

(1990) 09 AP CK 0005

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 16483 and 164778 of 1986

D.Y. Moghe and Another

APPELLANT

Vs

The Singareni Collieries Co. Ltd. and Others

RESPONDENT

Date of Decision : 21-09-1990

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1992) 1 ALT 165

Hon'ble Judges : Sivaraman Nair, J

Bench : Single Bench

Advocate : H.S. Gururaja Rao, for the Appellant; K. Sirnivasa Murthy, for the Respondent

Final Decision : Allowed

Judgement

Sivaraman Nair, J.—Petitioners were Additional Chief Mining Engineers in the Singareni Collieries Company Limited, Kothagudem. They were aspirants for promotion as General Managers in their turn according to seniority in 1986. The complaint of the petitioners in these petitions is that they were superseded by their juniors in the feeder category for promotion. They claim that the principle which the respondent-company has adopted for advancement in service is promotion on the basis of seniority-cum-merit which is the same as seniority-cum-fitness. This principle, according to the petitioners, is different from promotion on the basis of selection based entirely or predominantly on merit, in which system seniority may have no place. The principle of seniority-cum-merit or seniority-cum-fitness visualises only rejection of the unfit. It does not enable the employer to promote a junior on the ground that he is more fit or more meritorious. In other words, a senior has to be considered first; and only if he is found to be unfit for promotion or lacks on merit of the optimum standard to be promoted, can a junior be promoted. If both the senior and the junior are found eligible and fit for promotion, a junior cannot be promoted while retaining the senior in the lower position for the reason that the junior is more fit. Petitioners

submit that if promotion is based on comparative merit, seniority can have no place, since ranking has to be made on merit irrespective of seniority. Selection on the basis of merit, in other words, does not involve ranking according to seniority, after selection. A system where seniority counts to any extent, can therefore only mean rejection of the senior only if he is found to be unfit or lacks in merit for promotion. It is the alternative case of the petitioners that they have advanced in service on the basis of merit assessed by performance-evaluations, and it cannot be as if for the purpose of the present promotions, they are found to be unfit or are inferior to any of the respondents. They assert that there has not been a fair and reasonable evaluation of merit and promotability on the basis of any known standard and that personal likes and dislikes of the men who constituted the Departmental Promotion Committee, their unregulated whims and inexplicable fancies got the better of reason and fairness which resulted in junior favourites being chosen for top managerial positions in spite of the exemplary performance to the credit of the petitioners.

2. Counsel submits that the petitioners have been subsequently considered and have actually been promoted during the pendency of the Writ Petitions. Petitioners are not, however, satisfied with the subsequent promotion, since they feel that their claims were overlooked when their juniors were promoted in 1986, and the subsequent promotion three years later is little solace to them.

3. I will refer to the facts in some detail. Petitioner in W.P.No. 16477/86 joined service of the respondent company on 8-1-1962. He was promoted to E-7 grade as Additional Chief Mining Engineer in the pay scale of Rs. 2,800-100-3,600 on 28-8-78. During the period of 28 years of his service, he had acquired awards and special commendations on a number of occasions. Though he was a mining Engineer, he was put in charge of the main workshops at Kolhagudem in the year 1977 and was selected for training/ study tour under the Colombo plan sponsored by Singareni Collieries Company Ltd. In the year 1980 while he was working as Divisional Superintendent, Ramagundam-II Division, he was appointed as project Administrator of Coal Chemical Complex, with a special allowance. He was sent for a study tour to Japan and Australia in 1981 and for senior management training to the Administrative Staff College, Hyderabad, in 1983. The mines which he was entrusted with at Godavari Khani acquired national productivity prize among the Singareni Collieries. Though he was only in Grade-7 post of Additional Chief Mining Engineer, he was actually put in charge of the post of General Manager in E-8 Grade for a fairly long period of over one and half years prior to 31-10-1987. It is his submission that one of Ms seniors Sri A. Ramaswamy and himself had some disagreement while both of them were working as General Managers, the former on a regular basis and the petitioner on an officiating basis. Petitioner submits that Sri Ramaswamy was nursing that grievance even after he became a Director and wreaked vengeance by tarnishing his service records when he happened to be his reporting officer for a period of one and half months, relevant to the reporting year 1986. Petitioner submits that according to the guidelines issued by the company, only such superior officers

