation - Bad. Assessed as a - poor officer.

1995 : Slow in work.

1996 : Work - needs improvement. Very strong rumour exist touching his integrity. Integrity - not free from doubt. General reputation poor. Assessed as a - poor officer

1996-98 : Under suspension/reinstated on 27.7.1998

2000 : Quality of Judgment- below average. Quality of work - below standard. Integrity - Doubtful. (reasons recorded for giving adverse entry regarding doubtful integrity). Assessed as a - poor officer.

2005 : Business of Court - Not good. Discussion of law - poor Assessment of the officer - poor Reputation - poor. Integrity - not good. (In the criminal cases relating to G.R. Case No. 151 of 2005, G.R. Case No. 245 of 1994 and 2(a) CC Case No. 57 of 1993, the Officer while posted at Boudh on 5.9.2005 and 6.9.2005 advanced the case and granted bail to the accused knowingly well that the Addl. Sessions Judge, Boudh has rejected the Bail. In that cases the accused persons absconded for a long time. 2006 : Conduct of business of the Court - He does no judicial work. General reputation - Not good. Punctuality - Not punctual nor regular. Assessed as a - poor officer.

22. Promotion to the Orissa Superior Judicial Service has to be made under Rule-9 of the Superior Judicial Service Rules, 1963 which reads as under:

9(1). Whenever a vacancy in the Senior Branch of the service is decided to be filled up by promotion the Government shall fill up the same after due

consideration of the recommendation of the High Court in accordance with Sub-rule (2).

(2). 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.

23. The ordinary and general signification of "suitable" is "likely to suit," "capable of suiting", or "adopted". This is by no means equivalent to "adequate". That which is adequate must be suitable, but that which is suitable may not be adequate.

24. According to the definitions in Webster's and the Dictionaries, "suitable" means fitting, capable of suiting, or appropriate. The test of the suitability of an article for a certain purpose is, not whether it is commonly used therefore, but whether it possesses actual, practical, commercial fitness for that purpose.

25. In *Shri Parvez Qadir Vs. Union of India (UOI)*, ; the Apex Court considered the meaning of word "suitable" and observed that it did not require a definition because any man of experience would know who is suitable. However, each case has to be viewed in the context in which the word "suitability" or "suitable" is used, the object of the enactment and the purpose sought to be achieved. The word "suitability" itself is correlated with the object of recruitment, viz., that a person has to be considered suitable for appointment to a service which itself furnishes the norm that he is considered suitable having regard to his past service. The criteria laid down in the rules provides sufficient indication as to the norms applicable for adjudging suitability. The rules applicable therein provided for determination of suitability on the basis of his performance in the service. Therefore, it was held that his service record i.e. ACR's would reveal his performance in the departmental service. While deciding the said case, the Court placed reliance on its earlier Judgments in *S.P. Jinadathappa v. R.P. Sharma and Ors.* AIR 1961 SC 1523; *Harakchand Ratanchand Banthia and Others Vs. Union of India (UOI) and Others*, ; and *Shri Janki Prasad Parimoo and Others Vs. State of Jammu and Kashmir and Others*, .

26. In *Valsala Kumari Devi M. Vs. Director, Higher Secondary Education and Others*, , the Apex Court held as under:

The expression "suitability" means that a person to be appointed shall be legally eligible and "eligible" should be taken to mean "fit to be chosen".

27. Therefore, eligibility includes "suitability". A person is "suitable" means "fit" for the said particular post in all respects.

Whether a person is suitable for a particular post would depend upon the nature of the post and essential qualities of the person seeking appointment on that post.

28. In view of the adverse entries referred to above, it cannot be held that

Petitioner could be found suitable for promotion on the higher post. Adverse entry i.e. "knowledge of law - needs improvement" has been recorded throughout his career. Thus, in view of the above, if we examine the Service Record of the Petitioner as it exist, we do not find any fault with Respondent Authorities in not promoting the Petitioner.

