



IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C). No. 15419 of 2014

(An Application under Articles 226 & 227 of the Constitution of India)

Somanath Mandal Petitioner

-Versus-

Vice Chancellor, OUAT & Others Opposite Parties

Advocate(s) appeared in this case:-

For Petitioner : Mr. P.K.Ray, Advocate,

For Opp. Party : Mr. P.Panda,
Advocate

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT

9th October, 2024

SASHIKANTA MISHRA, J.

The petitioners have approached this Court with the following prayer:

*“Under the above circumstances, it is humbly prayed that the Writ application be allowed and issue notice to Ops and after hearing the counsels for the parties;
(a) May kindly quash the order dtd. 06.08.2014 & letter No. 35257, dtd. 07.08.2013 passed by the OP no-2 in respect of the petitioner as it has been passed with a malafide intention by violation of Rules
And*



(b) A writ of mandamus or an appropriate writ be issued commanding the OPP. Parties more particularly to the Opp. Party No. 2 to modify/cancel the letter No. 35257, dtd. 07.08.2013 as per the representation and promotion to the post of Asst. Registrar/Account Officer w.e.f. 2011 as per office order of the OUAT No. 33804, dtd. 30.08.2007 and keeping in view the corrigendum laid down by the O.P. No. 1 basing on the letter dtd. 29.12.2010, by declaring the catch up principle is not applicable to the petitioner for interest of justice.

(C) The petitioner may kindly be promoted to the post of Asst. Registrar/Accountant Officer 'notionally' with effect from dt. 01.01.2011 and all consequential service benefits from that date, including the pensionary benefits, may kindly be extended to him.

(D) And may kindly pass any other/orders or direction/directions be issued so as to give complete relief to the petitioner with financial benefits.

And for this act of kindness, the petitioner shall as in duty bound ever pray.

2. Though much has been stated by the parties with regard to the facts, in view of the developments during pendency of the writ application, only such of the facts are referred herein as would be relevant to decide the *lis*.

3. The petitioner joined as Junior Assistant on 15.12.1986 under the control of OUAT (Opp. Party No.2). He was promoted to the post of Senior Assistant w.e.f. 16.04.1990, as Section Officer level-II w.e.f. 27.12.2005 and as Section Officer level-I w.e.f. 01.09.2009. He claims to have become eligible to be appointed for the post of Assistant Registrar (Accounts Officer). It is his further case that though he was a Scheduled Caste candidate, he was appointed against the post meant for ST category in



view of permissibility of exchange of posts between SC and ST categories. His further case is that Opposite Party Nos. 6 to 9 joined on 17.06.2011 as Section Officer level-I whereas the petitioner joined as such on 01.09.2009. Since he was not granted further promotion and the gradation list was revised by showing the Opposite Party Nos. 6 to 9 as senior to him and they were given promotion on 12.08.2013 by applying the catch-up principle and ignoring the case of the petitioner, he approached this Court challenging such action in W.P.(C) No. 9884 of 2014, which was disposed of by order dated 28.05.2014 directing the University Authorities to consider his representation. His representation was rejected by order dated 06.08.2014 on the ground that one post of Accounts Officer/Assistant Registrar reserved for Schedule Caste candidate had been filled up by one Madhusudan Behera since 25.06.2011 and that his representation would be considered only after the post is vacated by Mr. Behera on resignation/retirement. As regards modification of the gradation list, it was stated



that the same was done by applying the catch-up principle as per resolution dated 16.06.2000 of the Government. During pendency of the writ application, the petitioner retired on attaining the age of superannuation on 31.01.2020. As such, he was permitted to amend the writ application to insert the prayer at Sl. No. (d) quoted above. The petitioner's grievance is that despite giving assurance as above, his case was not considered for promotion even though, Mr. Madhusudan Behera retired on attaining the age of superannuation on 31.05.2015.