under whom a subordinate had worked for not less than four months could write his confidential record. Petitioner asserts that he had worked for a period of ten and half months under Mr. Paranjpe and only one and half months under Mr. Ramaswamy. Instead of requiring Sri Paranjpe to make entries in his confidential record, Sri Ramaswamy himself made adverse entries and scrupulously kept back such entries from the petitioner, and he himself sat in the Committee which decided to supersede the petitioner for promotion. The adverse entries which Sri Ramaswamy had made on 12-2-1986 were expunged by the Director (Personnel) in his letter dt.9-4-1987. The respondents did not consider this fact and review his case thereafter. Petitioner assails as unfair, the proceedings of the departmental promotion committee resulting in his supersession and the consequential preference of his juniors.

4. Petitioner in W.P.16483/86 pleads almost similar facts. Sri Suresh Chandra Gupta commenced service in the company on 20-7-1962. He was highly qualified even at that time. He obtained merit ranking and merit promotions in his career as a senior officer in the company during 28 years of his service. While working as Additional Chief Mechanical Engineer, he was promoted as General Manager, Ramagundam-II mine by order dt.26-4-85. That was a grade-8 post. He could exceed the target fixed for him consistently during the period when he was in charge of Ramagundam-II area mines. While Sri A. Ramaswamy who was his senior was promoted as Director and who participated as a member of the departmental promotion committee could exceed his target of 6,90,000 tonnes of coal during the year 1985-86 i.e. by only 63,914 tonnes (aggregating 7,53,914 tonnes), petitioner could exceed his target of 22,50,000 tonnes by 1,26,395 tonnes, aggregating to 23,76,395 tonnes. In the communication dt.6-1-1986 the Secretary in the Ministry of Energy, Department of Coal, communicated to the petitioner, appreciation of the Government of India of his outstanding performance and informed him that- "we are very happy to note the consistently good performance of the longwall face in your mine, which, on some occasions, has been better than that achieved in advanced coal mining countries." Likewise, the Managing Director of the Respondent Company in his letter dt. 8-8-1981 had congratulated the petitioner for exceeding the target of production by nearly ten thousand tonnes. Another commendation came his way when the Chairman and Managing Director of the Company wrote to him on 19-1-1987 congratulating him for his excellent performance in managing the mines, achieving production in excess of the target and taking his team of officers with him in the unique effort. Yet another commendation of the Chairman and Managing Director was dt. 8-4-85. He wrote again on 10-12-85 to the petitioner to intimate his happiness that Ramagundam, Centre-II had secured second rank in the V.T. Centre Assessment week. 1985" Petitioner submits that his. performance was assessed as excellent and consistently outstanding over the period of years- particularly since he was posted as General Manager, perhaps in an officiating capacity in 1985. In spite of these manifest advantages, which justified superior merit ranking he was superseded in favour of his juniors for regular promotion to

Grade-E-8 with the result that less deserving juniors have stolen a march over him, only due to the personal whims of the members of the departmental promotion committee. Here again the petitioner asserts that the rule which ought to have been applied was promotion on the basis of seniority-cum-merit i.e. seniority-cum-fitness and not pure selection or comparative merit

5. Petitioners submit that departure from "seniority-cum-merit" rule to "selection on merit" principle is contrary to the guidelines for promotion contained in Minute No. 4 of the Board meeting held on 13-5-1975, which bind the employer as well. Here again the petitioner asserts that the performance assessment was tarnished by two officers and those very persons sat as members of the departmental promotion committee and unreasonably rejected his claims. The adverse remarks were expunged by the Chairman and Managing Director in letters dated 9-4-1987 and 20-7-88. While doing so, the Chairman and Managing Director stated that-

"He is wonderful colleague to work with; He is capable of accepting the challenge and keeps excellent rapport with his staff. A lively person, sociable and capable of taking greater responsibility. He is an outstanding team man".

It is the petitioner's case that his case was not considered fairly and reasonably and that he became a victim of "Nelson's eye" since commendations from the Chairman and Managing Director of the Company, the Secretary in the Ministry of Energy, Department of Coal etc. about his consistently excellent performance from 1981 and particularly his record of production far in excess of the targets while officiating as General Manager were completely ignored in treating him as unfit for promotion on the basis of adverse remarks which were expunged by the competent authority juniors who were selected had service records which were in no manner better nor even as good as his. He asserts that they were ordinary and slovenly. He joined the other petitioner in asserting that the refusal to promote him is vitiated by mala fides and amounts to arbitrary victimisation, violative of Articles 14 and 16 of the Constitution of India.

