

THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.31572 OF 2021

*An application under Articles 226 & 227 of
the Constitution of India.*

Dr. Kshetrabasi Thatoi

: Petitioner

-Versus-

State of Odisha and another

: Opposite Parties

For Petitioner

: Mr. G. Sinha, Advocate
Mr. A. K. Parida, Advocate

For Opposite Parties

: Mr. A. K. Nanda, Additional
Government Advocate

J U D G M E N T

CORAM :

JUSTICE SIBO SANKAR MISHRA

Date of Hearing: 30.10.2023 :: Date of Judgment : 06.11.2023

1. The Petitioner has filed the present Writ Petition under Article 226 of the Constitution of India *inter alia* seeking writ against the Opposite Parties to consider to give promotion to him to the cadre Group A (Senior Branch) to Junior Administrative Officer(Joint Director) and Selection Grade-II (Additional Director Level-II) and to grant him all consequential service benefits. The

Petitioner is facing a criminal prosecution initiated in the year 2010, therefore, although DPC has recommended his case for promotion but sealed cover procedure has been adopted owing to the pendency of the criminal prosecution against him. There is a disciplinary proceeding initiated by the department against him on 12.09.2011.

2. The said Writ Petition indeed was heard at length on 08.10.2021. The Coordinate Bench of this Court after hearing both parties was pleased to allow the Writ Petition. Relevant is to reproduce the order dated 08.10.2021 passed by learned Single Judge :-

“2. Heard learned counsel for the parties.

3. The petitioner has filed this application seeking direction to the opposite parties to give him promotion to the rank of Junior Administrative Grade (Joint Director) from 06.10.2018 and Selection Grade-II (Additional Director Level-II) from 30.04.2020 in Odisha Medical & Health Service Cadre, i.e., the date from which his immediate juniors got such promotion, and to grant all consequential service and financial benefits including further promotion within a stipulated time.

4. Moot question involves if a promotion of employee can be withheld for indefinite period on the premises of pendency of vigilance proceeding over a period of decades.

5. This Court considering such situation has already Order No. 01 settled the position of law keeping the sealed cover promotion aspect in view of pendency of the Disciplinary Proceeding and/or Vigilance Proceeding for decades becomes bad.

6. Fact involving the case reveals that there is one disciplinary proceeding pending against the petitioner and one the vigilance proceeding pending in the court of Special Judge, Vigilance, Bhubaneswar in T.R. Case No.37 of 2011 arising out of Bhubaneswar Vigilance P.S. Case No.23 of 2010. Involving the allegation against the

petitioner, it appears the Vigilance Proceeding initiated in the year 2010, but charge-sheet involving the Vigilance case was submitted in the year 2011. However the said vigilance case is yet to be disposed of. Pleading also further made clear that one disciplinary proceeding is pending against the petitioner on the same allegation. In this background of case an allegation is made that promotion of the petitioner taking effect in the year 2018 & 2020 has been kept in sealed cover only on the premises that a vigilance proceeding and disciplinary proceeding involving the petitioner are pending since 2010 and 2011 respectively. For the settled position of law, this Court in disposal of the writ petition observes, petitioner cannot suffer for the long pendency of the vigilance and departmental proceeding. It is also not known when the Vigilance Proceeding initiated in the year 2020 will come to end. It is keeping in this view, this Court in disposal of the writ petition directs the Principal Secretary to Govt. of Odisha, Health & Family Welfare Department-O.P. No.1 to give promotion to the petitioner to the rank of Junior Administrative Grade (Joint Director) & Selection Grade-II Page 3 of 3 (Additional Director Level-II) in OMHS cadre from the date of his juniors and batchmates got such promotion. However the promotion of the petitioner as per direction of this Court shall be subject to the ultimate outcome in the Vigilance Proceeding. Further it is also clarified that the promotion given to the petitioner to the rank of Junior Administrative Grade (Joint Director) & Selection Grade-II (Additional Director Level-II) in OMHS cadre shall not confer equity in the event, he will ultimately lose the Vigilance Proceeding. Entire exercise shall be completed within four weeks from the date of communication of this direction. It is also clarified that upon promotion, petitioner shall also be entitled to all consequential benefits.

