

(2017) 01 OHC CK 0010

In the Orissa High Court

Case No : 7011 of 2014

State of Orissa and others

APPELLANT

Vs

Laxman Kumar Behera

RESPONDENT

Date of Decision : 18-01-2017

Acts Referred:

Constitution of India, Article 226, Article 227 - Power of High Courts to Issue certain writs - Power of superintendence over all courts by the High Court
Prevention of Cor

Citation : (2017) 01 OHC CK 0010

Hon'ble Judges : Sanju Panda, Sujit Narayan Prasad

Bench : DIVISION BENCH

Advocate : B.Routray

Final Decision : Disposed

Judgement

1. This writ petition is filed by the State of Orissa invoking the jurisdiction of this Court conferred under Articles 226 and 227 of the Constitution of India, assailing the order dated 13.12.2013 passed by the Orisasa Administrative Tribunal in OA. No. 3471 of 2013 whereby and whereunder the learned Tribunal while allowing the Original Application has directed the authorities to open the sealed cover containing the recommendation of the review DPC held on 1.3.2013 and in case the said D.P.C. considered the applicant to be suitable for promotion, he shall be promoted to the next higher rank i.e. the post of Assistant Labour Commissioner from the date from which his immediate junior was promoted to the said rank, as has been done in the case of Sri Umakanta Jena as per the recommendation of the review DPC held on 1.3.2013.

2. The brief fact of the case of the parties is that opposite party no.1, while holding the post of District Labour Officer was to be considered for promotion to the post of Assistant Labour Commissioner on the basis of suitability, wherein 17 officers have been found to be under the zone of consideration as per the

gradation list of District Labour Officers including the opposite party no.1, whose name appears at Sl.No.6 of the proceedings of the Selection Board meeting held on 27.7.2012. The Selection Board has considered the case of opposite party no.1, but since he was suspended vide order No. 2135 dated 19.3.2012, as he was caught red-handed by the officers of the Vigilance Organization, Balasore, in Vigilance P.S.Case No. 7 dated 26.2.2012 under Section 7 of the P.C. Act, which has been registered against him, but on that date no vigilance case was pending against the officer and as such, his case was not found to be fit for promoting him to the higher post. According to opposite party no.1, the Selection Board on the same date has considered the case of Sri Umakanta Jena, whose name was at Sl.No.2 in the select of the Selection Board against whom punishment order has been passed withholding one increment without cumulative effect and the order of punishment was referred to Orissa Public Service Commission, Cuttack for concurrence and no departmental proceeding was pending as on that date. Subsequently, on the same date, the noting made by the Selection Board with respect to opposite party no.1 that it has further been found by the Board that after scrutinizing the CCR of opposite party no.1 for the year 2007-08 to 2009-2010 and other documents could not decide on his suitability for promotion due to want of adequate number of CCRs. The State authority has again convened a meeting of the DPC on 1.3.2013 in which the case of opposite party no.1 has again been considered, but on that date although he was not under suspension being reinstated in service after revocation of the order of suspension, since the prosecution has been sanctioned and a Departmental Proceeding under Section 15 of the OCS (CCA) Rules, 1961 has been initiated as also before the competent court of criminal jurisdiction, the charge-sheet has been filed vide final form No.2 dated 14.1.2013, as such the Selection Board has decided to keep its finding on opposite party no.1 in a sealed cover as per the G.A. Department Office Memorandum No. 3928 dated 18.12.1994. Opposite party no.1 being aggrieved with such decision of the authority, has approached the learned Orissa Administrative Tribunal by filing an Original Application being O.A.No.1313 of 2013. The learned Tribunal while disposing of the Original Application vide order dated 1.7.2013 directed the authorities to open the sealed cover and in case it is found that the D.P.C. has considered the opposite party no.1 to be suitable for promotion, he shall be given promotion to the next higher rank i.e. to the post of Assistant Labour Commissioner from the date from which his immediate junior was promoted to the said post as per the recommendation of the D.P.C dated 27.7.2012. The grievance of opposite party no.1 is that in spite of specific direction issued by the learned Tribunal regarding his promotion, since his case was not considered and he has been deprived of his legitimate claim to be promoted to the higher post, he again approached the learned Tribunal vide O.A.No.3471 of 2013 and the learned Tribunal while disposing of the application vide order dated 13.12.2013 has directed the authorities to open the sealed cover containing the recommendation of the review D.P.C held on 1.3.2013 and in case the said D.P.C considered the opposite party no.1 to be suitable for promotion, he shall be promoted to the next higher rank i.e. to the

