

(2017) 07 OHC CK 0044

In the Orissa High Court

Case No : 7398 of 2013

Subhendra Mohanty

APPELLANT

Vs

High Court of Orissa

RESPONDENT

Date of Decision : 31-07-2017

Acts Referred:

[Orissa Superior Judicial Service Rules, 1963](#), Rule 44, Rule 9

Citation : (2017) 07 OHC CK 0044

Hon'ble Judges : B.K.Nayak, Justice D. P. Choudhury

Bench : DIVISION BENCH

Advocate : G. A. R. Dora, Bibhu Prasad Tripathy

Judgement

1. In this writ petition the petitioner challenges the order dated 13.03.2013 under Annexure-9 retiring him compulsorily from judicial service.

2. The petitioner was recruited as Probationary Munsif on the basis of written test and interview and joined as such on 20.12.1982. He successfully completed his probation and was confirmed in service with effect from 21.12.1985. The case of the petitioner is that while working as Munsif-S.D.J.M. at Udala, a theft of Malkhana properties worth rupees 50,000/- (Rupees Fifty Thousand) took place in August, 1989 and the petitioner reported the matter to the District Judge and lodged an F.I.R. On 13.09.1989 the petitioner was promoted to the cadre of Orissa Judicial Service Class-I (Junior) and was further promoted to the cadre of Civil Judge (Senior Division) by notification dated 28.09.1995. It is stated by the petitioner that in August, 2002 an explanation was called for from him for not making proper arrangement to guard the Court Malkhana at Udala for which the theft in August, 1989 allegedly took place. Petitioner submitted his representation (Annexure-1) stating that the burglary in the Malkhana occurred on a Sunday when he had been to village Dukura along with his staff to hold Lok Adalat, and that there was only one watchman, who was on duty, and, therefore, there was no scope to make any alternative arrangement to guard the Malkhana. The explanation from the petitioner was called for apparently on the basis of a

report (Annexure-2) dated 24.01.1998 of the District Judge, Mayurbhanj, Baripada in which it was indicated that a disciplinary proceeding had been initiated against the watchman for negligence in duty for which the theft in the Malkhana at Udala occurred but the watchman was exonerated and it was indicated that the petitioner, then S.D.J.M., Udala, did not give proper attention in making arrangement to guard the Court Malkhana.

3. On consideration of the explanation of the petitioner the High Court by letter dated 22.08.2003 (Annexure-3) observed that the petitioner ought not to have diverted the services of the Malkhana Guard to attend the Lok Adalat without making arrangement for watch and ward and the petitioner was cautioned not to repeat such action in future. 4. It is further averred by the petitioner that during his incumbency as Civil Judge (Senior Division) at Sambalpur, the Hon'ble Portfolio Judge (Administrative Judge) made a surprise visit of the station and on the basis of the inspection report a departmental proceeding was initiated against the petitioner. The charges in the proceeding were that on 26.07.2002 the petitioner came to Court fifteen minutes late; the petitioner was careless in disposing of civil cases in the month of June, 2002 and that, in T.S. No.96 of 2009 the petitioner took one month time to pass the decree, though the plaintiff Bank accepted one time settlement; and that the petitioner passed an interim order of injunction in arbitrary manner, which was set aside by the District Judge.

In his show-cause to the first charge, the petitioner explained that the pool car while picking up different Judicial Officers from their residences, one or two Officers were not ready on time and therefore all the officers who came by the pool car reached office fifteen minutes late. As regards the second charge, the petitioner explained that as per the prescribed yardstick, only two title suits were to be disposed of in a month and one of the two suits relating to the Bank, arguments could not be completed before the summer vacation and that the same was completed only on the reopening day and the judgment was pronounced on the very next day. The third charge was however dropped. A Senior Judicial Officer was appointed as Inquiring Officer, who on completion of inquiry gave the finding that the petitioner rendered adequate outturn in the month of June, 2002 and, therefore, he cannot be said to be slow. However, the High Court on consideration of the inquiry report and the show-cause of the petitioner with regard to charges No.1 and 2, censured the petitioner which was communicated to him by the letter under Annexure-4.

