

(1982) 07 GUJ CK 0007
In the Gujarat High Court

D.B. Shah and Others

APPELLANT

Vs

State and Another

RESPONDENT

Date of Decision : 19-07-1982

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Gujarat Civil Services Classification and Recruitment (General) Rules, 1967 — Rule 11

Citation : (1982) GLH 903 : (1983) 1 GLR 319

Hon'ble Judges : B.K. Mehta, J

Bench : Single Bench

Judgement

B.K. Mehta, J.—The petitioners have moved this Court for appropriate writs, orders and directions to quash and set aside the order of their reversion from the posts of Under Secretary to Section Officer. The said order is dated July 14, 1977, Annexure "C" to the petition. The grievance of the petitioners is that though respondent No. 2 was promoted alongwith the petitioners in March 1977, and was ranked much below the petitioners in the unconditional select list of Section Officers prepared for promotion to the posts of Under Secretary and which select list is based on the respective seniority of the Section Officers, he was retained as Under Secretary while the petitioners have been reverted. This action of the Government is, in submission of the petitioners, discriminatory and, therefore, violative of Articles 14 and 16 of the Constitution of India. The petitioners have, therefore, prayed that the impugned order of reversion be quashed and set aside so far, as it affects the petitioners and it be declared that the petitioners have continued to hold the posts of Under Secretary all along.

2. After this petition was filed, it is an admitted position that the petitioners have been promoted again as Under Secretary sometime in the month of October, 1977.

3. The petition is resisted by the State Government broadly on the ground that the petitioners were not entitled to be promoted as a matter of right on the ground of seniority alone and unless they are found to be fit for such promotion

they are not entitled to promotion as prescribed in the Gujarat Civil Services Classification and Recruitment (General) Rules, 1967 (hereinafter referred to as "the Classification Rules"). The State Government has further stated in the reply affidavit of Shri H.D. Jokhaker, Under Secretary to the Government of Gujarat in General Administration Department that a committee called Departmental Promotion Committee was appointed for assessing the merits of the officers concerned and for assessment of the merits the confidential reports of the concerned officers were looked into and a provisional select list of Section Officers fit to be promoted to the posts of Under Secretary was prepared. In the meeting of the Departmental Promotion Committee held on 31st March, 1977, the cases of 15 Section Officers were considered and on comparative assessment of the relevant merits, a select list was prepared and the grading in the said list was determinative of the seniority in the cadre of Under Secretary. Accordingly, respondent No. 2 was ranked at Sr. No. 3 in the said select list while the petitioners were ranked at Sr. Nos. 7, 8, 9 and 10, respectively and, therefore, while deciding as to who should be retained on the post of Under Secretary as a result of abolition of four other posts, and having regard to the seniority of respondent No. 2, according to his gradation in the select list prepared by the Departmental Promotion Committee as aforesaid, the petitioners were reverted.

4. At the time of hearing of this petition, it was pointed out on behalf of the petitioners by Mr. Shukla, learned Advocate appearing for them, that the action of the State Government in drawing the select list as if the promotion from the post of Section Officer to Under Secretary was governed by the criterion of merit-cum-seniority is entirely misconceived inasmuch as the Government notification issued by the General Administration Department dated September 16, 1965 read with Rule 11 of the Classification Rules enjoins that promotion from the post of Section Officer to Under Secretary would be governed by the principle of seniority-cum-fitness. It was in light of this prescribed principle that an unconditional select list based on the seniority of the respective Section Officers was prepared by the Government Circular issued in General Administration Department dated July 16, 1970 and it is on the basis of this unconditional select list that the petitioners and respondent No. 2 were promoted in March, 1977. In the said unconditional select list, respondent No. 2 figures at Sr. No. 107 while the petitioners figure at Sr. Nos. 100, 102, 103 and 104, respectively, and, therefore, the petitioners were senior to respondent No. 2 and they could not have been reverted as was sought to be done by the State Government by the impugned order of reversion. It was, however, conceded by the learned Advocate for the petitioners that the present petition survives only for the purpose of the question of seniority of the petitioners in the cadre of Under Secretary and then in the cadre of Deputy Secretary to which the petitioners have been promoted by now.

5. I am of the opinion that there is great force in what the learned Advocate for the petitioners has contended. The relevant Government notification of September 16, 1965 is issued in exercise of the powers conferred under Article

309 of the Constitution prescribed Recruitment Rules for the posts of Deputy Secretary and Under Secretary to the Government. The provision contained in para B of the said notification provides for recruitment to the posts of Under Secretary. It reads as under:

8. Under Secretary to Government:

Except when it is filled by the appointment of a member of an All India Service appointment to the post of Under Secretary to Government shall be made by promotion of a Superintendent belonging to the Subordinate Secretariat Service. Provided that in the Public Works Department, posts requiring technical knowledge may be filled in by temporary transfer of a member of Gujarat Service of Engineers, Class-I:

Provided further that in the Legal Department posts requiring legal knowledge may be filled in by temporary transfer of a member of the State Judicial Service in prior consultation with the Public Service Commission:

Provided further that the Government may appoint a Deputy Collector as Under Secretary to Government for a specific purpose and term in prior consultation with the Public Service Commission.