7. Writ the above observation, the writ petition thus stands disposed of.

Issue urgent certified copy as per rules.”

3. The Opposite Parties preferred intra-court Appeal against the judgment of the Coordinate Bench dated 08.10.2021 being W.A. No.293 of 2022 contending therein that they were not given

opportunity to file counter and contest the Writ Petition. The Division Bench of this Court was pleased to allow the Writ Appeal, set aside the order of the learned Single Judge and remanded the matter back to the learned Single Judge to decide afresh by giving opportunity to the Opposite Parties to file counter affidavit. The Division Bench also was pleased to fix time line for disposal of the Writ Petition. Relevant is to quote the order of the Division Bench dated 27.03.2023:-

“1. In this writ appeal, the impugned order dated 7th September, 2021 was passed by the learned Single Judge on the very first day of hearing without giving an opportunity to the Appellants/State to file any reply.

2. In identical matters, which have been listed today, this Court has while setting aside the impugned order, remanded the matter to the learned Single Judge with specific time-bound directions. In those appeals, the Respondents have been represented by their respective lawyers.

3. As far as the present writ appeal is concerned, since none is appearing for the Respondent yet despite notice, this Court, instead of again issuing fresh notice in this writ appeal, considers it appropriate to set aside the impugned order of the learned Single Judge and direct that the writ petition shall be listed in the Roster Bench of the learned Single Judge on 27th June, 2023. The Registry will telephonically inform the learned counsel appearing for the Respondent herein, i.e., the writ Petitioner to remain present before the learned Single Judge on that date. The learned counsel for the State will of course remain present before the learned Single Judge on that date.

4. The learned Single Judge is requested to issue directions for completion of pleadings in a time bound manner and fix the date of hearing of the writ petition so that it can be expeditiously disposed of along with other similar writ petitions which have been directed to be listed

before the learned Single Judge in the Roster Bench on 17th July, 2023.

5. The writ appeal is disposed of with these directions.

6. An urgent certified copy of this order be issued as per rules.”

After relegation, the matter was heard by the learned Single Judge on 27.06.2023, 11.09.2023, and lastly on 30.10.2023. Despite a time bound direction given by the Division Bench to file the counter, the Opposite Parties further avail more than three opportunities to file the counter affidavit, but preferred not to file the same, hence the matter was heard.

4. Heard Mr. G. Sinha, learned counsel for the Petitioner and Mr. A. K. Nanda, learned Additional Government Advocate for the Opposite Parties.

5. Mr. Nanda, learned Additional Government Advocate vehemently opposes the prayer made by the Petitioner and contended that no ad-hoc promotion pending vigilance proceeding could be given to the Petitioner in view of the judgment of the Division Bench of this Court passed on 11.05.2023 in W.A. No.805 of 2021 and batch of Writ Appeals.

6. Per contra, Mr. G. Sinha, learned counsel for the Petitioner relied upon the judgment of the Division Bench of this Court passed on 06.05.2022 in W.P.(C) No.18500 of 2015, which

squarely covers his case. In the said case as well, pending vigilance proceedings although the DPC had recommended the promotion of the Petitioner, but the same was withheld keeping the result in the sealed cover. Therefore, the Division Bench of this Court had directed to open the sealed cover and grant promotion accordingly.

7. The judgment relied upon by learned counsel for the State is clearly distinguishable from the fact of the present case. In those cases the Petitioners appears to have contended that in the guise of pendency of the criminal proceeding in the vigilance court, no promotion is being granted to them. Therefore, the Petitioners in those cases urged that at least they should have been granted ad-hoc promotion awaiting the outcome of the criminal prosecution. The Division Bench thus held that there is no legal basis to support the claim of ad-hoc promotion and accordingly disallowed the prayer of the Petitioners in those batch of cases. But in the instant case the factual scenario is quite distinguishable from the facts of those cases. In the present case, the Petitioner is claiming promotion for which DPC has already recommended his case for promotion, however, it's not given effect to and sealed cover procedure has been adopted owing to the pendency of the criminal proceedings.

