

(1998) 12 GUJ CK 0094

In the Gujarat High Court

Case No : Letters Patent Appeal No. 513 of 1987 and Special Civil Application
No. 2725 of 1984

A.N. Memon

APPELLANT

Vs

Registrar

RESPONDENT

Date of Decision : 09-12-1998

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226
Gujarat Recruitment and Conditions of Service of Staff Rules, 1964 — Rule 38, 38(1),
42(6A), 62(6A)

Citation : (1999) 2 GLR 566

Hon'ble Judges : C.K. Buch, J;B.C. Patel, J

Bench : Division Bench

Advocate : Suresh M. Shah, for the Appellant; Mankad and S.P. Hasurkar for
Respondent Nos. 1 to 10, for the Respondent

Final Decision : Dismissed

Judgement

B.C. Patel, J.—Unsuccessful petitioner before the learned Single Judge in Special Civil Application No. 2725 of 1984, which was disposed of on 7th September 1987, has preferred this L.P.A. Learned Single Judge disposed of the petition on the ground of delay and laches as well as on merit.

2. The appellant at the relevant time was working as Assistant in the office of the High Court. By filing a petition under Article 226 of the Constitution, he challenged the grant of selection grade to respondents No. 2 to 10 and promotions given to them as Senior Clerk-cum-Assistant by this Court on its administrative side.

3. The appellant was appointed as a Section Writer on 24.10.1967. He was promoted as Junior Clerk on 15.11.1967 and was confirmed as Junior Clerk on 1.3.1972. He passed the Lower Standard Departmental Examination (hereinafter referred to as "examination") on 30th October 1974. 10% of the post of Junior Clerks were upgraded and made Selection post in the pay scale of Rs. 190-290 in

May 1974 and respondents No. 2 to 10 were given selection grade by order dated 5.6.1974, presumably because all of them, by that time cleared the departmental examination. They were given selection grade from different dates from 1.4.1972. The appellant was granted selection grade on 7.12.1974 i.e. after passing the examination on 30th October 1974. Thus, the respondents No. 2 to 10 were placed in the selection grade earlier and from the record it is clear that they were promoted to the cadre of Senior Clerk-cum-Assistant on different dates from 1.10.1973 to 19.3.1976. The appellant later on was promoted as Senior Clerk-cum-Assistant on 16.8.1976. Learned Single Judge has in clear terms observed that so far as the seniority in the Junior Clerk cadre is concerned, admittedly the appellant was senior to the respondent Nos. 2 to 10. Before this Court, the only contention raised is that the appellant being senior and having passed the examination on 30th October 1974, he should have been promoted soon thereafter and in any case, he should have been promoted along with the other persons. Mr. Shah, learned counsel submitted that considering the dates, as the appellant cleared the examination on 30.10.1974 and out of the respondents, respondents No. 5 onwards were promoted on 2.7.1975 and onward, the appellant ought to have been promoted on 2.7.1975, he being senior to others who were promoted.

4. Mr. Shah, learned advocate for the appellant submitted that the High Court of Gujarat (Recruitment and Conditions of Service of Staff) Rules 1964 (hereinafter referred to as the Rules), would govern the field. The first part of rule 38 (1), which is relevant in the instant, case, reads as under :-

38(1). Promotions shall be made on merit, but seniority in the cadre shall be ordinarily taken into account, as far as possible. A person, however, may receive special promotion for recognised merit irrespective of the grade to which he may belong or irrespective of his seniority within the grade.

4.1 He submitted that so far as the respondent No. 2 is concerned, he cleared the examination earlier and was also promoted before the appellant passed the examination for which he had no grievance, but the moment the petitioner passed the examination, he being senior, he should have been considered with others and should have been promoted. He submitted that there is nothing to show that the appellant had any demerit and on passing the examination, he would stand on the same footing as others. In the absence of any demerit at the relevant time, if all were qualified and appellant was senior, he should have been promoted. Learned advocate further submitted that if failure in passing the examination within the prescribed chances is to be considered as a demerit, then the appellant could never have been promoted to the higher post, but the very fact that he was later on promoted shows that failure in passing the examination within the prescribed chances was not considered as a demerit.

