Amarendra Kumar Dash Vs. Orissa Forest Development Corporation Ltd. and ors.

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Court : Orissa

Decided On : Jan-31-1996

Reported in : 81(1996)CLT393; (1996)ILLJ1239Ori

Judge : A. Pasayat and ;D. Misra, JJ.

Acts : Constitution of India - Article 226

Appeal No. : O.J.C. No. 6276/1992

Appellant : Amarendra Kumar Dash

Respondent : Orissa Forest Development Corporation Ltd. and ors.

Advocate for Def. : S.K. Patnaik, Adv.

Advocate for Pet/Ap. : B.S. Mishra, Adv.

Disposition : Writ petition partly allowed

Judgement :

D. MISRA, J:-

1. Invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, the petitioner calls in question the propriety of the action of

opposite party No. 1, the Orissa Forest Development Corporation Ltd. ('Corporation', in short) conferring promotional benefit on opposite parties 2, 3 and 4 ignoring the case of the petitioner, for the post of Senior Auditor and further promotion of opposite party No. 2, to the rank of Section Officer. The challenge is also in respect of the order passed by the Managing Director of the Corporation promoting the petitioner to the post of Senior Auditor retrospectively from December, 1985 instead of August, 1983, without pecuniary benefits.

2. The factual back drop which gives rise to the present writ application is hereunder delineated. The petitioner was appointed to the post of Auditor by office order No. 1195 dated August 22, 1979 as per Annexure-1. As averred, he retained the first position in the merit list and joined in his post on August 23, 1979, whereas opposite parties 2 to 4 joined as Auditor subsequently. The gradation lists published on March 9, 1981 (Annexure-2) and July 8, 1983 (An-nexure-3) indicate that the petitioner was senior to the opposite parties 2 to 4. In the year 1983, posts of Senior Auditor fell vacant and the case of the petitioner was not considered by the Departmental Promotion Committee as by that point of time a disciplinary proceeding was pending. During the pendency of this proceeding, the cases of opposite parties 2 to 4 were considered by the concerned Departmental Promotion Committee and they were promoted to the posts of Senior Auditor on August 2, 1983. On conclusion of the disciplinary proceeding, the disciplinary authority by order dated June 7, 1985, imposed the punishment of censure.

3. With the passage of time, 2 posts of Section Officers fell vacant and opposite party No. 2 was given promotion to the said post on December 26, 1985. While the juniors of the petitioner were being considered for promotion and were promoted to the cadre of Section Officer , another disciplinary proceeding was initiated against the petitioner and in the said disciplinary proceeding by order dated July 6, 1987 punishment of withholding two increments and stoppage of promotion for a period of five years was imposed on him. The petitioner being aggrieved made a representation to the Chairman of the Corporation who on consideration of peculiar facts and circumstances by a composite order dated October 28, 1988 (Annexure-12) set aside the order of punishment passed in the first disciplinary proceeding. The reasons given for the same are reproduced below:

'The disciplinary authority has not given any reason for differing from the findings of the enquiring officer. The orders of the disciplinary authority (Managing Director) dated June 7, 1985, are therefore set aside, on this ground'.

He also set aside the punishment relating to withholding of promotion imposed in the second disciplinary proceedings. The adverse entry against the petitioner in his C.C.R. for the year 1981-82 was modified. While dealing with the consequences of the orders of punishment being set aside, adverse entries being expunged and modified, the said appellate authority came to hold that the petitioner had been superseded and said supersession has caused hardship to him, and directed as follows:

'........ I also find from the subsequent remarks in the C.C.R. of Shri Dash for 1987-88, that the remarks of the Reporting Officer are very favourable to Shri Dash , and that the Reporting Officer has also observed that it was necessary to bring Shri Dash out of his depression. For these reasons, it is necessary that the case of Shri Dash for promotion is considered afresh by the D.P.C. for retrospective promotion in the light of the present orders....'

After this order was passed, a Review D.P.C. was convened and on its recommendations, the petitioner was promoted to the post of Senior Auditor as per Annexure-17. However, while giving him promotion retrospectively from December, 1985 he was denied the pecuniary benefits. The grievance of the petitioner is that his juniors (Opposite Parties 2 to 4) having been given promotion to the posts of Senior Auditors on August 2, 1983 , he should have been given promotion from that day and not from December , 1985. He also agitates that opposite party No. 2 has been given promotion to the Post of Section Officer (Audit) in the year 1985 and, therefore, he should have been promoted to the said post form the date opposite party No. 2 was conferred with that benefit. He also challenges refusal of pecuniary benefit from the date of retrospective promotion.