post of Assistant Labour Commissioner, from the date his junior was promoted to the said rank as has been done in case of Sri Umakanta Jena as per the recommendation of the review D.P.C held on 1.3.2013. The State of Orissa being aggrieved with the order passed by the learned Tribunal is before this Court in this writ petition solely on the ground that undisputedly when the 1st D.P.C has convened its meeting on 27.7.2012, the opposite party no.1 was under suspension, which was passed vide order dated 21.3.2012 and as per the Government circular dated 18.2.1994, there is embargo for consideration of cases of such Government servants for promotion, who are under suspension, but without taking into consideration the circular dated 18.2.1994, the learned Tribunal has passed the order, hence, the same is not sustainable in the eye of law. The second ground has been taken that the learned Tribunal has passed order on the very second day of its meeting without affording any opportunity to rebut the claim of the applicant as would be evident from the order impugned, wherein it is reflected as order no.3, which itself shows that no notice has been issued. Learned Addl Govt. Advocate further contends that the G.A. Department of the State has come up with another circular on 4.7.1995, which has been issued in partial modification of the circular dated 18.2.1994 and as such, the learned Tribunal could have at best directed to consider the case of opposite party no.1 for promotion in the light of the said Govt. circular dated 4.7.1995 instead of directing the authorities to open the sealed cover and grant him promotion from the date his juniors have been promoted.

3. While on the other hand, Mr.B.Routray, learned Sr.Advocate has vehemently opposed the submission of the learned Addl.Govt. Advocate and has submitted that on 27.7.2012 no proceeding was pending either judicial or departmental and as such, on the very date, i.e. on 27.7.2012 the case of opposite party no.1 should have been considered and instead of keeping the same under sealed cover, it should have been considered and opened giving effect to the recommendation of the committee. But instead of doing so, his matter has been deferred to be considered in the review D.P.C and as would be evident from the minutes of the meeting dated 27.7.2012 annexed to the writ petition the case of the opposite party no.1 had been deferred due to want of adequate number of CCRs. It has been submitted due to want of adequate of CCRs the employee cannot be made to suffer. He further submits that even in the review D.P.C meeting held on 1.3.2013, he was not under suspension, rather he was reinstated in service after revocation of the order of suspension and merely on account of the fact that the prosecution has been sanctioned against opposite party no.1 and charge-sheet has been filed before the competent Court of criminal jurisdiction, the review D.P.C should not have taken the decision regarding the promotion of opposite party no.1 in a sealed cover. He further submits that the learned Tribunal has specifically directed the authorities in the order passed in O.A.No.1313 of 2013 to open the sealed cover and in case it is found that the opposite party no.1 is found to be suitable for promotion, he shall be given promotion to the next higher rank and this order having not been

challenged by the State authority, the inaction on the part of the State authorities is highly illegal and arbitrary. The learned Tribunal after taking into consideration all these aspects of the matter has passed order in O.A.No. 34571 of 2013, which is the subject matter of the instant writ petition and allowed the Original Application directing the authorities to open the sealed cover containing the recommendation of the review D.P.C held on 1.3.2013 and in case the said D.P.C considered the opposite party no.1 to be suitable for promotion, he shall be promoted to the next higher rank i.e. the post of Asst. Labour Commissioner from the date his junior was promoted to the said rank.

4. We have heard the learned counsel for the parties and gone through the materials available on record.

5. The sole dispute revolves around regarding consideration of the case of the opposite party no.1 for promotion. We have gone through the proceedings of the minutes of the meeting held on 27.7.2012 and from its perusal, it is evident that the cases of 17 officers, who have been found to be eligible for consideration for promotion, have been put-forth before the Committee and the Committee while examining the case of opposite party no.1 has taken note of the fact that he was under suspension vide Department office Order No. 2135 dated 19.3.2012 as he was caught red handed by the officers of the Vigilance organization in connection with a case of gratification. The Committee has also taken note that adequate number of CCRs was not available and as such, no comment has been made regarding the fitness or unfitness of opposite party no.1 and recommended for promotion of six officers out of 17 who were under the zone of consideration. It further appears that one Umakanta Jena under the unreserved category, whose name was at Sl.No.2 has been found to be unsuitable for promotion. The review D.P.C meeting was directed to be conducted, which was held on 1.3.2013 in which the service records of opposite party no.1 and Sri Umakanta Jena have been put-forth. The Selection Board while considering the case of opposite party no.1 has observed that his case was kept in a sealed cover due to suspension on the date of D.P.C meeting as per the G.A. Department office memorandum dated 18.2.1994., However, in the meantime he has been reinstated in service vide department office order dated 5.2.2013, but prosecution has been sanctioned to proceed with the criminal proceeding by the sanctioning authority vide order dated 13.12.2012 and disciplinary proceeding under Section 15 of the OCS (CCA) Rules, 1962 has been initiated vide order dated 17.10.2012 and it was informed by the Vigilance Department vide letter dated 26.2.2013 that charge-sheet has been placed in the appropriate Court against him vide effect no.2 dated 14.1.2013. In view of the above facts, the Selection Board decided to keep its finding on opposite party no.1 in sealed cover as per G.A. Department memo dated 18.2.1994. In the meanwhile Sri Umakanta Jena has been promoted. Opposite party no.1 being aggrieved with the action of the State authorities has approached the learned Tribunal vide O.A.No.1313 of 2013. The learned Tribunal has passed order directing to open the sealed cover and if found suitable promotion be granted to the next higher rank. The grievance of the petitioner is

