

(2001) 07 AP CK 0083
In the Andhra Pradesh High Court
Case No : Writ Petition No. 17905 of 2000

A. Vema Reddy

APPELLANT

Vs

Controller General of Defence Accounts, New Delhi and
others

RESPONDENT

Date of Decision : 20-07-2001

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Mysore State Civil Services (General Recruitment) Rules, 1957 — Rule 4

Citation : (2001) 5 ALT 387

Hon'ble Judges : S.B. Sinha, C.J;S.R. Nayak, J

Bench : Division Bench

Advocate : Mr. Nooty Ram Mohan Rao, for the Appellant; Mr. M. Ganga Rao, for the Respondent

Final Decision : Allowed

Judgement

S.R. Nayak, J.—This writ petition is filed by the petitioner Sri A. Vema Reddy who is presently serving as Assistant Accounts Officer in the Office of the Joint Controller of Defence Accounts, PAO (ORS), Secunderabad, the 3rd respondent herein. The petitioner has been denied promotion to the post of Accounts Officer and his immediate junior one Sri S. Sitaraman, the 4th respondent herein and some other juniors are promoted to the post of Accounts Officer by superseding the petitioner. The petitioner being aggrieved by the said action of the respondent-Department filed OA No. 1346 of 1998 before the learned Central Administrative Tribunal, Hyderabad Bench (for short "the Tribunal") questioning the action of the respondent-Department in not promoting the petitioner to the post of Accounts Officer and seeking consequential direction to promote him to the post of Accounts Officer with effect from the date on which his immediate junior was promoted to the post of Accounts Officer with all consequential benefits. The said OA was dismissed by the learned Tribunal by its judgment and order dated 13-12-1999. Hence this writ petition assailing the validity of the same.

2. The background facts that led to the filing of this writ petition may be stated briefly as under: The petitioner was originally appointed as Auditor in the office of the 3rd respondent with effect from 4-6-1964. While working as such, the petitioner passed the prescribed departmental test in the year 1976 and thereafter he was promoted as Section Officer (Accounts) on 17-7-1977. Subsequently, the petitioner was promoted as Assistant Accounts Officer with effect from 1-4-1987 and since then the petitioner has been working in the said post. Next promotional post is Accounts Officer. Under the relevant cadre and recruitment rules, the mode of promotion from the post of Auditor to the post of Section Officer (Accounts), from the post of Section Officer to the post of Assistant Accounts Officer and from the post of Assistant Accounts Officer to the post of Accounts Officer is by way of seniority-cum-fitness. It appears that the Departmental Promotion Committee (DPC) met during September, 1996 to consider the case of the candidates who came under zone of consideration for promotion to the post of Accounts Officer and on such consideration, it prepared a list of officers for promotion which list included the name of the 4th respondent herein who is admittedly junior to the petitioner in the cadre of Assistant Accounts Officers. The petitioner was superseded and his name was not included in the list prepared by the DPC. It appears that on the basis of the said list, the 4th respondent and some others were promoted as Accounts Officer in the month of October, 1997. Therefore, the petitioner made two representations to the official respondents on 27-10-1997 and 24-11-1997 complaining against the denial of promotion to him. In response to the above representations of the petitioner, the 3rd respondent informed the petitioner that the case of the petitioner was initially considered by the DPC held in the month of September, 1996 along with others and he was assessed "not yet fit" for promotion to the post of Accounts Officer and that subsequently also when the DPC met in the month of December, 1997, it decided to keep its recommendation as regards the petitioner in a "sealed cover" on the ground that a disciplinary proceeding was pending against the petitioner. Thereafterwards, the petitioner made two representations dated 19-1-1998 and 16-3-1998 to the Controller General of Defence Accounts, New Delhi, the 1st respondent herein seeking promotion, but did not get any response from the 1st respondent. That led to the petitioner filing the OA before the learned Tribunal.

3. Before the learned Tribunal, it was contended by the petitioner that unless a relatively senior officer serving in the post of Assistant Accounts Officer who comes under zone of consideration for promotion is declared to be unfit, he is entitled to be promoted to the post of Accounts Officer; the 4th respondent who is admittedly junior to the petitioner was promoted as Accounts Officer ignoring the relative seniority and legitimate claim of the petitioner; when the DPC met in the month of September, 1996, no disciplinary proceeding was pending against the petitioner; penalty of censure imposed on the petitioner on the alleged ground that he misbehaved with his official superior is not a valid legal ground which would disentitle him from being considered for promotion to the post of

Accounts Officer, and be that as it may, against the appellate order dated 6-5-1998 passed by the 2nd respondent in an appeal preferred by the petitioner against the penalty order, the petitioner has filed revision petition before the 1st respondent on 15-6-1998 and the same is yet to be disposed of by the 1st respondent.