5. It is also stated by the petitioner that while working as S.D.J.M., Nayagarh, in a criminal trial for conviction for offence of wrongful restraint, the petitioner by mistake passed sentence of one month rigorous imprisonment instead of simple imprisonment. It is stated that the inadvertent mistake could have been corrected by the higher forum, yet the Hon'ble High Court issued a warning to the petitioner. It is stated by the petitioner that apart from the aforesaid three incidents for which the petitioner was cautioned, censured and was issued with warning, which were themselves not justified, there was no other misconduct or

misdeemeanor on the part of the petitioner.

6. It was further stated that by notification dated 21.09.2005 the petitioner was promoted to the cadre of Orissa Superior Judicial Service (Junior Branch) and posted as Chief Judicial Magistrate, and further by notification dated 28.12.2006 (Annexure-5) the petitioner was promoted to the Cadre of Orissa Superior Judicial Service (Senior Branch) on adhoc basis and posted as Additional District Judge in the Fast Track Court at Jajpur. By notification dated 17.09.2007 (Annexure-6) the petitioner was appointed as Orissa Superior Judicial Service (Senior Branch) on officiating basis against regular vacancy in terms of Rule-9 of Orissa Superior Judicial Service Rules, 1963. These promotions were effected by the Government in consultation with the Hon"ble High Court as per the rules, which required that the High Court shall recommend for appointment to the Senior Branch of the Superior Judicial Service an officer of the Junior Branch, who in the opinion of the High Court is most suitable for the purpose. Thus, the petitioner had been promoted to the cadre of Orissa Superior Judicial Service (Senior Branch) by the Government on the recommendation of the Hon"ble High Court. It is stated that the High Court of Orissa thereafter decided to post the petitioner as the District Judge, Boudh while he was acting as Member, Second M.A.C.T., Berhampur, which is apparent from the notification dated 10.04.2012 under Annexure-8.

7. It is further stated that while the matter stood thus, in 2012 the Full Court of the High Court of Orissa recommended the Government for compulsory retirement of the petitioner. In November 2012 His Excellency the Governor of Odisha returned back the file to the High Court for reconsideration of the recommendation as he was not satisfied with the grounds of compulsory retirement. In January 2013 the Full Court again sent the file to the Government reiterating its earlier decision and His Excellency the Governor vide his notification dated 13.03.2013 (Annexure-9) retired the petitioner from Government service compulsorily by giving him three months pay and allowances. 8. It is averred in the writ petition and also contended by the learned counsel for the petitioner that as per Rule-44 (2) of the OSJS and OJS Rules, 2007 (hereinafter referred to as "2007 Rules") whether any Officer of the service should be retired in public interest under Sub-Rule- (1) of Rule 44 shall be considered at least three times i.e. when he was about to attain the age of 50 years, 55 years and 58 years.

It is submitted that on completion of 50 years the services of the petitioner were reviewed by the High Court in 2009 and after taking into consideration his service records the petitioner was allowed to continue in service beyond 50 years of age and was found fit to be confirmed in the cadre of District Judge (OSJS Senior Branch) and was found capable and suitable for holding the post of District Judge. It is stated that when the entire service record of the petitioner was considered during his review at the age of 50 years and he was found fit and suitable to continue further beyond the age of 50 years and thereafter there is no

other misconduct or adverse remark against him, for which he was found fit and suitable to be confirmed in the cadre of Superior Judicial Service (Senior Branch) and to hold the post of Principal District Judge, the decision and recommendation of the High Court in administrative side to give the petitioner compulsory retirement at the age of 55 years was wholly uncalled for. It was submitted that there was no additional adverse material against the character, conduct, integrity and performance of the petitioner except those which were available already during remote past and taken into consideration for review of his services at the age of 50 years, the very same materials could not be said to be sufficient for the purpose of recommending compulsory retirement of the petitioner at the age of 55 years.