6. Counsel on both sides joined issue as to what shall be the criterion for promotion. Petitioners assert that at its meeting held on 13th May, 1975, the Board had adopted resolution No. 4 to the effect that the criterion for promotion shall be seniority-cum-merit and all the qualified candidates as on the date of vacancy be considered for promotion, seniority being determined on the basis of length of service in E-7 grade in the immediate preceding grade and not by the date of passing the qualifying examination. They submit that this decision has not been altered atleast till the departmental promotion committee considered the cases of the petitioners in 1986.

7. Counsel for the respondent has no case that by any rule, regulation or decision, the Board had made any alteration in the principle which was applicable for promotion. What he asserts is that in the principle of seniority-cum-merit, when applied to senior positions in any organisation, seniority has only a

subordinate place and merit is far more predominant. According to him seniority comes into play only if the competing candidates are of equal merit. In other words, the more meritorious candidate has to be preferred to the less meritorious senior for promotion to senior executive positions, because such promotions have to be made by selection on the basis of comparative merit. Respondents have denied the allegation of malafides and bias. Counsel for the respondents submit that such allegations emanate from disappointment of individuals, who had assessed themselves as superior, but could not convince others of such superiority. As a matter of fact, the only controversy involved in these petitions relate to the interpretation of the criterion for promotion and the emphasis which has to be given to seniority in applying that principle.

8. The fact that the Board of Directors of the respondent company had decided in resolution No. 4 at its meeting held on 13th May, 1975 that-

"the Board reiterated that the criteria for promotion should be seniority-cum-merit and all the qualified candidates as on the date of vacancy be considered for promotion, the seniority being determined on the basis of length of service put in, in the immediate preceding grade and not by the date of passing the qualifying examination,"

is not seriously controverted. Constitution of the Departmental Promotion Committees to consider promotions in the executive scales of pay i.e. from E-1 to E-8 is also not in dispute. The respondents have admitted that no rules or regulations were framed prescribing any other criterion for promotion. It is admitted that according to the practice followed by the respondent company, merit was assessed on the basis of performance-appraisals for which separate forms had been prescribed. The only classification of employees at the relevant time under column 5 of the Proforma was "above" or "below" average. The company had realised that the personnel-appraisal was defective and had drawn pointed attention of reporting officers to such defects in the letters dated 4-4-83 and 13-1-1986. In the new proforma which was prescribed to avoid such defects, sevenfold categorisation of assessment had to be made as follows:

- (1) Unproved (2) Satisfactory (3) Barely Adequate
- (4) Adequate (5) Good (6) Very Good and
- (7) Outstanding.

9. These assessments are naturally related to volume of production, personnel relations, capacity for leadership, capacity for decision-making and other related managerial skills. In the instructions regarding filling up of the Proforma of appraisal reports, Clause 4 is to the effect that-

"Reporting Officer should write PARs of officers who had worked under them for a minimum period of 4 months under his control. If the officer had worked under different Reporting Officers during a year, for 4 months or more under each officer, there should be 2/3 reports pertaining to the period he worked under

each controlling officer."

The Officer reported upon is entitled to represent against adverse comments which the superior officer has to consider and finally dispose of.

10. Respondents assert that in the process of selection, petitioners were considered along with their juniors; and they had to be eliminated, because they did not measure up to the attainments of their juniors who were preferred for promotion on the basis of merit.

11. I do not propose to go into the facts in greater detail because the decision on the controversy involved in these Writ Petitions has to rest on the meaning of the words "seniority-cum-merit" as a criterion for selection. Is the phrase capable of conveying different shades of meaning in different situations viz., as it applies to subordinate/clerical/manual assignments which involve more of physical and manual endeavour, than qualities of leadership and personal dynamism necessary for a team leader or supervisor. Do the words "seniority" and "merit" have altogether different meanings in cases involving promotion to higher and senior Executive positions at policy-planning and decision-making levels rather than at the subordinate implementation/ministerial levels? On the answers to these questions Will depend the fate of the main controversy in these Writ Petitions. Another question which also assumes considerable importance is whether even assuming that merit is a predominant factor, there has been an unbiased appraisal of merit on the basis of known standards in a fair and reasonable manner in the case of petitioners who were seniors and the respondents who were juniors in the respective categories for promotion to the next higher category?