4.2 The Special Civil Application was dismissed on the ground of delay and laches and also on merits.

5. The respondent No. 2 was promoted on 1.10.1973. The appellant must have known about the promotions of others also and nothing prevented the appellant from challenging the decision of the administrative side of this Court by filing a writ petition within a reasonable period which may be reckoned from 1.10.1973. Even a representation was made by the appellant and the same was disposed of much earlier, i.e. on 23.7.1974. It is required to be noted that the appellant remained silent from 1974 till 1982, to be precise, till 11.10.1982, on which date he made a representation in connection with fixing of seniority in the cadre of Sr. Clerk on the basis that promotions given to respondents No. 2 to 10 were not correct. This representation was grossly belated as even the last person, respondent No.10, was promoted on 19.3.1976. After the representation was rejected, the appellant waited for a long period of one year and one month and then filed the petition before the learned Single Judge. Learned Single Judge has rightly held that the grievance of the appellant is grossly belated and should not be entertained. Learned Single Judge accepted the preliminary objection as canvassed by the learned advocate for the respondent on the ground of gross delay and laches. In our opinion, learned Single Judge has rightly rejected the petition on the ground that it was grossly belated and it reflected a stale claim.

6. The Apex Court, in the case of K.R. Mudgal and Others Vs. R.P. Singh and Others, made a pertinent observation in paragraph 7 of the judgment, which is quoted below :-

"Satisfactory service conditions postulate that there should be no sense of uncertainty amongst the Government servants created by the writ petitions filed after several years as in this case. It is essential that any one who feels aggrieved by the seniority assigned to him should approach the Court as early as possible as otherwise in addition to the creation of a sense of insecurity in the minds of the Government servants there would also be administrative complications and difficulties."

7. The learned Single Judge considered the judgment of the Apex Court in the case of R.S. Makashi and Others Vs. I.M. Menon and Others, and has quoted the following observations :-

"In these circumstances, we consider that the High Court was wrong in overruling the preliminary objection raised by the respondents before it, that the writ petition should be dismissed on the preliminary ground of delay and laches, inasmuch as it seeks to disrupt the vested rights regarding the seniority, rank and promotions which had accrued to a large number of respondents during the period of eight years that had intervened between the passing of the impugned resolution, and the institution of the writ petition. We would accordingly hold that the challenge raised by the petitioners against the seniority principles laid down in the Govt. resolution of March 22, 1968 ought to have been rejected by the High Court on the ground of delay and laches and the writ petition insofar as it related to the prayer for quashing the said Government resolution should have been dismissed."

8. For belated challenge, the Apex Court, in the case of B.V. Sivaiah and Others etc. Vs. K. Addankl Babu and Others etc., in paragraph 24 held that :-

"Since there was no challenge to the promotions made on May 3, 1988 till 1993, the promoted officers had been working for nearly five years by then and had acquired right to seniority on the basis of such promotion and they cannot be deprived of the said right. The High Court, in our opinion, has rightly held that the belated challenge to the promotions made on May 3, 1988 raised by the appellants in these appeals cannot be entertained."

9. The Apex Court in the case of B.S. BAJWA VS. STATE OF PUNJAB reported in 1998(1) SLR 461 considered the question of delay and laches. In that case, the Court pointed out that a writ petition was wrongly entertained and allowed by the learned Single Judge. The Apex Court set aside the judgment of the learned Single Judge as well as the Division Bench. In that case, the Court pointed out in paragraph 7 that :-

"It is well settled that in service matters the question of seniority should not be re-opened in such situations after the lapse of a reasonable period because that results in disturbing the settled position which is not justifiable. There was inordinate delay in the present case for making such a grievance. This alone was sufficient to decline interference under Article 226 and to reject the writ petition."

10. Mr. Shah, learned advocate for the petitioner placed reliance on the judgment in the case of A. Sagayanathan and others Vs. Divisional Personal Officer, S.B.C. Division, Southern Railway, Bangalore, and submitted that the learned Single Judge has committed grave error in dismissing the petition. He submitted that the petition cannot be dismissed merely on the ground of delay in agitating the grievance. From the Apex Court's judgment, it clearly appears that the Tribunal did not enter into the merits of that case but rejected the petition on the ground that the petitioners were too late in agitating their grievance. Moreover, what was the period of delay is also not clear from the judgment. However, in the instant case, the petition is not rejected solely on the ground of delay. Learned Single Judge has dealt in detail on the merits of the case also. Moreover, learned advocate could not point out whether the promotions in the case relied upon were based on the principle of merit-cum-seniority or seniority-cum-merit. If the promotions in that case were based on seniority-cum-merit, then the same will be of no assistance in this case. Apart from that, as stated above, since in the instant case the petition has been considered on merit also, this judgment would not assist the appellant in the facts of the present case.