9. A joint counter affidavit has been filed by the High Court and the State Government (Opposite Parties No.1 and 2). It is stated in the counter affidavit that with regard to the theft of properties worth rupees 50,000/- (Rupees Fifty Thousand) from the Court Malkhana at Udala, the District Judge, Mayurbhanj conducted an inquiry and came to observe that no arrangement was made by the petitioner to guard the Malkhana as he had diverted the service of the watchman on that day. An explanation having been called for, the petitioner explained that the day burglary occurred in the Malkhana was a Sunday and he had gone to village Dukura along with his staff to hold Lok Adalat and that the only watchman not being on leave on that day, there was no scope for making alternative arrangement. It is stated that the District Judge having observed on the basis of his inquiry that the petitioner did not make alternative arrangement for guarding the Malkhana, the High Court was right in observing in Annexure-3 that the petitioner ought not to have diverted the services of the Malkhana guard, and, therefore, cautioned the petitioner not to repeat such action in future.

With regard to the disciplinary proceeding initiated against the petitioner during his incumbency as Civil Judge (Senior Division), Sambalpur, it is stated in the counter affidavit that the Inquiring Officer found that the petitioner was very slow, casual and careless in disposing of civil cases. It was further found by him that in the month of June, 2002 the petitioner had disposed of only two suits and in one of the suits though the plaintiff-Bank accepted the proposal of the defendant for one time settlement, the petitioner took one month time to pass the decree in the said suit, which amounts to failure to discharge his duties. It is denied that the petitioner rendered adequate out-turn in the month of June, 2002 as per the findings of the Inquiring Officer is not correct. Therefore, the order of censure is just and proper. It is also admitted that the petitioner was warned by the High Court for passing sentence of rigorous imprisonment for an offence for which the statute prescribed only simple imprisonment. It is urged that giving caution and passing orders of censure and warning for the aforesaid instances could not be said to be unjustified

10. It is also stated in the counter affidavit that though the petitioner was given promotion, taking into consideration his entire service record, his confidential

character rolls in his personal files the Hon"ble High Court came to conclusion that the petitioner did not possess the standard of efficiency required to discharge the duties of his office and found him not suitable to be retained in service and recommended for his premature retirement in public interest. It is stated that for the various instances cited by the petitioner himself, it cannot be said that the petitioner had unblemished service record. Though no adverse entry was communicated to the petitioner, but the Court observed that he was slow in disposal of cases and his yardstick was just sufficient and he was instructed to strive hard to achieve more targets and to maintain punctuality. The petitioner was rated "average" and the Court also directed that he should be kept under surveillance.

Therefore, it was contended, the recommendation of the High Court for premature retirement of the petitioner from service was made after taking into consideration the materials on record relating to the entire service career of the petitioner and, hence it cannot be said to be the out come of non-application of mind or it smacks of malafides. It is stated further that though at the first instance His Excellency the Governor of Odisha returned the file, the High Court on reconsideration reiterated their earlier decision after taking into consideration the observations of His Excellency vis-?-vis the entire service record of the petitioner. Therefore, no exception can be taken to the decision of premature retirement of the petitioner from service.

11. The petitioner has filed a rejoinder affidavit repeating the factual aspects with regard to his service career during which he was cautioned for being negligent in making arrangement for guarding the Court Malkhana and being censured in the disciplinary proceeding and being warned for imposing graver punishment for an offence for which statute prescribed lesser sentence. It is however, stated that apart from the aforesaid instances there was no other misconduct, misdemeanor or deficiency in performance of the petitioner as a Senior Judicial Officer, and that in spite of all those instances, which were not very serious, the petitioner was allowed to continue in service in the first review at the age of 50 years. No other defect, deficiency in his service career thereafter has been found or even reported and for the review at the age of 55 there was no adverse material against him except those which were already available and considered at the time of first review at the age of 50. Since the very same materials were not found sufficient justifying premature retirement of the petitioner at the age of 50, the same could not have been the basis for the conclusion that petitioner's continuance in service beyond 55 years of age was not in the public interest. It is also stated that the rating of the petitioner as "average" and observation that he should be kept under surveillance are arbitrary, baseless and motivated. It is stated that even the said remarks were available prior to completion of 50 years of age of the petitioner and were taken into consideration at the time of first review, and as such the same could not have been the basis for retiring the petitioner prematurely at the time of second review at the age of 55 years.