12. Counsel on both sides referred to a number of decisions in support of their respective positions-some of them are seemingly contradictory, if We go only by the ratio without reference to the facts in each case. However; on a closer examination of the facts, it may not be impossible to find a common thread in the apparently conflicting precedents bearing on this question. I propose to refer only to a few of the important decisions in this regard.

13. In State of Mysore Vs. M.H. Bellary, the Supreme Court dealt with the "next below Rule" for promotion and held that a person is entitled to promotion according to his rank even during his absence from his parent service on deputation or otherwise. Promotion there was based entirely on seniority.

14. In State of Mysore and Another Vs. Syed Mahmood and Others, , the Supreme Court dealt with a case of promotion from the category of junior statistical Assistants in the Mysore State Government Service. Promotion was based on seniority-cum-merit. The Court held that seniority-cum-merit was the same as seniority-cum-fitness and relied on H.M. Bellary's case (1 supra) to consider the claims of the senior who was overlooked.

15. In State of Mysore Vs. C.R. Sheshadri and Others, the case involved

promotion to the post of Assistant Secretary. The criterion for promotion was seniority-cum-merit. The Supreme Court observed that "if the criteria for promotion is one of seniority-cum-merit, comparative merit may have to be assessed if length of service is equal or an outstanding junior is available for promotion". Holding that the claims of the respondent were not considered when his junior was promoted, the court directed that his claim for promotion must be considered on the basis of the decision in Syed Mahmood's case (2 supra). It is to be remembered that in Seshadri's case (3 supra) also the post involved was not a very senior post, though promotion was based on seniority-cum-merit which was equated to seniority and fitness.

16. In Union of India (UOI) Vs. Vasant Jayaram Karnik and Others, the Supreme Court had to consider cases of promotion from the post of Income Tax Officers to Assistant Commissioners-middle level posts. The Court observed that in selection for promotion, seniority has to prevail among persons who were found fit.

17. In Government of India and Another Vs. C.A. Balakrishnan and Others, the post involved was Superintendent in the Food and Supplies Department, Government of India and the rule provided for promotion on the basis of seniority-cum-fitness. Here again, the post was not a top level one. It was a middle level post in ministerial wing of government service. The Supreme Court followed its earlier decision in Syed Mahmood's case (2 supra) and held that the High Court was right in directing consideration of the claim of the employee for promotion on the basis of seniority-cum-fitness.

18. In point of time, the earliest decision which examined the concept of promotion to "Selection Grade Posts" was Sant Ram Sharma v. State of Rajasthan, AIR 1969 SC 1910. The Court held that posts of Inspector General, Addl. Inspector General and Dy. Inspector General of Police were selection grade posts and suggested that promotion to those posts would not be automatic and should be based primarily on merit and not on seniority alone.

19. In Union of India (UOI) Vs. Mohan Lal Capoor and Others, the Supreme Court had to consider appointment in the Indian Administrative Service/Indian Police Service under the promotion regulations on the basis of merit and suitability. It may be noted that the posts were more proximate to top level positions. The court held that "selection committee had an unrestricted choice of best available talent from among eligible candidates, determined by reference to reasonable criteria applied in assessing the facts revealed by service records of all eligible candidates so that merit and not mere seniority is the governing factor". This marks a slight divergence from the line of decisions beginning with Syed Mohammed (2 supra) but such divergence is understandable in the context of the facts and the rules which were considered.

20. Whereas the earlier decisions in H.M. Bellary and Syed Mahmood's cases (1 and 2 supra) related to comparatively lower posts in Government Service, Santa Ram Sarma (6 supra) and M.L. Capoor (7 supra) related to higher positions of

greater responsibility which required more of talent in formulation of policy, decision-making capabilities, individual dynamism and qualities of leadership. The court was cautious to understand the terms seniority and merit/fitness in a slightly different manner as compelled by the context. As an employee goes up the ladder, advancement has necessarily to become selective and not based entirely on durability in service.