4. The official respondents 1 to 3 have filed reply statement in which they admitted that the post of Accounts Officer has to be filled up on the basis of seniority-cum-fitness. However, the official respondents have defended the impugned action of the department in denying promotion to the petitioner on the ground that the petitioner has earned gradation "average" in the ACRs for the year 1993-94, 1994-95 and 1995-96 and in that view of the matter, the DPC which met in the month of September, 1996 declared the petitioner as "not yet fit" for promotion to the post of Accounts Officer and the DPC was fully justified in doing so in terms of the guidelines contained in the Official Memorandum No.DOP & TOM No.22011/5/86-Estt(O), dated 10-4-1989. The official respondents also put forth the penalty of censure imposed on the petitioner as a justification to deny promotion to the petitioner in the meeting held by the DPC in the month of December, 1997.

5. The learned Tribunal without dealing with all the contentions raised by the petitioner/applicant and without considering the authorities cited in the application, dismissed the Original Application by the impugned order. The reasons that weighed with the Tribunal for dismissing the application are found in paragraph (9) of the impugned order. Para (9) reads:

"9. The Selection Committee has certified that the applicant is not yet fit for promotion. Though we may not be able to sit on the remark, we perused the CRs of the applicant for the year 1991-92 to 1995-96 so as to make sure that the Selection Committee acted on the basis of the material available in the CRs. Hence we perused the details as embodied in the CRs of each year from 1991-92 to 1995-96. In the first 2 years namely 1991-92 and 1992-93 the applicant had been graded as good. Whereas in the subsequent 3 years he has been graded as average. That would go to show that the applicant's ability is deteriorating. Hence we cannot find any fault with the certificate given by the DPC. Further a reading of the CRs also makes us believe that the grading given is in tune with the remarks made in the various columns of the CRs."

6. Learned Counsel for the petitioner would reiterate the same contentions before us that were taken in the OA filed before the learned Tribunal and would supplement by contending that assessment of the petitioner's performance as "average" for the years 1993-94, 1994-95 and 1995-96 cannot be equated to assessing him as "unfit" so as to disentitle him for promotion to the post of Accounts Officer and, therefore, there was absolutely no justification for DPC which met in the month of September, 1996 not to recommend the name of the petitioner for promotion to the post of Accounts Officer particularly in view of the fact that the promotion to the post of Accounts Officer is by the mode of

"seniority-cum-fitness".

7. On the other hand, learned Counsel for the respondents would support the impugned action of the department and the impugned order of the Tribunal.

8. Having regard to the rival contentions of the learned Counsel for the parties, the only question that arises for decision is whether denial of promotion to the petitioner to the post of Accounts Officer is justified and legal. It cannot be gainsaid that seniority in service is one of the important factors for making promotions. There are two well known methods which are adopted in the recruitment rules for making promotions and they are (1) Seniority -cum-fitness or sometimes called, seniority-cum-merit; (2) promotion by selection. While the method of seniority-cum-fitness is generally prescribed for promotions in the lower cadres, the method of promotion by selection is adopted in making promotion to the higher echelons of service. There is a clear-cut distinction between the two methods of promotion.

9. In the case of promotion by seniority-cum-fitness, every civil servant is entitled to the consideration of his case for promotion according to his seniority, either in the provisional seniority list or final seniority list, as the case may be. The promoting authority has to consider the cases of all eligible officers who come within the zone of consideration strictly according to the seniority. If the seniormost official due for promotion is found fit for promotion he has to be promoted and there is no question of comparing his merit with those of his juniors in terms of relative merit. In other words, unless the senior official is found unfit for promotion either on account of adverse service record or does not satisfy other conditions or qualifications prescribed under the rules, he has a right to be promoted. It is only after reaching the conclusion that the seniormost official is unfit for promotion, the promoting authority could proceed to consider the case of the next senior and so on, on each occasion for promotion. In the case of promotion by selection, on the other hand, merit is the sole consideration from among the eligible officials who came within the zone of consideration for promotion. In this mode, generally speaking, whether an officer is senior or junior is immaterial, If, under the rules, an official is eligible for promotion, he has a right for consideration of his case. The authority making the selection has to make the selection on the basis of comparative merit among the eligible candidates. In other words, selection of a candidate for promotion would depend upon the assessment of his superior relative merit among the officials who come within the zone of consideration. But, even in a case where promotion is by way of selection, seniority has relevance where merit of two or more candidates is equal. In such case, seniority should be the basis in making selection and appointment as held by the Supreme Court in *Union of India v. M.L. Capoor* AIR 1974 SC 74. But, where the merit is unequal, promotion by selection has to be made according to merit only. Thus, it can be safely said that seniority by itself is no basis to make promotion in either of the methods. The Supreme Court in *Sant Ram Sharma Vs. State of Rajasthan and Another*, , dealing with the problem