12. In course of his argument the learned counsel for the petitioner urged that the theft from the Malkhana at Udala took place in the year 1989 and long thirteen years thereafter explanation was called for from the petitioner and though he gave his explanation, he was only cautioned to be careful in future. It is stated that the so-called lapse on the part of the petitioner was not so grave since the Malkhana guard was already on duty on that day. It was also submitted that charges in the disciplinary proceeding in which petitioner was censured are also not very serious and they did not touch upon the integrity of the petitioner and that the imposition of punishment of rigorous imprisonment for an offence punishable for simple imprisonment was an inadvertent mistake on the part of the petitioner for which he was only warned. The incidents aforesaid were not so serious for which the petitioner was promoted to the cadre of District Judge and so also found fit and suitable during the first review at the age of 50, to continue in service beyond that age. It is urged that there being no additional adverse material against the petitioner after his first review, the very same materials which were available and considered during first review could not be said to be sufficient so as to justify premature retirement of the petitioner at the age of 55 years.

13. The learned Additional Government Advocate representing the Opposite Parties submitted that the petitioner had consistently bad service records for which he was cautioned, censured in a disciplinary proceeding and warned for imposing inappropriate sentence and that he was also rated "average" as per his C.C.R. and, therefore, taking into consideration his entire service record he was found un-suitable to continue in service in public interest beyond 55 years of age. It is submitted that the cumulative effect of the entire service records of the petitioner were taken into consideration in order to find out whether his further continuance in service was desirable. It was submitted that the mere giving of promotion at some stage to the petitioner cannot be said to have washed-off the adverse service records. It is, therefore, submitted that the premature retirement of the petitioner was legally justified and needs no interference. It was also submitted that the scope of judicial review in a case of compulsory retirement is very limited.

14. Rule 44 of the 2007 Rules provides for premature retirement of Officers of Orissa Judicial Service and Orissa Superior Judicial Service, which runs as under:-

" 44. Retirement in public interest-

(1) Notwithstanding anything contained in these rules the Governor shall, in consultation with the High Court, if he is of the opinion that is in the public interest so to do, have absolute right to retire any member of the service who has attained the age of fifty years, by giving him/her notice of not less than three months in writing or three months pay and allowances in lieu of such notice.

(2) Whether any officer of the service should be retired in public interest under Sub-rule (1) shall be considered at least three times, that is, when he is about to

attain the age of fifty years, fifty five years and fifty eight years.

Provided that nothing in Sub-rule (2) shall be construed in public interest as preventing the Governor to retire a member of the service at any time after he/she attains the age of fifty years on the recommendation of High Court under Sub- rule (1).")

15. Giving premature retirement to a Judicial Officer on review of his services at the age of 50, 55 and 58 years ought to be in public interest. The whole purpose of review of the services is to remove "dead wood". The principles governing premature retirement or compulsory retirement before superannuation have been laid down by the Hon"ble Supreme Court in the case of *Baikuntha Nath Das v. Chief District Medical Officer*; (1992) 2 SCC 299 to the following effect:-

" 34. The following principles emerge from the above discussion: (i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehavior.

(ii) The order has to be passed by the Government on forming the opinion that it is in the public interest to retire a Government servant compulsorily. The order is passed on the subjective satisfaction of the Government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate Court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary - in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.

(iv) The Government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter - of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential record/character rolls, both favourable and adverse. If a Government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it un-communicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference.

Interference is permissible only on the grounds mentioned in (iii) above. This aspect has been discussed in paras 30 to 32 above."