An employee has no right to promotion. He has only a right to be considered for promotion. Having considered for the promotion by DPC, the result could not have been withheld awaiting the conclusion of disciplinary proceeding/criminal prosecution indefinitely. In this regard the Department of Personnel & Training (DO & PT), the Ministry of Personnel, Public Grievances and Pensions Government of India have issued updated guidelines on 30.08.2022 advising the methodology to be followed in the cases where sealed cover procedure have been adopted and promotion of the Government employees have been withheld because of the pendency of disciplinary proceeding/criminal prosecution, which reads as under:-

“SIX MONTHLY REVIEW OF “SEALED COVER” CASES

4. It is necessary to ensure that the disciplinary case/criminal prosecution instituted against any Government servant is not unduly prolonged and all efforts to finalize expeditiously the proceedings should be taken so that the need for keeping the case of a Government servant in a sealed cover is limited to the barest minimum. It has, therefore, been decided that the appointing authorities concerned should review comprehensively the cases of Government servants, whose suitability for promotion to a higher grade has been kept in a sealed cover on the expiry of 6 months from the date of convening the first Departmental Promotion Committee which had adjudged his suitability and kept its findings in the sealed cover. Such a review should be done subsequently also every six months. The review should, inter alia, cover the progress made in the disciplinary proceedings/criminal

prosecution and the further measures to be taken to expedite their completion.”

In the present case since 2018 & 2020, the DPC has recommended the case of the Petitioner for promotion, which has been kept in the sealed cover without even once subjecting to review. This is nothing but adding insult to the injury.

8. Moreover, in the instant case, the vigilance proceeding was initiated way back in the year 2010 being Bhubaneswar Vigilance P.S. Case No.23 of 2010 corresponding to T.R. Case No.37 of 2011. Although charge-sheet was filed on 26.07.2011, but the trial of the proceeding is moving in the snail's pace since last about 13 years. The prayer of the Petitioner regarding the consideration for promotion is his time bound right and delay at the instance of the State would cause serious deprivation from his rightful claim.

Unexplained prolongation of criminal trial violates the constitutional rights of an accused and denial of statutory or any other rights, for that matter, for a delinquent officer/government servant impending such delayed trial is indeed a case of double jeopardy.

9. Faintly matching the facts of the present case, the Hon'ble Supreme Court while dealing with the issues in subject has been pleased to hold in the matter of *Union of India and others Vrs.*

K.V. Jankiraman and others reported in ***(1991) 4 SCC 109*** that irrespective of pendency of criminal cases, the Petitioner has continued to serve and mere pendency of criminal case cannot be taken as ground to delay the promotion to the Petitioner nor the Competent Authority can withhold the recommendation of the Petitioner indefinitely on the ground of adopting the sealed cover procedure during the pendency of criminal proceedings.

Confronted with exactly a similar situation the Madras High Court in its judgment dated 11.11.2019 in W. P.(MD) No.21879 of 2019 in the case of ***Jaber Sadiq vs. The District Collector, Dindigul District*** relied upon the judgment of the Hon'ble Supreme Court reported in ***(1995) 2 SCC 570*** in the case of ***State of Punjab and others vs. Chaman Lal Goyal*** and has been pleased to held as under:-