that even though order has been passed by the learned Tribunal in O.A.No. 1313 of 2013, order has not been made effective and hence, he has again approached the learned Tribunal in O.A.No. 3471 of 2013 and again order has been passed by the learned Tribunal for opening of the sealed cover and if opposite party no.1 is found to be suitable being recommended for promotion by the review D.P.C held on 1.3.2013, he shall be promoted to the next higher rank.

6. We have gathered from both the meetings of the meetings i.e. 27.7.2012 and 1.3.2013, that in both the meetings no observation regarding fitness or unfitness has been made by the Selection Board. What we find from the meeting of the Selection Board that on 27.7.2012 the fact regarding pendency of the criminal case due to alleged charge of gratification and the order of suspension, his case has been considered but with no remark whether fit or unfit and also not stipulated that his case is being taken in a sealed cover. We further find from the minutes of the meeting dated 1.3.2013 that on that date although opposite party no.1 was not under suspension, since has been reinstated in service due to revocation of the order of suspension on that date, departmental proceeding has been initiated by virtue of issuance of charge sheet and cognizance has been taken by the competent Court of criminal jurisdiction. It is settled that promotion is not a fundamental right, rather right to consideration is the fundamental right. It has also been laid down by the Hon''ble Apex Court in the case of Union of India K.V. Janakiraman, AIR 1991 SC 2010 that only due to pendency of departmental or judicial proceeding a rightful claim of the Govt. servant be not deprived so far as it relates to promotion to higher cadre and to meet out the suffering of the Govt. servant, it has been laid down in the said judgment by evolving the concept of sealed cover so that on the due date of consideration the case of such Govt. servant against whom departmental or judicial proceeding is pending, be considered and in case exoneration or acquittal from the proceedings, they be given promotion from the due date from which they are entitled to get it so that they may not be made to suffer due to litigation, which ended in their favour.

After coming of the pronouncement of the judgment of the Hon''ble Apex Court in the case of K.V.Janakiraman (supra), the State of Orissa has come up with a memorandum on 18.2.1994 wherein it has been laid down regarding the manner and method to be adopted by the D.P.C while selecting the employees for promotion to the next higher grade in the context of employee, who is under suspension and it has been resolved therein that at the time of consideration of the cases of officers for promotion, details of such officers in the zone of consideration falling under the following categories should be specifically brought to the notice of the concerned screening committee and one of them is that the Government servant under suspension.

The Govt. of Orissa has come up with another office memorandum on 4.7.1995, which has been issued in partial modification of the office memorandum dated 18.2.1994 wherein procedure has been laid down enhancing the scope of earlier

memorandum dated 18.2.1994 keeping into consideration the agony of the Govt. servant regarding delay caused due to long litigation or pendency of the departmental proceeding for prolonged period and the following direction has been issued.

"The Government, after careful consideration of all the aspects and in partial modification of the instructions contained in G.A. Department Office Memorandum No.3928-Gen., dated the 18th February 1994 referred to above, have been now pleased to decide as follows :-

(i) The disciplinary authorities, while framing charges against a delinquent Government Servant, should carefully consider the circumstances while deciding whether the delinquency merit framing of charges u/r 15 u/r 16 of O.C.S. (CCA) Rules, 1962,

In the cases, where a minor penalty proceedings have been drawn up u/r 16 of O.C.S. (CCA) Rules, 1962, the "Sealed Cover" procedure shall not be applicable.

(ii) Where, the major penalty proceedings have been drawn up u/r 15 of O.C.S. (CCA) Rules, 1962, the procedure envisaged in G.A. Department Office Memorandum No.3928, dated 18th February 1994 should be followed.