16. Further in the case of *Registrar, High Court of Madras v. R. Rajiah*, AIR 1988 SC 1388, the Hon"ble Supreme Court held that though the High Court, in its

administrative jurisdiction, has the power to recommend compulsory retirement of a member of the judicial service in accordance with the rules framed in that regard, it cannot act arbitrarily and there has to be material to come to a decision that the Officer has outlived his utility. It was also observed that in exercise of its power of control over the sub-ordinate judiciary, the High Court is under a constitutional obligation to guide and protect Judicial Officers from being harassed or annoyed by trifling complaints relating to judicial orders so that the Officers may discharge their duties honestly and independently.

17. In the case of *S. Ramachandra Raju v. State of Orissa*; (1994) Supp (3) SCC 424 the Hon"ble Supreme Court held as follows:-

"Though the order of compulsory retirement is not a punishment and the government servant on being compulsorily retired is entitled to draw all retiral benefits, including pension, the Government must exercise its power in the public interest to effectuate the efficiency of service. The dead wood needs to be removed to augment efficiency. Integrity of public service needs to be maintained. The exercise of power of compulsory retirement must not be a haunt on public servant but act as a check and reasonable measure to ensure efficiency in service, and free from corruption and incompetence. The officer would go by reputation built around him. In appropriate case, there may not be sufficient evidence to take punitive act of removal from service. But his conduct and reputation is such that his continuance in service would be a menace in public service and injurious to public interest."

18. It is trite that while considering the case of compulsory retirement from service, all the materials available on record of the Officer pertaining to his service and ACRs should be taken into consideration. In the cases of *Chandramauleswar Prasad v. Patna High Court*; AIR 1970 SC 370; *Baldev Rajchadha v. Union of India*; AIR 1981 SC 70 ; *J. D. Sribastav v. State of M. P.* ; AIR 1984 SC 630; and *Narasingh Patnaik v. State of Orissa* ; AIR 1996 SC 3223 it has been held by the Hon"ble Apex Court that the old adverse entries should not be taken into consideration and utilized against the Officer.

19. Time and again Superior Courts have emphasized that for effective administration of justice, honest, impartial and law knowing Judicial Officers are required. However, an Officer having knowledge in law but without integrity is a great danger to the smooth functioning in the judiciary. The object of compulsory retirement is not to punish or penalize the Government servant but to weed out the worthless who have lost their utility for the administration by the insensitive, un-intelligent or dubious conduct impeding the flow of administration or promoting stagnation.

20. With regard to the question whether after promotion of a Government servant to a higher rank earlier adverse entries/record would be wiped-off or the same can be taken into account while considering the case of the employee for giving him compulsory retirement, the Hon"ble Supreme Court in the case of

Pyare Mohan Lal v. State of Jharkhand (2010) 10 SCC 693 held as follows:

" 24. In view of the above, the law can be summarized to state that in case there is a conflict between two or more judgments of this Court, the judgment of the larger Bench is to be followed. More so, the washed-off theory does not have universal application. It may have relevance while considering the case of Government servant for further promotion but not in a case where the employee is being assessed by the reviewing authority to determine whether he is fit to be retained in service or requires to be given compulsory retirement, as the Committee is to assess his suitability taking into consideration his "entire service record." Affirming the aforesaid proposition the Hon"ble Supreme Court in the case of Rajasthan State Road Transport Corporation and others v. Babulal Jangir; (2013) 10 SCC 551 held as follows:

"22. It clearly follows from the above that the clarification given by a two-Judge Bench judgment in Badrinath is not correct and the observations of this Court in Gurdas Singh to the effect that the adverse entries prior to the promotion or crossing of efficiency bar or picking up higher rank are not wiped-off and can be taken into account while considering the overall performance of the employee when it comes to the consideration of case of that employee for premature retirement.