21. In *Jai Narain Misra v. State of Bihar* the Supreme Court, 1970 SLR 92 had to consider appointment to the post of Director of Agriculture in the State of Bihar. The relevant rules provided that the post of Director shall remain outside the cadre of the service and may be filled at the discretion of the State Government by a member of the service. The court held that in view of the position of the post and the provisions in the rules it was for the State Government to select such officer as it considered most suitable. The Supreme Court rejected the contention that the claim of the senior must have been considered.

22. In *R.L. Butail v. Union of India*, 1970 SLR 926 the same question was considered again. The post involved was Director (Selection Grade) in the Central Water and Power Commission. The Court held that the appellant could not challenge his non-promotion on the ground of seniority alone, apparently in view of the fact that the promotion was to a top level post which was assumed to be a selection post.

23. A Full Bench of the Himachal Pradesh High Court in *Hari Datt Kainthla, CJM v. State of Himachal Pradesh*, 1974 (1) SLR 208 brought out this difference in approach more prominently, relying on the observations in academic writings by authors like Leonard D. White on Public Administration, etc., as also the observations made in *Sant Ram Sharma v. State of Rajasthan* (6 supra) and *Syed Mahmood* (2 supra) the court observed that "seniority-cum-merit" implies that seniority is the primary consideration, that fitness as a supporting concomitant in respect of junior positions whereas selection for promotion is made on the sole basis of merit to higher positions. The post involved in that decision was District Judge in the Higher Judicial Service.

24. In *Rev. Mother Provincial v. State*, 1969 KLT 749a Full Bench of the Kerala High Court held that-

"seniority-cum-fitness means that due and equal regard should be paid both to seniority and to fitness and since fitness is a matter of degree, it would appear that a senior person can be overlooked in favour of a junior who is demonstrably more fit for the appointment than he is".

25. In *P. Chandrasekhara Pillai Vs. The Accountant-General and Others*, a Division Bench of the Kerala High Court held that in the case of promotion to selection grade posts, merit-cum-seniority meant comparative merit subject to seniority. The posts involved in that decision were those of Upper Division Clerks in the Accountant General's Office.

26. In *Mercy Mathew v. the Vice Chancellor*, 1974 (I) LLJ 206 and Ors. a single Judge of the Kerala High Court held that the rule of seniority-cum-fitness allowed persons of superior merit to be chosen in preference to the seniors. The posts involved were higher teaching posts in collegiate educational institutions managed by minority communities.

27. In *Punnose v. Manager, P & T Motor Service*, 1977 (2) SLR 399, Cochin Chandrasekhara Menon, J. of the Kerala High Court held that "seniority-cum-fitness will not mean selection made on merit and ability. There is no question of any comparative assessment as such coming in. " On a consideration of various decisions he held that the appointment being not on merit or ability, the senior could not have been denied promotion. The posts involved were those of lower selection grade Monitors in the P & T Department-same of the lowest in the Department.

28. In *State Bank of India v. Mohd. Mynuddin*, AIR 1987 SC 189 the Supreme Court held 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 were promoted. E.S. Venkataramaiah, J. (as he then was) observed that-

"it is not sufficient that in his confidential reports it is recorded that his 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."

it was further found that it was a post which required the employee to handle greater responsibilities of the higher office and that duties of such higher post may need skills of different kinds viz., Scientific, technical, financial, Industrial, Commercial, Administrative, Educational, etc. The court further observed with reference to *Syed Mahmood's* case (2 supra) that promotion to be made by selection on the basis of seniority-cum-merit to be the same as seniority-cum-fitness of the candidate to discharge the duties of the post from among candidates eligible for promotion.

29. As it often happens in the case of precedents, both sides rely heavily on this decision-the petitioner to show that the selection on the basis of seniority-cum-merit is the same as seniority subject to fitness of the candidate to discharge the duties of the post. Respondents rely on this decision to show that promotion to a higher post even in middle management grade has to be made on the basis of merit and no officer can claim promotion to such higher post as a matter or right by virtue of seniority alone.

