
(2008) 08 OHC CK 0150

In the Orissa High Court

Case No : Writ Petition (C) No. 8864 of 2007

State of Orissa and Others

APPELLANT

Vs

Akshaya Kumar Pati

RESPONDENT

Date of Decision : 05-08-2008

Acts Referred:

Citation : (2008) 08 OHC CK 0150

Hon'ble Judges : L. Mohapatra, J;I. Mahanty, J

Bench : Division Bench

Advocate : R.K. Rath, N.R. Rout and P. Rath, for the Respondent

Judgement

L. Mohapatra, J.—State has filed this writ application challenging the legality of the order dated 18.1.2007 passed by the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 162 (C) of 2007.

2. The case of the applicant-opposite party before the Tribunal is that he entered into government service on 12.4.1974 and was subsequently promoted to the post of Sub-Registrar on 4.4.1997 and was confirmed in the said post with effect from 5.4.1999. On 12.6.2006 a Departmental Promotion Committee (in short, "DPC") met for consideration of promotion of the applicant-opposite party and similarly placed officers to the rank of D.S.R. and the case of the applicant-opposite party was recommended by the Committee for such promotion. After such recommendation was made by the DPC., a disciplinary proceeding was started against the applicant-opposite party on 2.8.2006 and in view of such disciplinary proceeding, his promotion to the post of D.S.R. was withheld. Challenging such action of the Petitioners, the applicant-opposite party had approached the Orissa Administrative Tribunal for a direction to promote him to the post of D.S.R. on the basis of the recommendation made by the DPC.

3. At the stage of admission, the Tribunal disposed of the original application referring to a decision of the Apex Court in the case of Union of India and Ors. v. Dr. (Smt.) S. Salhan reported in (1998) 2 A TT (SC) 1 holding that the

disciplinary proceeding paving been initiated after recommendation made by the Departmental Promotion Committee, the applicant-opposite party is entitled to promotion and directed the Petitioners to treat the original application as representation and consider the same for the purpose of promotion and also directed to give ad hoc promotion to the applicant-opposite party by a speaking order.

4. The learned Counsel for the State assails the impugned judgment on two grounds. The first ground taken by the learned Counsel for the State is that without affording an opportunity to the State to file counter affidavit, the original application was disposed of at the stage of admission in favour of the applicant-opposite party and the second ground is that even at the time of recommendation made by the DPC, the vigilance investigation was going on against the applicant-opposite party and therefore, he could not have been recommended for promotion.

5. Shri. Rath, the learned Counsel appearing for the applicant opposite party submitted that the vigilance investigation was continuing when the DPC met, but no charge sheet had been filed pursuant to the said vigilance investigation on the date the D.P.C. met and on the date the recommendation was made by the DPC neither there was any charge sheet against the applicant-opposite party in the vigilance case nor any disciplinary proceeding was pending against him. In view of the above, the applicant-opposite party could not have been denied promotion solely on the ground that at a later stage a disciplinary proceeding was initiated against him.

6. Admittedly the applicant-opposite party is facing an investigation by the Vigilance Department for last more than ten years. Admittedly on the date the DPC met to consider the case of the Petitioner for promotion, charge sheet had not been filed by the Vigilance Department and admittedly also no disciplinary proceeding was pending against the applicant-opposite party even on the date the DPC recommended the case of the applicant-opposite party for promotion. Now the question therefore to be considered is as to whether in absence of a charge sheet and a disciplinary proceeding, the DPC having recommended the case of the applicant-opposite party, whether his promotion can be withheld solely on the ground that a disciplinary proceeding was initiated against him after such recommendation was made by the DPC.

7. The learned Counsel for the State referred to an office memorandum issued by the General Administration Department in Annexure-7 dated 18th February, 1994. Clause-9 of the said office memorandum is quoted below:

An officer who is recommended for promotion by the Screening -Committing but in whose case any of the circumstances mentioned in Para 3 above arise after the recommendations of the Screening Committee are received before he is actually promoted, will be considered as if his case had been placed in a sealed cover by the Screening Committee. All the subsequent Committees shall assess

the suitability of such officers along with other eligible candidates and place their assessment in a sealed cover. The sealed cover(s) will be opened on conclusion of the disciplinary case / criminal prosecution. In case the officer is completely exonerated, he would be promoted as per the procedure outlined in Para 6 above and the question of grant of arrears would also be decided accordingly. If any penalty is imposed upon him as a result of the disciplinary proceedings or if he is found guilty in the criminal prosecution against him, the findings of the sealed cover in his case shall not be acted upon.