23. The principle of law which is clarified and stands crystallized after the judgment in Pyare Mohan Lal v. State of Jharkhand is that after the promotion of an employee the adverse entries prior thereto would have no relevance and can be treated as wiped-off when the case of the government employee is to be considered for further promotion. However, this "washed-off theory" will have no application when the case of an employee is being assessed to determine whether he is fit to be retained in service or requires to be given compulsory retirement. The rationale given is that since such an assessment is based on "entire service record", there is no question of not taking into consideration the earlier old adverse entries or record of the old period. We may hasten to add that while such a record can be taken into consideration, at the same time the service record of the immediate past period will have to be given due credence and weightage. For example, as against some very old adverse entries where the immediate past record shows exemplary performance, ignoring such a record of recent past and acting only on the basis of old adverse entries, to retire a person will be a clear example of arbitrary exercise of power.

However, if old record pertains to integrity of a person then that may be sufficient to justify the order of premature retirement of the government servant."

21. We have perused the service records of the petitioner including his ACRs. The ACRs which are finally recorded by the High Court are as follows:

ACRs of the Year Remarks

1984 Average

1985 Good
1986 Good
1987(I) Very Good
1987(II) Good
1988 Average
1989 (upto February,1989) Average
1990 (from 25.09.1989) Good
1991 Not recorded by the High Court
1992 Good
1993 Good
1994 Good
1995(I) Efficient and hard working
1995(II) Very Good
1996 Good
1997 Very Good
1998 Good
1999 Good
2000 Good
2001 Average
2002 Good
2003 Good
2004 Good
2005 Good
2006 Average
2007 Good
2008(I) Average
2008(II) Good
2009 Good

22. It transpires from the records that the ACR for the year 2009 was recorded by the Full Court of the High Court on 07.03.2012, that is just two months before

the Review Committee of the High Court decided on 03.05.2012 recommending compulsory retirement of the petitioner, which was accepted by the Full Court on 11.05.2012. The ACRs of the petitioner for the year 2010 are in two parts, one from 01.01.2010 to 14.05.2010 and the other from 17.05.2010 to 31.12.2010 reported by the Reporting Officers. For the first part for the year 2010 the petitioner was assessed "poor" by the Reporting Officer and for the second part of the year he was assessed "good" by the Reporting Officer. For the first part he was in an administrative post where as for the second part of the year 2010 he was holding a judicial post, i.e., First Additional District and Sessions Judge with powers to try cases under the S.C. & S.T. (P.A) Act, N.D.P.S. Act, Electricity Act and Motor Accident Claims Tribunal. With regard to integrity of the petitioner for the first part of 2010 the Reporting Officer reported doubtful integrity without mentioning any circumstance to form such opinion though the guidelines for recording ACRs mandate that instances, circumstances and informations about questionable integrity be indicated. For the second part, the Reporting Officer has mentioned "nothing adverse has been brought to my notice". Be that as it may, since the ACRs of the petitioner submitted by the Reporting Officers for the year 2010 have not been finally considered by the Full Court of the High Court, the same must be left out of consideration.

23. From the ACRs of the petitioner as seen above he has been rated "good" and "very good" consistently since 1990, except for the years 2001, 2006 and the first half of 2008 for which he was rated "average". For the years 2001, 2006 and first half of 2008 though overall assessment of the petitioner was average, so far as his integrity for the said period is considered, nothing adverse has been found.

24. Thus from the pleadings of the parties and from the service records of the petitioner it is apparent that for theft of property worth Rs.50,000/- (Rupees Fifty Thousand) from the Court Malkhana at Udala in the year 1989 an explanation was called for from the petitioner on the basis of the report of the District Judge, Mayurbhanj to the effect that the petitioner did not make alternative arrangement for guarding the Malkhana on the date of theft, for which the petitioner was simply cautioned in the year 2003. Similarly, in the departmental proceeding No.7 of 2002 initiated against the petitioner, out of the three charges the third charge was dropped and the first two charges appear to be not very grave for which, even though they were proved, the petitioner was only censured and the High Court thought it fit not to impose any major penalty. Similarly, during his incumbency as Sub-Divisional Judicial Magistrate, Nayagarh, the petitioner passed sentence in a criminal case of one month rigorous imprisonment instead of simple imprisonment as mandated by law for which he was issued with a warning. Apart from these three incidents in the remote past there are no other incident of any misconduct or misdemeanor touching upon the integrity, efficiency and performance of the petitioner as a Judicial Officer. The three incidents described above were taken into consideration by the Review Committee and the Full Court in November, 2008, while the service of the

petitioner was being reviewed at the age of 50. The Review Committee then by its Resolution dated 11.11.2008 allowed the petitioner to continue in service beyond the age of fifty years, while recommending for compulsory retirement of some other officers. The recommendation of the Review Committee was accepted by the Full Court by resolution dated 17.11.2008.