4. The Corporation has filed a return and the stand of the Corporation is that the Review D.P.C. did not find the petitioner suitable for the year 1983, but he was found suitable for the year 1985. The further stand of the Corporation is that by virtue of retrospective promotion of petitioner .from 1985, he becomes junior to

opposite party No. 2 in the cadre of Senior Auditor and, therefore he cannot claim to be considered for promotion from the date when opposite party No. 2 was considered. With regard to non granting of pecuniary benefits, the plea of the corporation is that the Chairman had allowed the benefit on the ground of mercy and further the petitioner having not worked in the promotional posts, denial of consequential benefits is reasonable and justified.

5. We have heard Shri B.S. Mishra for the petitioner and Shri S.K. Patanik for the Corporation at length. Shri Mishra raises the following contentions:

(a) The case of the petitioner should have been considered by the D.P.C. which met in the year 1983 and the proceedings relating to the petitioner should have been kept in a sealed cover so that it could have been given effect to immediately after finalisation of the disciplinary proceedings, but the same not having been done, the Corporation has been in an advantageous position to take the stand that the petitioner was not found suitable from 1983.

(b) The Departmental Promotion Committee has committed grave error while retrospectively considering the case of the petitioner by adopting a procedure of comparative assessment, though for selection to the post of Senior Auditor, the same is not required. Had the D.P.C. considered in proper perspective, the petitioner would have been givenpromotion with effect from 1983 and thereby he could have been considered for the next higher post of Section officer (Audit) with effect from December, 1985, when opposite party No. 2 was considered to the said post. Alternatively, if the D.P.C. proceedings are accepted, then also the petitioner's case should be considered by the Corporation for the higher post from the date when promotion of 1985 or thereafter were considered.

(c) There is no justification not to grant the petitioner the pecuniary benefit, as he has been completely exonerated in the first disciplinary proceeding. Moreover, he has been deprived to work in the promotional post for no fault of his. In any case the petitioner's further performances having been appreciated by the Chairman, denial of financial benefit not only causes harassment, but also does not mitigate the real victimisation.

6. Controverting the submissions of Shri Mishra for the petitioner, the learned counsel for the Corporation, Shri Patnaik submits that the findings of the D.P.C. are not perverse or illegal and the jurisdiction of court in interfering with the findings of D.P.C. is limited. According to him the D.P.C. in the instant Case has not done any comparative assessment but has assessed the performances of the petitioner on the basis of the materials available on record. Assessment for the purpose of finding suitability is within the domain of the D.P.C. and in absence of any materials that there is procedural error as commanded by law or perversity, in approach or bias, the Court could not interfere, as it does not sit in appeal over the proceedings of the Departmental Demotion Committee. With regard to denial of the pecuniary benefits stand taken in the counter affidavit is reiterated and it is submitted that the Chairman had allowed the promotion on grounds of mercy and, therefore, there is no illegality in not conferring the financial benefits. It is also submitted that as the petitioner has not worked during that period, the concept of 'no work, no pay' is attracted, and the petitioner has not been totally exonerated in the second disciplinary proceeding. With regard to the consideration for promotion to the next higher post, i.e., Section Officer (Audit) it is stated that mere has been no promotion to the said post from amongst the promotees of 1985 or thereafter.

7. We have carefully considered the rival contentions of the parties. The submission of Shri Mishra that the Corporation should have availed the sealed cover procedure and the Departmental Promotion Committee should have adjudged the suitability of the petitioner in the year 1983 while his juniors were considered has substantial force. Pendency of a disciplinary proceeding does not create a bar for being considered for promotion. The minutes of the Departmental Promotion Committee as far as the delinquent official is concerned to be kept in a sealed cover to be opened after the disciplinary proceeding is over and the recommendation of the D.P.C. is to be worked out depending upon the result of the proceeding.