4. The case of the Opposite Parties as reflected in the counter affidavit is that the petitioner initially got appointment as ST candidate even though, he belongs to the SC category. The cut off mark for SC candidates was 111.33 whereas the petitioner secured 101.33 marks. Since, the cut off mark for ST candidate was 94.33, he was selected as such. Had he been considered as SC candidate, he would not have been recruited at all. Nevertheless, being recruited as ST category candidate, the petitioner availed promotion in the post of Senior



Assistant as ST candidate and further, as Section Officer Level-II and Level-I as SC candidate upon production of caste certificate issued by Tahasildar, Balasore. It is further stated that 7 posts of Assistant Registrar/Accounts Officer are available in OUAT which, as per Rule 24 (1) of Odisha University Recruitment and Promotion, Rules 1991, can be filled up from Section Officer Level-I and other equivalent posts by promotion and direct recruitment. In so far as promotion is concerned, the eligibility criteria is that the person concerned must have rendered at least 10 years of service and further, Rule 26 (3) provides that all promotions shall be on merit and suitability in all respect with due regard to the seniority. Rule 30 permits the University to fill up the posts on deputation or by a Government Servant or foreign service terms. Thus, two posts of Accounts Officer and one post of Assistant Registrar are filled up from amongst OFS/OAS cadre on deputation from the Government and of the remaining four posts, two posts of Assistant Registrars and 2 posts



of Accounts Officers are filled up on promotion with 2 posts being reserved for general category candidates, one for ST candidates and one for SC candidates. As per the last promotion, the petitioner belongs to SC category. The post reserved for SC was filled up by one Madhusudan Behera w.e.f. 25.06.2011 and therefore, until said post was vacated the petitioner's case could not have been considered. It is also stated that one post of Assistant Registrar/Accounts Officer meant for ST candidate is lying vacant since long. As regards Opposite Party Nos. 6 to 9, it is stated that the petitioner is pretty junior to them in the feeder post and therefore, upon applying the catch-up principle, their position was restored at the promotional level. It is further the case of OUAT that in view of the controversy relating to the initial appointment of the petitioner under ST category despite belonging to the SC category, the matter was referred to the Government in department of Agriculture and Farmer's Empowerment. By letter dated 24.05.2019, the Government after taking note of all relevant facts clarified



that his initial appointment against ST vacancy notwithstanding availability of ST candidates is illegal and so also his subsequent promotion in such category. However, since he has not himself contributed to such illegality and his services were availed by the employer, his appointment cannot be called into question at this point of time. The Government, therefore, observed that OUAT shall have to regularize the gradation list subsequently by assigning the petitioner his position among the unreserved appointees. The Government further clarified that DPC cannot be held basing on the present list.

5. Heard Mr. P.K.Ray, learned counsel for the petitioner and Mr. N.Panda, learned counsel appearing for the OUAT.

6. Mr. Ray would argue that the petitioner's initial appointment cannot be called into question as the provisions of the ORV Act and rules permit exchange of posts between SC and ST categories. That apart, despite being appointed as ST candidate, the petitioner was



allowed two promotions as a SC candidate. Moreover, the authorities themselves assured that his case would be considered against SC category after vacation of the post by the incumbent Madhusudan Behera. Though, Mr. Behera retired on 31.05.2015, the petitioner's case was not considered. Even otherwise, the petitioner could have been considered for promotion against the UR quota in view of the clarification issued by the Government but the same was not done. As a result, the petitioner was forced to retire despite being eligible for the higher posts.

7. Per contra, Mr. N.Panda would contend that since there was a confusion as regards the category to which the petitioner belongs, initially, considering the fact that his last two promotions were granted by treating him as SC candidate, the OUAT authorities while rejecting his representation held that his case can be considered after vacation of the post held by the incumbent Madhusudan Behera but subsequently, the matter was referred to the Government and after examining all the relevant facts, the Government clarified that the petitioner can only be



treated as an unreserved candidate. The gradation list was thereafter, revised and objections were invited but there being no vacancy in the UR category, the petitioner's case could not be considered and he retired on superannuation. Mr. Panda, further argues that the petitioner's claim for grant of notional promotion cannot be considered as no promotion can be granted without convening a DPC, which obviously cannot be done after his retirement.