“7. From the materials on record, it is seen that the petitioner was arrested on 07.04.2015 by the Inspector of Police, Vigilance and Anti-Corruption, Dindigul and final report is also filed in the criminal case. In addition to that, the charge memo dated 28.08.2017 was issued to the petitioner and disciplinary proceedings are pending from that date onwards. From the above facts, it is seen that for the alleged offence committed by the petitioner on 07.04.2015, both the criminal case as well as the disciplinary proceedings are pending against the petitioner and the petitioner is deferring promotion, in view of the pendency of these two proceedings. This issue was already considered by the Full Bench of this Court in the judgment reported in 2011 (3) CTC 129 W.P.(MD) No.21879 of 2019 (Deputy Inspector General

of Police Vs. P.Rani), wherein, it has been held that when criminal proceedings and disciplinary proceedings are pending for long time, an employee can be promoted, after getting an affidavit of undertaking to the effect that in the event of his failure in the criminal case, he can be reverted to the lower post. Again, this issue was considered by this Court, by the order dated 19.08.2016, in W.P.No.28925 of 2016, after considering the judgment of the Full Bench of this Court referred to above and the judgment of the Hon'ble Apex Court reported in 1995 (2) SCC 570 (State of Punjab and others Vs. Chaman Lal Goyal).

8. The judgments referred to above are squarely applicable to the facts of the present case. The petitioner cannot be denied promotion, in view of the pendency of the criminal case and disciplinary proceedings.

9. For the above reason, the impugned order of the respondent, dated 03.07.2019, is set aside. The respondent is directed to include the name of the petitioner in the panel for promotion to the post of Block Development Officer for the year in W.P.(MD) No.21879 of 2019-2020, if he is otherwise eligible and on obtaining an affidavit of undertaking from the petitioner that he can be reverted back to the post of Deputy Block Development Officer, if any adverse orders are passed against him in the criminal case as well as in the disciplinary proceedings. The respondent is also directed to pass orders, within a period of four weeks from the date of receipt of a copy of this order.”

10. In *Chaman Lal Goyal* (supra), while observing that the principles enunciated therein were broadly applicable to the pleas of delay both in criminal prosecution proceedings and the disciplinary proceedings alike, in Para-11 *inter alia* held:-

“11. The principles to be borne in mind in this behalf have been set out by a Constitution Bench of this Court in A.R.Antulay v. R.S.Nayak & Anr. (1992(1)

S.C.C.225). Though the said case pertained to criminal prosecution, the principles enunciated therein are broadly applicable to a plea of delay in taking the disciplinary proceedings as well. In paragraph 86 of the judgment, this court mentioned the propositions emerging from the several decisions considered therein and observed that "ultimately the court has to balance and weigh the several relevant factors - balancing test or balancing process - and determine in each case whether the right to speedy trial has been denied in a given case". It has also been held that, ordinarily speaking, where the court comes to the conclusion that right to speedy trial of the accused has been infringed, the charges, or the conviction, as the case may be, will be quashed. At the same time, it has been observed that that is not the only course open to the court and that in a given case, the nature of the offence and other circumstances may be such that quashing of the proceedings may not be in the interest of Justice.. In such a case, it has been observed, it is open to the court to make such other appropriate order as it finds just and equitable in the circumstance of the case."

11. Therefore, for the foregoing reasons I feel it appropriate to allow the Writ Petition directing the State-Opposite Parties to give promotion to him to the cadre Group A (Senior Branch) to Junior Administrative Officer(Joint Director) and Selection Grade-II (Additional Director Level-II) 06.10.2018 and 30.04.2020 respectively subject to the condition that in the event the Petitioner is convicted in the impending criminal case, he shall be reverted back down the hierarchy. It is accordingly, made clear that the promotion of the Petitioner would be subject to the outcome of the vigilance proceeding, which is pending in the Court of the Special

Judge (Vigilance), Bhubaneswar in Bhubaneswar Vigilance P.S.

Case No.23 of 2010 under Section 13(2) r/w 13(1) (d) PC Act.

12. With the above direction, the Writ Petition stands disposed of.

(S.S. Mishra)
Judge

Orissa High Court, Cuttack.

The 6th November, 2023 /Swarna Prava Dash, Senior Stenographer