relating to promotion policy was pleased to observe-

"The question of a proper promotion policy depends on various conflicting factors. It is obvious that the only method in which absolute objectivity can be ensured is, for all promotions to be made entirely on grounds of seniority. That means that if a post falls vacant it is filled by the person who has served longest in the post immediately below. But the trouble with the seniority system is that it is so objective that it fails to take any account of personal merit. As a system it is fair to every official except the best ones; an official has nothing to win or lose provided he does not actually become so inefficient that disciplinary action has to be taken against him. But, though the system is fair to the officials concerned, it is a heavy burden on the public and a great strain on the efficient handling of public business. The problem, therefore, is how to ensure reasonable prospect of advancement of all officials and at the same time to protect the public interest in having posts filled by the most able man? In other words, the question is how to find a correct balance between seniority and merit in a proper promotion-policy...

The principal object of a promotion system is to secure the best possible incumbents for the higher positions, while maintaining the morale of the whole organisation. The main interest to be served is the public interest, not the personal interest of the members of the official group concerned. The public interest is best secured when reasonable opportunities for promotion exist for all qualified employees, when really superior civil servants are enabled to move as rapidly up the promotion ladder as their merits deserve and as vacancies occur, and when selection for promotion is made on the sole basis of merit. For the merit system ought to apply as specifically in making promotion as in original recruitment. Employees often prefer the rule of seniority by which the eligible longest in service is automatically awarded the promotion. Within limits, seniority is entitled to consideration as one criterion of selection. It tends to eliminate favouritism or the suspicion thereof; and experience is certainly a factor in the making of a successful employee. Seniority is given most weight in promotions from the lowest to other subordinate positions. As employees move up the ladder or responsibility, it is entitled to less and less weight. When seniority is made the sole determining factor, at any level, it is a dangerous guide. It does not follow that the employee longest in service in a particular grade is best suited for promotion to a higher grade; the very opposite may be true".

10. In this case, admittedly, promotion to the post of Accounts Officer is on the basis of seniority-cum-fitness. As aforesaid, the petitioner came within the zone of consideration for promotion to the post of Accounts Officer in the meeting of the DPC held in the month of October, 1997. There is also no controversy that the 4th respondent herein is junior to the petitioner in the feeder cadre. It is also relevant to notice that when the DPC met in the month of September, 1996 and considered the candidates for promotion, the petitioner was not subjected to any disciplinary proceeding as on that date, much less punishment or censure was awarded on him for the alleged misconduct. Therefore, there was no justification

for the DPC to ignore the candidature of the petitioner for promotion to the post of Accounts Officer. However, according to the official respondents 1 to 3, the petitioner was denied promotion by the DPC, which met in the month of September, 1996, on the ground that the petitioner has earned gradation "average" in the ACRs for the years 1993-94, 1994-95 and 1995-96. Therefore, the question that arises for consideration is whether the promoting authority is justified in denying promotion to the petitioner on the ground that he earned gradation "average" in the ACRs for the years 1993-94 to 1995-96 before proceeding to consider the legality of the action of the promoting authority in denying promotion in the subsequent meeting of the DPC held in the month of December, 1997.

11. It can be seen from the judgment of the learned Tribunal that the petitioner was graded as "good" in the CRs of the petitioner for the years 1991-92 and 1992-93 whereas for the subsequent three years the petitioner was graded as "average". It is stated by the petitioner that he was graded as "good" all through his service in the feeder cadre except for the three years 1993-94 to 1995-96. This factual assertion made by the petitioner is not denied by the appointing authority. The petitioner has also questioned the correctness of gradation "average" recorded in his ACRs for the years 1993-94 to 1995-96 as baseless and unfounded and, in fact, in his representations dated 27-10-1997 and 24-11-1997, the petitioner had sought for reasons from the promoting authority for denying promotion to him. In the reply sent by the 3rd respondent herein the only reason stated to deny promotion to the petitioner in the DPC meeting held in the month of September, 1996 is that the DPC declared him "not yet fit", and no other reasons. It will be irrational to hold that the gradation as "average" by itself can be considered as adverse for the purpose of consideration of the candidature of the petitioner for promotion, particularly when the mode to be applied for promotion is seniority-cum-fitness and not by way of selection. If the mode of promotion is by way of selection, law requires that the best among those officials who come within the zone of consideration should be selected irrespective of their seniority, purely on the basis of assessment of relative merits of the candidates and, in such a case nobody can take any exception to the action of the promoting authority in eliminating the average candidates, but the question is whether such principle can be applied when the promoting authority has to promote the officials by way of seniority-cum-fitness. It is quite apposite to notice what the Apex Court had to say in B.V. Sivaiah and Others etc. Vs. K. Addankl Babu and Others etc., .