25. It transpires that without there being any subsequent or additional adverse material in the service record of the petitioner, the Review Committee while reviewing his service at the age of 55 years on 03.05.2012 recommended for his premature retirement in public interest and in the interest of better administration of justice on payment of three months salary and allowances in lieu of three months' notice, under Rule- 44 of the OSJS and OJS Rules, 2007 and the said recommendation was accepted by the Full Court of the High Court by Resolution dated 11.05.2012. The recommendation of the High Court was not found favour with His Excellency the Governor of Odisha, who returned the recommendation for reconsideration and the Full Court by its subsequent Resolution reiterated its previous decision and accordingly the impugned order of compulsory retirement has been passed.

26. Even though adverse remarks/records of a Government employee prior to his promotion is not washed-off for the purpose of taking them into consideration while reviewing service of an employee to decide whether he should be continued in service or be given premature retirement, it does not appeal to conscience that the adverse remarks which have already been considered in a previous review of service and they were not found sufficient to retire the employee on review, the same adverse remarks/records, without any further or additional adverse remarks in the service records would be sufficient to prematurely retire the employee while reviewing his services at a subsequent stage, i.e., at the age of 55 years.

27. In this respect the decision of this Court in the case of Epari Vasudeva Rao v. State of Orissa and another; 2014 (2) OLR 381 is worth noting. The services of the petitioner in that case had been reviewed at the age of 55 years and he was allowed to continue in service, despite he had some adverse remarks/records. On the basis of self-same adverse remarks he was given compulsory retirement while reviewing his service at the age of 58 years, without there being any subsequent or additional adverse remarks/service records, apart from promotions being given to petitioner therein in between. Therefore, this Court quashed the order of compulsory retirement and directed reinstatement of the said employee in service with back wages.

28. In the instant case the three instances of remote past for which the petitioner was cautioned, censured and warned were of very minor nature and the same were considered while reviewing the service of the petitioner at the age of 50 years and the Review Committee as well as the Full Court did not give him compulsory retirement at that stage and allowed him to continue in service, evidently considering the said incidents as not justifying giving of compulsory

retirement. Thereafter the petitioner was promoted to the cadre of District Judge and even those incidents did not furnish ground for withholding promotion. As to conduct and performance, except for the years 2001, 2006 and the first half of 2008 when his overall rating was "average", there was no allegation about his integrity. On the other hand, the rating of the petitioner as "average" for the years 2001, 2006 and the first half of 2008 was also available to the Review Committee as well as to the Full Court of the High Court during the review of his service at the age of 50 years in November, 2008. These ratings and the three adverse remarks described earlier could not persuade the High Court to give compulsory retirement to the petitioner then. His ACR for other years was "good" and "very good". Therefore, without there being any additional or further adverse remark/service record and having regard to the decision of this Court in the case of Epari Vasudev Rao (Supra) we are of the opinion that the Court's decision to retire the petitioner compulsorily is arbitrary and unreasonable and, therefore, the impugned order of compulsory retirement under Annexure-9 cannot be sustained. Accordingly we quash the said order.

The petitioner has crossed the age of superannuation, i.e., 60 years in May, 2017, and, therefore, there is no scope to direct his reinstatement in service. However, we direct that he must be deemed to have continued in service from the date of his compulsory retirement till the date of his superannuation at the age of 60 years and he shall be given his salary at the time scale of pay for the post he was holding at the time of compulsory retirement for the said period and retiral benefits accordingly.

The writ petition is thus disposed of.

The records received from the Registry be returned.