30. These conflicting view-points which find expression in the same decision have to be reconciled: and the only manner of doing so is to understand the decision with reference to the relevant rules and the context in which it refers to *Syed Mahmood's* case (2 supra). It is evident from the statements contained in paragraphs 4 and 5 of the judgment that promotion had to be made to the post in middle management, Grade-III by selection on the basis of merit. Seniority

had no role to play in that process. The court held in that context that the only fact that a senior had a record of service which was "satisfactory" and had no adverse entry against him would not entitle him automatically for promotion. Reference was made to Syed Mahmood's case (2 supra) only for the purpose of indicating the manner in which the High Court should have disposed of the petition filed by the senior. The decision is not helpful to support the propositions advanced by either side, because the rule of principle applicable to the promotion in the present case is not selection entirely on merit without any reference to seniority as in Moinuddin's case (15 supra). Seniority has also a role to play. The only question is the relative stress to be laid on "merit" and "seniority".

31. It is true that "seniority-cum-merit" and "seniority-cum-fitness" have been understood by courts to have slightly different connotations in different contexts as to whether the posts to which promotion was claimed was in the subordinate or middle management or senior management positions. It will be right to proceed on the assumption that the same terms have acquired different shades of meaning in slightly different contexts and the same meaning cannot be attributed in all fact situations. It is also right that even in top management promotions, seniority may be relevant, if the rules or conditions of service prescribe that. The reason apparently is that among the top-most managers who have come a long way on the basis of merit, seniority, may be the only discernible test.

32. R.S. Dass Ors. Vs. Union of India (UOI) and Others, related to promotion to the Indian Administrative service from Punjab State Civil Service. A senior complained against his supersession without stating any reason as arbitrary and violative of Clause 5 of the Promotion Regulations. Reliance was placed on the decision in M.L. Kapoor's case (7 supra). As we have noticed earlier, the Regulations as they stood at the time of M.L. Kapoor's case insisted that a senior in the field of choice should ordinarily be selected, and also provided that if a senior was to be superseded, it should only be for recorded reasons. Even though promotion was to fairly high positions in the administrative hierarchy, seniors had a right to be promoted unless superseded for recorded reasons. The Regulations were amended by notification dt. 3-1-1977 providing for classification of candidates for promotion on the basis of merit into outstanding "very good", "good" or "unfit". Among the candidates included in each category, seniority has to be maintained. The court held that if a junior was classified as "outstanding" and a senior only as "good" the latter could not complain, since promotion was based on selection on merit and selection of the more meritorious did not amount to supersession of the senior.

33. The stress of the decision naturally was on a realistic categorisation of eligible officers on the basis of ascertainable objective criteria and observance of seniority inter se among persons included in each category. The court made a departure from M.L. Kapoor's case (7 supra) for the reason that the amended regulations lay greater stress on merit and relegated seniority to a much less

significant role. Sabyasachi Mukerjee, J (as he then was) however highlighted, the need for more objective basis for categorisation of officers for purposes of selection and elimination. He observed-

"In order to rule out any grievance actual or fancied, some objective basis for the categorisation should be laid down. If such objective bases are made knowns, that fact the after categorisation, the selection of junior officers in preference to senior officers need not state reasons and would not be violative of the canons of justice: but otherwise there will be room for suspicion and that too would not be wholly unjustified."

34. The above observation is a pointer to the fact that the Supreme Court was conscious of the likelihood of abuse even by the highest officials if some effective checks were not built into the system. That is evident from the following observations in the judgment of K.N. Singh, J:

"It is true that where merit is the sole basis for promotion, the power of selection becomes wide and liable to be abused with less difficulty."

The same concern found expression in M.L. Kapoor's case (7 supra) in the following words of Beg, J.

"The place of an officer on the list could not be disturbed suddenly by placing him below new entrants or new candidates of a succeeding year or throwing him out of the list altogether unless the process of review and revision of the list for a subsequent year revealed that he deserved such treatment either due to deterioration of his work or the sudden influx of a number of officers of exceptional merit who may have become eligible for the year in which he is expelled from the list."

35. The effect of all these decisions is that promotions have to be ordered strictly in terms of the Rules or conditions of service and elimination of eligibles can only be on the basis of ascertainable and objective standards. It may also be that the same set of words- "seniority-cum-merit" or "seniority-cum-fitness" may have slightly different connotations depending as to whether the posts involved are those in the subordinate category in which case, seniority prevails or in the middle level where again seniority may prevail subject to the rejection of the unfit, and merit may be the only criteria in higher and top level positions in Government or Public Sector undertakings, subject of course to definite and ascertainable standards for selection. If that distinction is borne in mind, it is not difficult to reconcile the apparently conflicting precedents referred to above. The principle deducible from these decisions therefore is that as employees move up the ladder of promotions, seniority may become less and less significant in gradual stages and merit and ability come to the fore. That is exactly what Leonard D. White in his introduction to the study of Public Administration, Introduction to the Study of Public Administration (4th Edition) By Leonard D. White stated: .