The apex Court in the case of Union of India, etc K.V. Jankiratnan, etc (199-II-LLJ-570) held that during the pendency of a disciplinary proceeding, the sealed cover procedure is to be followed. The same view was reiterated by the apex Court in State of Madhya Pradesh and another v. Syed Zahir and another (1993-I-LLJ-174) wherein their Lord ships emphasised that procedure of keeping in sealed cover qua-delinquent has to be adopted.

On examination of the records, it appears that the sealed cover procedure was not followed. Had it been followed, immediately after termination of the disciplinary proceeding, the recommendation of the D.P.C, could have been worked out. It is relevant to point out here that the proceeding was concluded on June 7, 1985, but the D.P.C. having not followed the sealed cover procedure the case of the petitioner for grant of promotion could not be considered. While we accept the contention of Shri Mishra that the Corporation has committed illegality in not following the sealed cover procedure, the same is not much of assistance to the petitioner as the Review D.P.C. has considered his case retrospectively and found him suitable from the year 1985. We will advert to the findings of the D.P.C. a little later.

8. With a view to appreciate the stand of the Corporation, we required Shri Patnaik to produce the file relating to the Review D.P.C. which was duly produced. We have perused the same. From the file it appears that the Committee while dealing with the case of the petitioner has observed as follows:

'..... The Committee reviewed the performance for the year prior to 1983 and for the period prior to 1985 and found that he was rightly superseded in the year 1983. But, supersession in the year 1985 was not proper. The Committee is satisfied with his performance for the year 1982-83, 1983-84 and 1984-85 and recommends his promotion from the year 1985 as Sr. Auditor.....'

This finding of the Review D.P.C. does not indicate any kind of comparative assessment as alleged by the petitioner. On the contrary, this is an assessment of the performance of the petitioner. This assessment is essentially to adjudge the suitability of an employee whose case is considered for promotion. It is the duty of a Departmental Promotion Committee to consider the relevant materials which throw light on the performance of the employee. Non-consideration in this regard amounts to a failure of duty. As in the instant case, the Departmental Promotion Committee has clearly indicated in categorical terms with regard to the performances of the petitioner and we consider this to be adjudication of suitability of individual performance of the petitioner, there is rib illegality or infirmity in the same. It is the settled position of law that the Court does not sit in appeal over the assessment of a selection committee or departmental promotion committee. In this regard reference may be made to the decision of this court in K.P. Bhowmick v. Union of India through the secretary, Minister of Home affairs and Ors., 1986 (1) O.L.R.80 wherein it was held:

'Ordinarily the Court does not sit in appeal over the assessment of a Selection committee or a Departmental Promotion Committee. Interference is in extraordinary circumstances and in rare cases where the assessment is so whimsical, arbitrary or perverse that the assessment has been vitiated by bias, prejudice or interested ness....'

Judged by these parameters we do not find any error in the assessment of the Departmental Promotion Committee and we hold that the promotion of the petitioner from 1985, and not from an earlier date does not suffer from any infirmity. Accordingly, we reject this contention of Shri Mishra.

9. With regard to the grant of pecuniary benefit, the learned counsel for the petitioner submits that the petitioner had made a representation to the Chairman and the said representation has been treated as an appeal as is evident from paragraph 8 of the counter. The Chairman being the appellate authority completely exonerated the petitioner from the charges and set aside the order of punishment. There is no material on record that the petitioner had any role to play in dragging the disciplinary proceeding. Logically developing the proposition he submits that initiation of the second departmental proceeding has nothings to do with the consequential benefit of being granted, when retrospective promotion is given as Senior Auditor from 1985. It is further submitted that the disciplinary authority imposed the punishment of censure in the first disciplinary proceeding on June 7, 1985, and the second disciplinary proceeding was initiated on December 29, 1986, almost a year and half thereafter. The petitioner in normal course would have been promoted to the post of Senior Auditor as the punishment was set aside in its entirety and in absence of any kind of blemish at the relevant point of time, there is no justification to deny the consequential financial benefit to the

petitioner. Moreover, the appellate authority has set aside a substantial portion of the punishment in the second departmental proceeding and he also appreciated the work of the petitioner while disposing of the appeal., Any part of the punishment of the second disciplinary proceeding might have effect in the computation of the claim, but it cannot debar the petitioner to be fitted into the scale of pay in the post of Senior Auditor in December 1985 and to get the consequential benefit of such fitment. Shri Mishra has placed reliance on the decision in K.K. Jaggia, Superintending Engineer, Haryana P.W.D. Irrigation Department v. The State of Haryana and Anr.: 1972 S.L.R. 678, State of Mysore v. C.R. Seshadri and another: (1974-I-LLJ- 301) (SC), Ramachandra and Ors. v. Union of India and Ors.: 1977 (1) S.L.R. 655 and Gurudev Singh Inspector of Police v. State of Haryana and Ors.: 1990(1) S.L.R. 44