8. After hearing the parties at length and upon going through the materials available on record, this Court is inclined to accept the position that the initial appointment of the petitioner as ST category candidate was apparently not in order. Reference to the Government communication dated 24.05.2019 (copy enclosed as Annexure A/1) to the reply filed by OUAT to the rejoinder of the petitioner reveals that reference has been made to Section 6 of the Reservation of Vacancies in posts and services for SC and ST) Act, 1975 which stipulates that the vacancies can be exchanged between



SC and ST candidates only in the event of non-availability of candidates from the respective communities. It is stated that notwithstanding availability of the ST candidates at the relevant time, the petitioner was engaged under the ST category. The stand taken by the OUAT that the petitioner had secured less than the cut off marks for ST category has not been disputed. Thus, the Government's stand that the initial appointment of the petitioner and subsequent promotion against ST vacancy was irregular. The Government has also held, and rightly so, that the petitioner has himself not contributed to such irregularity/illegality and his services were availed by the employer for all these years. This Court is also of the view that it would be iniquitous to call in question the initial appointment of the petitioner at this distance of time. Under such peculiar circumstances, the Government held that the petitioner should be treated as a UR candidate. In view of the facts narrated above, this Court finds nothing wrong in such decision. The Government also made it clear that the



select list is to be revised by assigning the petitioner the position he deserves. In paragraph 10 of the reply affidavit filed by the OUAT it is stated that pursuant to the instructions of the Government the provisional gradation list of Section Officer Level I was circulated inviting objections. But what happened there after has not been mentioned which, in the facts of the case, is a significant omission. It is stated that there was no vacant post of Assistant Registrar/ Accounts Officer in OUAT under the UR category for which the petitioner's case cannot be considered. In course of argument, Mr. Ray, learned counsel for the petitioner has specifically argued that as on 01.01.2011, he was the only candidate eligible for promotion and vacancy in UR category was available. There is thus, a disputed question as to if any vacancies were available at the relevant time under the UR category.

9. Be that as it may, in view of the aforementioned observation of the Government all other facts automatically recede to the background. The position



that emerges is, the petitioner could have been considered for promotion as UR candidate after issuance of the clarification by the Government. What happened to the final revision of the gradation list pursuant to Government instructions has not been placed before this Court by the OUAT.

10. Coming to the stand taken by Mr. Panda, learned counsel for the OUAT that having already retired on superannuation the petitioner's claim for promotion has become infructuous, this Court would observe that while there can be no right for promotion as such, yet it is trite law that an employee has the right to be considered for promotion, which cannot be denied.

11. From the facts narrated above, it is evident that no action was taken by the OUAT authorities to comply with the observations of the Government at the relevant time. As already stated, whether there were any vacancies under UR category or not at the relevant time is not clear. This Court, therefore, holds that while the petitioner, after issuance of the clarification by the Government



could not have been considered for promotion as a SC candidate yet his claim as a UR candidate for the post cannot be denied. This Court is conscious of the fact that by efflux of time, the petitioner retired on attaining the age of superannuation but it was during pendency of the writ application. Therefore, this Court having found that a right for consideration for promotion had been accrued in favour of the petitioner at least after issuance of Government clarification vide letter dated 24.05.2019, when he was still in service. It was incumbent upon the authorities to have acted accordingly and not having done so, they cannot resist the claim of the petitioner now only on the ground that he has retired in the meantime. Nevertheless, in the absence of any clear cut evidence regarding availability of the vacancies in the UR category no mandamus can be issued by this Court by commanding authorities to grant the relief of notional promotion as claimed by the petitioner.

12. For the foregoing reasons therefore, the writ application is disposed of with direction to the OUAT



authorities to ascertain if any vacancy under UR category was available after receipt of letter dated 24.05.2019 of the Government. If any vacancy was available and the petitioner was otherwise eligible for consideration, the authorities shall do well to at least confer notional benefit of promotion to the petitioner against the said post by refixing his last pay appropriately and by revising his pension and pensionary benefits accordingly. It is made clear that this order shall be operative only if vacancy in UR category was available at the relevant time and the petitioner was otherwise eligible to hold the post. Necessary order in this regard shall be passed by the authorities as early as possible preferably, within a period of two months.

Sashikanta Mishra,
Judge