29. During the course of argument on 20.1.2009, Petitioner has submitted an additional affidavit running to 215 pages. Most of the documents contained therein are in respect of incidents which occurred subsequent to filing of this Writ Petition and culminating in compulsory retirement of the Petitioner. Most of those documents are not relevant for the purpose of deciding this Writ Petition. In the additional affidavit several allegations have been made against three consecutive District Judges named therein submitting that as the Petitioner could not satisfy their illegal demands, they had spoiled the career of the Petitioner by making adverse entries. Therefore, the same had to be ignored.

30. It is settled legal proposition that in case allegations of mala fide are made against any person he is to be impleaded by name, otherwise the allegations cannot be considered. (Vide State of Bihar and Another Vs. P.P. Sharma, IAS and Another, ; Dr. J.N. Banavalikar Vs. Municipal Corporation of Delhi and another, ; All India State Bank Officers' Federation and Others Vs. Union of India (UOI) and Others, ; and I.K. Mishra Vs. Union of India and Others, .)

31. In Federation of Railway Officers Association and Others Vs. Union of India (UOI), , the Apex Court has held that the allegation of mala fide has to be specifically made and the person against whom such allegations are made has to be impleaded and in his absence such allegations cannot be taken into consideration.

In the instant case none of the District Judges against whom allegations have been made has been impleaded for the reasons best known to the Petitioner.

32. Even if the submission made by the Petitioner that adverse entries made in the CCRs of the Petitioner from 1995-2000 be ignored is accepted, the entries made in his CCRs prior to and after the said period are also not satisfactory. The submissions made by the Petitioner that he had been promoted from time to time, therefore the earlier adverse entries had to be ignored as the same stood washed of, is preposterous, for the simple reason that Petitioner had never been promoted in substantive capacity as Chief Judicial Magistrate. The temporary promotion given to the Petitioner did not confer any legal right upon him to hold the post.

33. In fact, the Petitioner does not even know as on what date the cause of action had arisen; when the person juniors to him had been promoted as Chief Judicial Magistrates; and under which order the promotion to his juniors for first track Courts had been made; and when those Respondents had been promoted in substantive capacity as Addl. District Judges. Petitioner had shown total ignorance about these developments and insisted that he was entitled to get the

reliefs claimed and for information sought by the Court regarding the dates of appointment and promotion of the said Respondent Nos. 4 and 5, the Court should find out from its record as he was not aware about the dates of their promotion. He expressed his inability to inform the Court as what were the Rules applicable in this case.

34. The Petitioner had been a Judicial Officer for more than twenty seven years, but he was not in a position to say what are the rules which governed his services, or the rules under which he was seeking promotion. Most of the time, he had been submitting about his compulsory retirement which is not the subject matter of this Writ Petition, rather a subsequent development. No plea had ever been made initially by the Petitioner about any vindictiveness or malice on the part of any of the District Judges against him. The petition remained pending before this Court for about more than four and half years. First time, allegations had been made by filing additional affidavit in the Court on 20.1.2009. None of the said District Judges is impleaded as Respondent. They had retired long back. No explanation could be furnished by the Petitioner as to why these allegations had not been made in the Writ Petition. Petitioner admitted in his additional affidavit dated 20.01.2009 that he had met certain illegal demands of the District Judges within his capacity. All these allegations appear to be after thought. Had there been some substances in these allegations, Petitioner could have brought to the notice of this Court earlier and could have taken all these grounds in the Writ Petition.

35. Petitioner accepted his promotion on the post of C.J.M. temporarily for officiating without any protest. We fail to understand how Petitioner could claim parity with unequals, i.e. Respondent Nos. 4 and 5, who had been promoted in substantive capacity. In case Petitioner had not been promoted as C.J.M. in substantive capacity, question of his promotion on next higher post could not arise as service record remained far from being satisfactory.

36. In view of the above, as the Service Record of the Petitioner had not been satisfactory, we are of the considered view that no relief can be granted to the Petitioner and accordingly the petition is dismissed.

B.N. Mahapatra, J.

I agree.