Shri Patnaik for the Corporation in his turn relies on two decisions of this court rendered in O.J.C. No. 3592 of 1991 disposed of on September 10, 1993 (Jagabandhu Patra v. Chairman, Rushikulya Gramya Bank, Berhampur and Anr.) and O.J.C. No. 1766 of 1983 disposed of on February 5, 1990 (Subhash Chandra Naik v. Managing Director, O.F, C. Ltd. & Ors.) These decisions cited by Shri Patnaik are not the authorities for the proposition that while retrospective promotion is given, consequential financial benefit is not to be given. -In the case of Jagabandhu Patra (supra) this court directed in the following terms:

'In the facts and circumstances, we would call upon opposite parties land 2 to restore the seniority of the petitioner though in the facts and circumstances we decline to grant the pecuniary benefit flowing from the above relief.....'

In the case of Subhash Chandra Naik (supra) the Court held:

'...Promotion would, however, be notional and shall bring in its wake all the service benefits to be petitioner except that the pay of the promoted post shall become available to him from the date of joining in the said post...'

Thus it becomes clear that in the aforesaid decisions it has not been laid down as a principle that while giving retrospective promotion financial benefits are not be conferred.

10. A service holder has always the aspiration to be promoted. He looks forward with eagerness to be considered by his employer and always expects a fair deal. It is the legitimate expectation of an employee. It is the crystallization of his aspiration and concretisation of his conceptual eventuality in service. Absence of promotional facilities mars the zeal to work. Prospects of promotion enhance the workingability and the enthusiasm of an employee. Stagnation annihilates creativity. Denial of promotion on unacceptable grounds cripples and impairs the efficiency of an employee. Consideration in proper perspective by a model employer fosters the appropriate attitude in an employee and acts as a catalyst in achieving excellence in service. When an employee eager to work in a promotional post, is denied or deprived to do so because of pendency of a proceeding he faces humiliation and ultimately when he is given promotion on being totally exonerated, his grievance is mitigated and reputation restored. But the mitigation and restoration are not complete if he is denied the financial benefits-.The agony of the employee subsists, the humiliation continues and the penury pursues. The apex Court on the decision reported in the case of C.R. Seshadri (supra) while dealing with disappointment by denial of promotion of an incumbent held that with the passage of time some times a service issue becomes the issue of payment of money. Krishna Iyer, J., in his inimitable style observed as follows: at page 304

' The length of this litigation has really disappointed the petitioner by denying him the enjoyment of likely promotion. He retired the day before the judgment of the High Court. No one in service would be affected by the allowance of the petitioner's claim and what was a service issue has now been reduced to one of money payment. A retired government official is sensitive to delay in drawing monetary benefits. And to avoid posthumous satisfaction of the pecuniary expectation of the superannuated public servant -not unusual in government-we direct the appellant to consider promptly the claim of the petitioner in the light of our direction and make payment of what is his due.....'

This decision gives emphasis on payment of arrears with retrospective effect. In the aforesaid decision, the petitioner was also entitled to promotion with retrospective effect and direction was given to the government to make payment of arrear pay within a specified period.

We may profitably refer to the case of Jankiraman(supra) in this regard. A contention was advanced in that case that a person who has not worked in the promotional post is not entitled to the financial benefits as the normal rule of 'no work, no pay 'is applicable. Repelling the said .contention their Lordships held as follows: at page 576.