11. In view of the aforesaid position, the appeal is required to be dismissed on the ground of delay and laches in filing the writ petition.

12. On merits, Mr. Shah, learned advocate submitted that the learned Single Judge has committed an error in considering the demerits acquired by the appellant by failing at the examination within the prescribed chances in comparison to others and would continue as a demerit. Mr. Shah further

submitted that the so called demerit automatically gets evaporated on passing the examination. He submitted that in view of Rule 42 (6A), the Junior Clerk has to pass the examination within three chances (four chances in case of candidate belonging to scheduled castes or scheduled tribes). He further submitted that this rule also provides that additional chances shall be granted to him on payment of examination fee of Rs. 15/per chance. By inviting our attention to Rule 42 (6A), Mr. Shah submitted that the only consequences would be of withholding of the increments and nothing more. He further submitted that on passing the examination, even the increments withheld will become payable from the date on which the employee passes the examination. Rule 42 (6A) reads as under :-

Failure to pass the examination as prescribed above will render a Junior Clerk liable to have increments withheld until he passes the examination. Any increment withheld shall become payable to him from the date on which he passes the Lower Standard Departmental Examination and all future increments shall accrue to him as if no increment had been withheld:

Provided that he shall not be entitled to refund of the actual pay which he has lost owing to one or more increments having been withheld.

Explanation.- For the purpose of releasing the withheld increments, "the date of passing the examination" means the date following the date on which the examination ends.

13. Appellant, according to Mr. Shah, did not lose his seniority as a Clerk vis-a-vis respondents No. 2 to 10 who were also Clerks. Mr. Shah further submitted that merely they were enjoying selection grade in the same cadre from time prior to the time the petitioner was placed in the selection grade in the same cadre, that would not mean that they were to be given any priority. Considering the effect of Rule 38, 42(6A) coupled with the subjects in which one is required to appear, is required to be considered. One has to remember that for efficient working of an institute, it is necessary to have meritorious persons in the department. After a person is selected in the grade of Junior Clerk though he stands ahead in seniority, he will be required to compete with others. It is necessary wherever criteria of merit-cum-seniority is provided to show better performance. Mr. Shah's submission is that considering the language used in rule 38 (1), one should read it as seniority-cum-merit and not merit-cum-seniority. According to his submission, seniority in the cadre is to be ordinarily taken into consideration as far as possible. The use of the words "but", "ordinarily" and "as far as possible", according to Mr. Shah suggests that seniority is given predominance over the merit though it might have been mentioned that promotions shall be made on merit. So far as seniority-cum-merit rule is concerned, it postulate that minimum necessary merit requisite of administration, the senior, eventhough less meritorious shall have priority. There is no need to have comparative assessment of merit. Minimum standard is required to be laid down. In the case of seniority-cum-merit, seniority of

employees who are eligible for consideration is required to be taken into consideration which is normally based on the length of service. If in a given case employees appointed on the same day and have the same length of service, the basis of the placement in selection grade for appointment is a relevant consideration. Determination of seniority confer certain rights and the principle of seniority-cum-merit gives effect to such a right flowing from seniority, and, therefore, obviously, where the criteria is seniority-cum-merit, seniority has an important role. In a given case there may be necessity to have a comparative assessment of merit.

14. So far as merit-cum-seniority is concerned, greater emphasis is on merit and ability; seniority plays less significant role. Seniority is to be given merit only when merit and ability are approximately equal. The Apex Court, in paragraph 37 of the judgment in the case of Union of India (UOI) Vs. Mohan Lal Capoor and Others, has pointed out that in case of merit-cum-seniority, seniority would play a secondary role. It is only when merit and suitability are roughly equal that seniority will be a determining factor, or if it is not fairly possible to make an assessment inter se of the merit and suitability of two eligible candidates and come to a firm conclusion, seniority would tilt the scale. In case of seniority-cum-merit, the Apex Court in the case of STATE OF KERALA VS. N.M. THOMAS reported in 1976 SC 490 while explaining the criteria of seniority-cum-merit has observed that "seniority-cum-merit means that given the minimum necessary merit requisite for efficiency of administration, the senior, though the less meritorious, shall have priority (para 38).