6. It should be noted at this stage that by para A of the said notification, provision made for recruitment to the post of Deputy Secretary. The appointment to the post of Deputy Secretary to the Government is to be made by promotion of an Under Secretary to the Government strictly on consideration of efficiency and proved merit. Now, there is no such condition to be found in para 6 where the provision is made for recruitment to the post of Under Secretary. I have, therefore, to consider as to what is the effect of Rule 11 of the Classification Rules. The said rule provides general condition for appointment by promotion. The material part of Rule 11 reads as under:

11. Appointment by promotion

(1) Where an appointment to any post is to be made by promotion, no servant shall be entitled to such promotion on the ground of seniority. No such appointment shall be made unless in addition to seniority, the servant to be appointed is found to be fit for such promotion.

(2)

In other words, where the appointment to a post is prescribed by mode of promotion only that appointment is to be made subject to the rule of seniority-cum-fitness. As a matter of fact, in the reply affidavit filed on behalf of the State Government, it has been conceded as under:

2. At the out-set, I say that the recruitment rule relied upon by the petitioners at Ex. D merely provides that appointment to the post of Under Secretary to Government shall be made by promotion of a Superintendent belonging to the Subordinate Secretariat Service. I say that Gujarat Civil Services Classification

and Recruitment (General) Rules, 1967 provide that where an appointment to any post is to be made by promotion, no Government servant shall be entitled to such promotion on the ground of seniority alone and that no such appointment shall be made unless, in addition to seniority the Government servant to be appointed is found to be fit for such promotion.

7. It is, therefore, precisely the cases of the State Government that the Government notification of September 16, 1965 read with Rule 11 of the Classification Rules provides for y appointment to the post of Under Secretary by promotion on the basis of the principle of seniority-cum-fitness. If that is the legal position, and I do not feel any doubt about it, the connotation of the principle of seniority-cum-fitness is well recognized. It is settled legal position that when appointment to a post or service is by promotion based on the principle of seniority-cum-fitness, there is no question of comparing or assessing the performance of a candidate competing for the post with the other candidates of his cadre. The question is to be examined with respect to each of the candidates concerned by finding out whether he is positively unfit for the promotion, and it is passing over in favour of his junior candidate. The term "seniority-cum-merit" has settled connotation, and it is that the case of each officer is to be considered and rejected if found unfit. The distinction between criterion for promotion on seniority-cum-merit basis and the criterion for promotion on merit-cum-seniority basis is well known. The gist of the test of seniority-cum-merit is that inspite of seniority of an officer a junior could be promoted, if the officer concerned was unfit to hold the post of promotion. Where the promotion is based on seniority-cum-merit, a particular officer cannot claim promotion as a matter of right by virtue of seniority alone if he was found unfit to discharge the duties of higher post and in that case he may be superseded and a junior officer can be promoted (vide : State of Mysore and Another Vs. Syed Mahmood and Others, . The said criterion of seniority-cum-merit, therefore, implies the test of unfitness and not one of positive merit. The comparative merit of the officers considered for promotion may have to be assessed if the length of service of the competing candidates is equal, or outstanding junior is available for promotion (vide : State of Mysore Vs. C.R. Sheshadri and Others, . The question of comparative merit as per the settled legal position would arise if the length of service was equal, or the outstanding junior was available for promotion. Otherwise seniority is a vital factor which could not be disregarded. It is only unfitness which would enable the authority to disregard seniority, otherwise the test of comparative merit may be applied only when the length of service was equal or outstanding junior was available. The assessment of confidential reports is a recognized method for assessing comparative merit or suitability but that comparative merit would have to be assessed between persons whose length of service was equal, (vide : Zarna F. Vaidya v. State of Gujarat Special Civil Application No. 1292 of 1976 decided by J.B. Mehta, J. on September 15, 1977). The learned Advocate for the petitioners was, therefore, right when he urged that the authorities in the State Government have adopted a

procedure of comparative assessment by considering the merit and the confidential reports of the competing candidates which is a method to be adopted when the appointment by promotion is governed by the principle of merit-cum-seniority. The petitioners were, as stated above, included in the unconditional select list of Section Officers prepared on the basis of their respective seniority and that select list was declared by the State Government by its circular issued in General Administration Department on July 16 1970. The petitioners are much above respondent No. 2. In that view of the matter, therefore, the order of reversion could not be sustained. Since the petitioners are already promoted to the posts of Under Secretary and then to the posts of Deputy Secretary, no further directions would be necessary to be given except that the State Government should be directed to fix seniority of the petitioners in the cadre of Under Secretary and that of Deputy Secretary in the light of this decision since possibly the question of seniority inter se the petitioners and respondent No. 2 may have a bearing in the future when the promotional chances open for the post of Joint Secretary. The learned Advocate for the petitioners fairly did not press for the claim of the salary and allowances for the period of three to four months during which they were under the impugned order of reversion working as Section Officers. No direction on that count is therefore necessary.

8. The result is that this petition is allowed and the impugned order of reversion is declared to be bad in law and void. Rule is made absolute with the directions aforesaid. There would be no order as to costs in this petition.