' It was further contended on their behalf that the normal rule is no work , no pay'. Hence a person cannot be allowed to draw the benefits of a post the duties of which he has not discharged. To allow him to do so is against the elementary rule that a person is to be paid only for the work he has done and not for the work he has not done. As against this, it was pointed out on behalf of the concerned employees, that on many occasions even frivolous proceedings are instituted at the instance of interested persons, sometimes with a specific object of denying the promotion due, and the employee concerned is made to suffer both mental agony and privations which are multiplied when he is also placed under suspension. When, therefore, at the end of such suffering, he comes out with a clean bill he has to be restored to all the benefits from which he was kept away unjustly.

We are not much impressed by the contentions advanced on behalf of the authorities. The normal rule of 'no work, no pay' is not applicable to cases such as the present one where the employee although he is willing to work is kept away from work by the authorities for no fault of his. This is not a case where the employee remains away from work for his own reasons, although the work is offered to him...'

The aforesaid decisions were also relied upon in the case of Syed Nassem Zahir and Ors. (supra) wherein their Lordships observed as follows: at page 176.

'..... In case he is completely exonerated, the sealed cover shall be opened and if the recommendation is in his favour, he shall be notionally promoted with effect from the date when a person junior to him was promoted to the post of Chief Engineer. In that event, he shall be entitled to all consequential benefits including back wages.....'

From the aforesaid analysis, it becomes absolutely clear that once an employee is promoted with effect from a retrospective date on being completely exonerated, he cannot be deprived of the pay and other benefits to which he would have been entitled had he in fact been promoted to the said post on the date on which he has been subsequently promoted. Any condition imposed to the effect that the said employee would not be entitled to pay and allowances as a result of the promotion, is illegal and unsustainable. Payment of back wages or arrear salary in case of retrospective promotion where the case of an employee is considered after completion of a disciplinary proceeding, is within the jurisdiction of the disciplinary authority. Whether an employee could get back wages or not, depends upon the ultimate result of the disciplinary proceedings. If the employee has been completely exonerated and there is no blemish whatsoever and he is not visited with penalty, even of censure, he has to be given the benefit of salary from the date on which he would have been normally promoted, but for the disciplinary proceeding. In other cases where promotion is given with retrospective effect after conclusion of a departmental proceeding, but there are other factors like dragging of the proceeding by the delinquent, exoneration because of technical defects or non proving of charges because of peculiar circumstances, the question of back wages to be paid has to be determined by the competent authority. Grant of back wages is not intrinsically inherent when retrospective promotion is granted. But it goes without saying that when no punishment is visited and there is no other factor concomitant, as indicated above, the employee is entitled to full back wages. We may hasten to add that in cases where promotion is denied illegally and later on notional promotion is given, with retrospective effect, without financial benefits the same would be arbitrary. The principle behind this is that no one can be penalised for no fault of his and the employer cannot take advantage of an illegal action.

11. In view of our analysis as made above, we reject the contention advanced by the counsel for the Corporation and hold that the condition imposed while granting retrospective promotion;by denying the pecuniary benefit is unjust and inequitable and direct that the petitioner is entitled to the financial benefits from December, 1985. We however, make it clear that if any computation is to be made on the basis of imposition of punishment in the second departmental proceeding that may be done while working out the benefit of arrear salary.

12. The other grievance of the petitioner is that he is entitled to be considered for the next higher post from the date his juniors were considered. The claim of the petitioner that he should be considered for the post of Section Officer (Audit) with effect from 1985 is not acceptable as he has become junior to opposite party No. 2. The alternative submission of Shri Mishra is that his case should be considered if promotees of 1985 or thereafter have been considered for the post of Section Officer (Audit) by the Corporation. We find substantial force in this submission and we are of the view that if any promotee of 1985 or thereafter has been considered by the Corporation for the post of Section Officer (Audit), the case of the petitioner must be considered from that date. If necessary, a Review D.P.C. should be convened and the case of the petitioner should be considered and benefit should be worked out keeping in view our observations made above.

13. In the result, we quash the order dated May 27, 1992 (Annexure-17) so far as it relates to refusal of financial benefits. We direct that the financial benefits form December , 1985 be computed and the differential arrear amount be given to the petitioner within a period of three months from the date of communication of our order. We further direct the Corporation to consider the case of the petitioner for the next higher post, i.e., Section Officer (Audit) with effect from the date when promotees of 1985 or thereafter were considered.

14. The writ application is allowed to the extent indicated above. In the facts and circumstances of the case, there will be no order as to costs.

A. Pasayat, J.

15. I agree.