".....While applying the principle of seniority-cum-merit for the purpose of promotion what is required to be considered is inter se seniority of the employees who are eligible for consideration. Such seniority is normally determined on the basis of length of service, but as between employees appointed on the same date and having the same length of service, it is generally determined on the basis of placement in the select list for appointment. Such determination of seniority confers certain rights and the principle of

seniority-cum-merit gives effect to the such rights flowing from seniority. It cannot, therefore, be said that in the matter of promotion on the basis of seniority-cum-merit seniority has no role where the employees eligible for promotion were appointed on the same date and have the same length of service.

18. We thus arrive at the conclusion that the criterion of "seniority-cum-merit" in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit".

12. Further, the Supreme Court in Chabungbam Ibohal Singh Vs. Union of India (UOI) and Others, , dealing with the denial of promotion to an employee on the ground that he was considered to be unfit without disclosing reasons in support of that opinion, had to say thus-

"8. The minutes of the meeting concerning the year 1977 shows that the Selection Committee recommended two names, one of which was of Shri R.K. Modhusana Singh who belonged to General Category and another Shri L.S. Thangjon who was a Scheduled Tribe candidate. R.K. Modhusana Singh was the junior most incumbent in the list of eligible candidates. His assessment was, however, recorded as "very good" whereas qua the appellant it had been stated "unfit". As the appellant was being superseded by one of his juniors, we do not think if it was enough on the part of the Selection Committee to have merely stated "unfit", and then to recommend the name of one of his juniors. No reason for unfitness is reflected in the proceedings....."

13. Therefore, in our considered opinion, the assessment of the petitioner by the DPC as "average" cannot be equated to its assessment as "unfit", and if it can be, it tantamounts to saying that an "average official" is an "unfit official" for the purpose of promotion even in a case where the method to be applied is merit-cum-fitness. Such a reasoning cannot be adopted keeping in mind, as held by the Supreme Court in Sant Ram Sharma's case (supra), that public interest is best secured when reasonable opportunity for promotion exist for all qualified employees. It is well settled that where the method of seniority-cum-fitness is adopted in terms of the rule for promotion, a senior cannot be denied promotion merely because his junior is more meritorious. In such fact situation, law requires that the senior should be promoted though his junior is more meritorious in the opinion of the promoting authority. A Division Bench of the Karnataka High Court in N. Srinath v. Stale of Mysore 1972 SLR 449 (Vol. 7), dealing with a similar question has observed-

"13. Another aspect of the matter is that whether the promotion be on seniority-cum-merit basis or by selection, it is impossible to promote a junior without considering the case of a senior. In the case of the first type of promotions, it is obvious that a senior must be considered first and that when he is found unfit, the case of the next junior may be considered. In the second category of promotions, the promoting authority must consider a sufficient number of persons in the lower cadre or a number which, a relation to promotional vacancies to be filled, is reasonable sufficient at the top of the lower cadre for consideration. They should take the number from the persons at the top, because both according to well known notions of merit in Government service and according to the express provisions of Rule 4 of the Mysore Civil Services (General Recruitment) Rules, seniority is an element in the assessment of merit, and even in cases where promotion is by selection, due regard must be had for seniority also".

14. The DPC when it met in the month of September, 1996 did not record any specific finding on consideration of relevant materials in the service records of the petitioner that he was found to be unfit to hold the post of Accounts Officer. Be that as it may, the promoting authority also refused to disclose the circumstances or the grounds or the reasons for the DPC to record its opinion that the petitioner is "not yet fit", in response to the petitioner's representations dated 27-10-1997 and 24-11-1997. That is the same position before the learned Tribunal as well as before us. No satisfactory materials are placed before the Court to satisfy ourselves that the above remark made by the DPC in its meeting held in the month of September, 1996 against the petitioner is based on relevant materials and considerations. Therefore, we hold that supersession of the petitioner by the DPC in its meeting held in the month of September, 1996 for promotion to the post of Accounts Officer is unjust and illegal.