15. There would have been no difficulty if the principle would have been seniority cum merit, but rule 38 (1) requires merits. The word used is "shall", and, therefore, merit must be given precedence. At the same time, in our opinion, there is no question of diluting the principle which is made clear in 38 (1) that promotions shall be made on "merit" only because the words "but" "ordinarily" and "as far as possible" are used. On construction of 38 (1), the learned Single Judge has pointed out that "reading that rule shows that promotions from the cadre of Clerk to the cadre of Senior Clerk will be on the basis of pure merit. Those who are found positively fit for promotions can aspire to be promoted as Senior Clerk and more meritorious junior Clerk can steal a march over his senior in the same cadre of Clerks if the seniors are found to be less meritorious at a given point of time." What is required to be considered is that the appellant did not pass the examination within the specified chances as compared to respondents No. 2 to 10 and that the respondent No. 2 to 10 obtained selection grade earlier on the criteria of positive merit. The question to be decided is: can it be said that the action of the respondent No. 1 in allowing the respondent No. 2 to 10 to steal a march over the appellant in the process of being selected as Senior Clerks from the cadre of Junior Clerk is violative of constitutional rights of the appellant under Article 14 and 16 of the Constitution? As pointed out earlier, criteria for promotion is merit-cum-seniority. The Honourable the Chief Justice had taken a decision in exercise of powers under the relevant rules that the fact

of passing departmental examination by a clerk will be considered to be a positive merit and non-passing thereof a corresponding demerit. That criteria did not cease to operate till it was reconsidered and was rightly pressed in service by the first respondent on its administrative side in effecting promotions of respondents No. 2 to 10 and in bypassing the appellant and promoting him as a Senior Clerk only from 16.8.1976. In our view, failure to clear the examination within the prescribed chances can be used as a circumstance to state that on merit the appellant failed to maintain the same level as that of respondents No. 2 to 10. The criteria being pure meritcum-seniority, failure to pass the examination within the specified chances and subsequent passing of examination on additional chance or chances would not place the appellant at par with others who passed the examination much earlier. Persons working in the Registry of the High Court are required to deal with the matters which are filed in the Registry; Their standard of general English should be upto a particular standard; Clerks must have acquired knowledge of civil and criminal manual and other Acts. With a view to find out that Junior Clerk has by working in the office acquired sufficient background to shoulder the burden of higher cadre or not, can be tested by means of examination. Naturally, the one who passes the examination at the first attempt can certainly be said to be having better merits than the person who is passing the examination after 4 or 5 trials. In the paper of General English of 100 marks, Junior Clerks knowledge was to be tested by giving him a question paper of General English including grammar, idioms, precis writing, letter drafting etc. Examinees knowledge will be tested in subjects of Civil Manual, Criminal Manual, Bombay Court Fees Act and the matters coming within the scope of Clerks' duties by a question paper of 100 marks. His knowledge was required to be ascertained by asking him to appear at the examination in particular part of the subjects of CPC and Code of Criminal Procedure. There is also typewriting test, which he is required to pass. A person working as Junior Clerk in the Registry must have acquainted himself with these subjects or part of it whatever prescribed. One cannot say that despite failure on several attempts, he will stand at par with Junior Clerks who passed at the first attempt.

16. It is also required to be noted that failure to pass the examination as prescribed will render a Junior Clerk liable to have increments withheld until he passes the examination; On passing the examination, the increments withheld shall become payable to him from the date on which he passes the examination and all future increments shall accrue to him as if no increment had been withheld. However, the proviso makes its clear that he shall not be entitled to refund of actual pay which he lost owing to one or more increments having been withheld. If the examination would have been considered insignificant either there would have been no provision of withholding the increment or if there is a provision for withholding the increment, the same would have been made payable. We are of the opinion that the tenor of the rule 42 (6A) is such that a person working as a Junior Clerk is not considered to be of any merit even to receive the usual yearly increment if he does not pass the departmental

examination; The provision to release the withheld increments is only with a view to ensure that he does not suffer monetarily after passing the examination. It is clear that the rule does not provide to consider such a person to be considered at par with a person who passed the test at the first trial. If that be so, passing of the test at the first trial definitely makes a person more meritorious than the person who passed the test after repeated trials. Reading the rule as it is, we are of the opinion that the rule making authority wanted to see that meritorious persons, though equally situated, are earning their increments as they have cleared the examination.