8. The aforesaid clause clearly provides that an officer, who is recommended by the Screening Committee for promotion but in whose case a disciplinary proceeding has been initiated after such recommendation of the Screening Committee and before he is actually promoted, it will be considered as if his case had been placed in a sealed cover by the Screening Committee. Referring to the said clause it was contended by the learned Counsel for the State that even if there was no disciplinary proceeding pending against the applicant-opposite party on the date of recommendation by the DPC, such proceeding having been initiated after such recommendation and before actual promotion, the aforesaid clause is applicable to the case of the applicant-opposite party and recommendation of the DPC has to be kept in sealed cover and accordingly, the applicant opposite party cannot be given promotion.

9. In the case of *Union of India v. Dr. (Smt.) S. Salhan* (supra) the Supreme Court held as follows:

The question, however, stands concluded by a Three Judge decision of this Court in *Union of India Vs. K.V. Jankiraman, etc. etc.*, in which the same view has been taken. We are in respectful agreement with the above decision. We are also of the opinion that if on the date on which the name of a person is considered by the Departmental Promotion Committee for promotion to the higher post, such person is neither under suspension nor has any departmental proceedings been initiated against him, his name, if he is found meritorious and suitable, has to be brought on the select list and the "sealed cover" procedure cannot be adopted. The recommendation of the Departmental Promotion Committee can be placed in a "sealed cover" only if on the date of consideration of the name for promotion, the departmental proceedings had been initiated or were pending or on its conclusion, final orders had not been passed by the appropriate authority. It is obvious that if the officer, against whom the departmental proceedings were initiated, is ultimately exonerated, the sealed cover containing the recommendation of the Departmental Promotion Committee would be opened, and the recommendation would be given effect to.

10. In the case of *Union of India Vs. K.V. Jankiraman, etc. etc.*, the Apex Court held that it is only when a charge-memo in a disciplinary proceeding or a charge-sheet in a criminal prosecution is issued to the employee, it can be said that the departmental proceedings/ criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge-memo /

charge-sheet is issued. The pendency of preliminary investigation prior to that stage would not be sufficient to enable the authorities to adopt the sealed cover procedure.

11. A similar view has been expressed by this Court in the case of Union of India and Ors. v. Sangram Keshari Nayak and Anr. reported in 2005 (Supp.) O.L.R. 512. The aforesaid decisions clearly laid down the law that if on the date the DPC recommends the promotion of an employee no disciplinary proceeding has been initiated or no charge sheet has been submitted in any criminal proceeding, the sealed cover procedure should not be adopted. Admittedly in the present case though vigilance investigation was continuing on the date the DPC met and recommended the case of the Petitioner for promotion, charge sheet had not been filed by the Vigilance Department and the disciplinary proceeding had also not been initiated nor the Petitioner had been put under suspension. Therefore, in terms of the aforesaid decisions, the recommendation of the DPC to promote the Petitioner could not have been kept in sealed cover. However, the provisions contained in Clause-9 of the office memorandum issued by the General Administration Department in Annexure-7 dated 18th February, 1994 is not in consonance with the decisions of the Apex Court as well as this Court. Such a provision has never been taken into consideration in anyone of the aforesaid decisions. Such clause has also not been looked into by the Tribunal while deciding the original application. Since the Tribunal has not considered the aforesaid decisions vis-a vis what has been provided in Clause-9 of the aforesaid office memorandum, we are of the view that it is a fit case, which should be remitted back to the Tribunal for reconsideration.

12. We accordingly set aside the impugned order and remit the matter back to the Tribunal to dispose of the case on merit keeping in mind the decisions referred to above as well as the office memorandum issued by the General Administration Department in Annexure-7 dated 18th February, 1994.

13. The writ application is accordingly disposed of.

I. Mahanty, J.

14. I agree.