(iii) In the cases, where criminal prosecution/disciplinary cases against the delinquent Government employees, have not come to an end even after the expiry of two years from the date of the meeting of the first Departmental Promotion Committee, the Appointing Authority may review the withheld promotion cases (provided the delinquent Government employees are not under suspension) to consider the desirability of giving the ad hoc promotion keeping in view the following aspects :-

(a) Whether the promotion of the employee will be against the public interest

(b) Whether the charges are grave enough to warrant continued denial of promotion

(c) Whether there is likelihood of the case coming to a conclusion in the near future

(d) Whether the delay in the finalisation of the proceedings, departmental or in a Court of Law, is not directly or indirectly attributable to the employee concerned.

(e) Whether there is any likelihood of misuse of the Official position, that the employee may occupy after ad hoc promotion, which may adversely affect the conduct of the departmental case/criminal prosecution.

In case the Appointing Authority considers that it would not be against the public interest to allow ad hoc promotion to the employee concerned, his case should be placed before the next D.P.C. to be held in the normal course to decide whether the employee is suitable for promotion on ad hoc basis. If the employee is considered suitable, on the basis of the totality of his record of service, without

taking into account the pending disciplinary case/criminal prosecution against him, an order of promotion may be issued making it clear that :-

(i) The promotion is being made purely on ad hoc basis and the ad hoc promotion will not confer any right for regular promotion; and

(ii) The ad hoc promotion shall survive until further orders.

(iii) It should also be indicated in the orders that the Government reserve the right to cancel the ad hoc promotion at any time and revert the employee to the post from which he was promoted without assigning any reason therefor.

All other conditions contained in the aforesaid Office Memorandum remain unchanged. "

7. It is evident from the office memorandum as quoted hereinabove that the Government has taken a decision that in certain cases wherein public interest is not being hampered, the appropriate authority can take decision by way of granting ad hoc promotion against whom departmental or judicial proceeding is pending.

8. In the case in hand, admittedly opposite party no.1 was suspended on 9.3.2012 and in course of his suspension, the first meeting of the Selection Board was held on 27.7.2012 and as such, as per the circular of the Government dated 18.4.1994, his case has been considered by the Selection Board but deferred without any remark either positive or negative and in the second meeting of the Selection Board held on 1.3.2013, by that time departmental proceeding has been initiated as also the charge-sheet has been submitted before the competent Court of criminal jurisdiction arising out of Vigilance case in which the opposite party no.1 was caught red handed and hence, his matter has been kept in a sealed cover without reporting anything about his fitness or unfitness. The learned Tribunal without considering as to whether the Departmental Promotion Committee has found the opposite party no.1 fit or unfit, has passed order by directing the authorities to open the sealed cover and in case the said D.P.C considered the opposite party no.1 to be suitable for promotion, he shall be promoted to the next higher rank i.e. the post of Asst. Labour Commissioner, but from the meeting of the D.P.C held on 1.3.2013 we have not found that the D.P.C has ever recommended the case of opposite party no.1 being suitable for promotion and as such, the opposite party no.1 since has not challenged the proceedings of the minutes of the meetings held on 27.7.2012 or on 1.3.2013 cannot now claim as a matter of right that without any recommendation by the D.P.C regarding his suitability, he be granted promotion to the higher rank. Accordingly, we find no justification in the argument advanced on behalf of opposite party no.1.

We also thought it proper to deal with the case of Umakanta Jena, against whom the opposite party no.1 is making claim of parity.

We find from the meeting of the Selection Board dated 1.3.2013 that the

Selection Board has found Umakanta Jena suitable for promotion and as such, he has been granted promotion, but that is not the situation with the case of opposite party no.1 since his case was kept in sealed cover without any remark fit or unfit, which he never challenged.

Moreover, the opposite party no.1 has not challenged either the decision of the review D.P.C. dated 1.3.2013 recommending Sri Umakanta Jena suitable for promotion or his order of promotion.

9. However, keeping the fact into consideration that the Government has come up with the circular dated 4.7.1995 to deal with the situation, which is the subject matter of the instant writ petition, as has been argued by the learned Sr.Counsel that opposite party no.1 had been suspended in the year 2012 and on that year the criminal case has also been instituted, but there is no progress, hence, taking into consideration this aspect of the matter, we thought it proper to revise the order of the learned Tribunal by directing the State authorities to consider the case of opposite party no.1 for promotion to the higher post of Asst. Labour Commissioner in the light of the circular office memorandum dated 4.7.1995 and take a decision preferably within a period of two months from the date of receipt of copy of the order.

10. Accordingly the writ petition is disposed of.