17. Learned Single Judge has referred to the decision of the learned Chief Justice dated 26.2.1974 which suggests that for failure to pass the lower standard departmental examination within the prescribed time is stoppage of increments till passing of the examination and it should be considered as a positive demerit. If passing of the examination within the specified chances is to be considered as a positive demerit, in our view, the learned Single Judge has rightly held that it cannot be said that while judging inter-se merit of the petitioner on one hand and his juniors - respondents No. 3 to 5 or for that matter upto respondent No. 10 on the other, for the purpose of eligibility for being promoted as senior clerks on the criterion of positive merit-cum-seniority, non-passing of the said examination within specified chances and non-obtaining of selection grade earlier, was to be accepted as a factor which was totally irrelevant and should never have entered the process of selection as made by this Court on administrative side at the relevant time". Merely because lateron the appellant has passed the examination, would not amount to making him to stand at par with others who passed the examination earlier in specified chances as the principle merit-cum-seniority is applicable.

18. On the question of merit, Mr. Shah, relying on the decision delivered by learned Single Judge in the case of K.L. Gadhvi Vs. Chief Conservator of Forest and Others, submitted that in the absence of indication that the appellant was positively unfit for promotion, he could not have been bypassed and he ought to have been promoted soon after he cleared the examination. In our view, this decision has no application in the facts and circumstances of the present case because that was a case where the promotion was on the basis of seniority-cum-merit. In the instant case, the promotion is on the basis of merit-cum-seniority rule.

19. It is also required to be taken into consideration while considering the merit that by passing the examination earlier, other respondents were drawing selection grade much earlier and that itself is a criterion of positive merit; Non-passing of the examination within the prescribed chances by the appellant is also required to be considered as a demerit in view of the decision of the learned Chief Justice dated 26.2.1974 whereby it is decided that failure to pass the examination within the prescribed time is to be considered as a positive demerit when the criterion is merit-cum-seniority. In our view, the learned Single Judge

has rightly taken these aspects into consideration and has rightly dismissed the petition.

20. Before the Apex Court in the case of GHULAM HUSSAN VS. UNION OF INDIA reported in 1973 (1) SLR 953 [paragraph 7] the suggestion was that since there is nothing adverse against them, the petitioners were entitled to be selected. The Apex Court pointed out "this claim is ofcourse misconceived for the simple reason that promotion is not made on the basis of absence of complaint but on the basis of positive merit. Absence of adverse remarks is no criterion of the quality of an officer". Thus, where the criteria is merit-cum-seniority, merits are to be seen first.

21. The Apex Court, in the case of STATE BANK OF INDIA vs. MOHD. MYNUDDIN reported in 1987 (4) SLR 383 pointed out that whenever promotion to a higher post is to be made on the basis of merit, no officer can claim promotion to the higher post as a matter of right by virtue of seniority alone with effect from the date on which his juniors are promoted. The Apex Court further pointed out that in the confidential reports it is recorded that services are "satisfactory"; An officer may be capable of discharging the duties of the post held by him satisfactorily but he may not be fit for the higher post. Before any such promotion can be effected it is the duty of the management to consider on the basis of the relevant materials. Working satisfactorily means that he might be working in the office on the present post to the general satisfaction. It does not mean that others who are working with him more efficiently are to be considered at par with the persons who is working satisfactorily generally. The test of examination really indicates that if within prescribed chances one has passed the examination, it can be said that he has acquired efficiency and merits. Junior Clerk, after working for some time in the Registry of the Court was required to appear at the examination. It is not that at first trial, he has to pass, but within three chances he has to pass the examination. Therefore, though liberal provision of three chances is provided, if a junior Clerk is not attaining that standard to pass the examination, he cannot say that he is equal to others those who have passed the examination within a reasonable period, i.e. three chances.

In the result, this appeal fails, and stands dismissed.