15. This takes us to the next question whether the DPC was justified and acted legally in denying promotion to the petitioner in its meeting held in the month of December, 1997. First, it is relevant to notice that even assuming that denial of promotion to the petitioner by the DPC in the meeting held in the month of September, 1996 was justified and legal, even then, the promoting authority was required to review the case of the petitioner for promotion on expiry of six (6) months from the date of convening of the last DPC, in terms of relevant Government Orders. In the instant case, there is nothing on record to show that such a review was made by the promoting authority between September, 1996 and December, 1997. Secondly, it is important to notice that when the DPC met for the second time in the month of December, 1997, no disciplinary proceedings were pending against the petitioner. It is borne out from the records that the disciplinary proceedings initiated against the petitioner culminated in the final order dated 27-11-1997 of the 3rd respondent herein, imposing the penalty of censure. Therefore, there was absolutely no justification for the DPC not to consider the case of the petitioner for promotion, in its meeting held in December, 1997 on the misconceived ground that disciplinary proceedings were

pending against the petitioner. In the first place, the view taken by the DPC is clear case of misreading of facts, non-application of mind. Secondly, the question that arises for consideration is whether the penalty of "censure" imposed on the petitioner could be a valid and good ground to deny promotion to the petitioner only on that count. We are of the considered opinion that the punishment of "censure" imposed on the petitioner, by the proceedings of the 3rd respondent dated 27-11-1997, itself cannot be a valid and justifiable legal ground for overlooking the seniority of the petitioner in the matter of promotion. The Kerala High Court, in *S. Mukundan Menon v. State of Kerala*, 1970 Lab.IC 897, dealing with the question whether punishment of "censure" by itself can be a valid ground for overlooking the seniority in matters relating to promotion, held-

".....All that has been made out in this case is that a punishment of censure has been awarded to the petitioner by the District Collector, Trichur by his order dated 21-5-1965. The fact that there has been such an order is not denied. But censure by itself is not a ground for overlooking seniority in the matter of promotion; and the Government have no case that the petitioner was denied promotion on the several occasions when his juniors were promoted on account of the above punishment In fact respondents 3 to 14 were promoted several months before the said punishment was awarded...."

We are in respectful agreement with the above view.

16. A Division Bench of the Kerala High Court in *K. Madhavan v. The Commissioner of Income Tax, Cochin and others* 1983 (1) SLJ 240, held that "censure" inflicted as a regular penalty in proceedings taken under the Classification, Control and Appeal Rules cannot have the effect of automatically postponing the employee's promotion; and it is difficult to see how a warning, which is not even a punishment and which is not given in accordance with the principles of natural justice, can withstand judicial scrutiny in the matter of preventing an employee's promotion.

17. The Supreme Court in *M.L. Capoor* 's case (supra) emphasised the need and requirement of disclosure of reasons in support of the opinion where an official or officer is superseded in the matter of promotion thus-

"28. In the context of the effect upon the rights of aggrieved persons, as members of a public service who are entitled to just and reasonable treatment, by reason of protections conferred upon them by Articles 14 and 16 of the Constitution, which are available to them throughout their service, it was incumbent on the Selection Committee to have stated reasons in a manner which would disclose how the record of each officer superseded stood in relation to records of others who were to be preferred, particularly as this is practically the only remaining visible safeguard against possible injustice and arbitrariness in making selections. If that had been done, facts on service records of officers considered by the Selection Committee would have been correlated to the conclusions reached. Reasons are the links between the materials on which

certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable. We think that it is not enough to say that preference should be given because a certain kind of process was gone through by the Selection Committee....."

18. Thirdly, in this case, the 4th respondent and some other juniors to the petitioner were promoted to the post of Accounts Officer in the month of October, 1997, that is to say, even before the disciplinary authority imposed the penalty of "censure" on the petitioner by proceedings dated 27-1-1997. We, therefore, hold that denial of promotion to the petitioner by the DPC in its meeting held in the month of December, 1997 is also not justified and legal.

19. In the result and for the foregoing reasons, as well as in the peculiar facts and circumstances of this case, we allow the writ petition and quash the impugned order of the learned Tribunal. A direction shall issue to the official respondents 1 to 3 to promote the petitioner to the post of Accounts Officer with effect from the date on which his immediate junior, the 4th respondent herein, was promoted to the post of Accounts Officer. No costs.