"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 promotion from the lowest to other subordinate positions. As employees move up the ladder of 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. Consistent application of the rule of seniority up the scale to supervisory and administrative positions would in itself cause the resignation of the better men and thus invite progressive deterioration in the higher grades where special competence is particularly needed.

36. Glenn Stahl in his Public Personnel Administration Public Personnel Administration (6th Edn.) by O. Glenn Stahj states:

We must avoid the oversimplified versions of promotion that result in little more than the progressive advancement of mediocrity or the periodic elevation of durability.

Accountability to the new requirements of a higher standard and possession of those intangible qualities which are so critical but so difficult to gauge otherwise.

An ideal promotion policy is not just a sugar plum for employees. It is, first of all, a plan to insure management that it will have the benefit of the best talent in the organization for the toughest jobs and a reasonable explanation for the promotions it makes when its actions are questioned. This is atleast half of the case. The other half is to insure employees that promotions are made strictly on the basis of merit and that opportunities are broad and open so as to minimize the dangers of dead ends or unfairness.

37. It shall be our anxiety to avoid dead-ends for energetic and dynamic employees as they move up the ladder to senior positions. It shall be equally our anxiety to see that the entire mobility in service is not based on durability of the mediocre. The odds shall not be unduly weighed against outstanding and brilliant juniors to move up, particularly at higher levels for the only reason that they happen to be down the ladder. It is also necessary that the normal expectations of advancement in service shall not be handicapped by individual whims or personal fancies or undiluted favouritism.

38. Based on these considerations, I hold that the principle of "seniority-cum-merit may have slightly different signification as it applies to promotion to different categories of posts. In promotion to posts in the lower categories which involve more of manual and less of intellectual endeavour, seniority may be predominant, merit being understood only in the sense of fitness. In that process, the unfit senior alone may be excluded. Among persons who are equally fit, the senior has preference. In intermediate posts, seniority becomes less

significant and merit has a slight edge depending on the nature of the post and the duties and responsibilities attached to that. In senior positions, greater emphasis may be laid on merit than seniority, though promotion cannot be based entirely on merit. An outstanding junior may steal a march over an "average" or "satisfactory" senior and may get an out-of-turn promotion. The last phase will be selection based entirely on merit without reference to seniority at all. That phase is beyond the principle of seniority-cum-merit". I am of the opinion that in the present case, the term "seniority-cum-merit" cannot be understood as selection on merit alone, it may be only elimination of "average" or "satisfactory" senior by an outstanding junior for an out-of-turn promotion. In other words, seniority among the eligibles will have a part to play, only a subordinate and subdued role.

39. It is necessary to ensure that the employees at every stage are treated fairly and reasonably. At the lower levels, the organised strength of the workmen is a guarantee for their rights. As they move up to managerial positions, these guarantees gradually wither away. More often than not, it is the individual whim or caprice of the immediate superior that decides the fate of the employee, in the absence of a well-articulated promotion policy. It may not be far too wrong to state that in selection for advancement in superior positions in employment, a lot of abuses are likely. Individual fancy may masquerade as managerial discretion. The more deserving senior may become a victim because of lack of the required amount of flexibility and plasticity in his vertebral column. As there are "yes Minister" in public administration, there are "yes sir" in other employments. Occasionally, a conscientious employee may also say "no" and that may perhaps be in the best interests of the institution and even the superior to whom that negative is addressed. But the inflated ego of the superior may consider that as an insult and seek revenge at the next available opportunity. This may perhaps be infrequent. But even its possibility has to be eliminated to the utmost extent. That anxiety to ensure a fair and reasonable procedure for selection on the basis of ascertainable criteria which eliminates individual idiosyncrasies, and an unbiassed human agency for selection may constitute; the only visible guarantee for managerial employees against abuses of the promotion process. The not-too-frequent scrutiny by courts may ensure the due enforcement of this guarantee.

40. It is equally important that not only the elimination but also the favourable assessment shall be based on definite and ascertainable standards. That involves a fair and constructive approach to record and to regard not only the negative points against, but also the positive points in favour of the employees in the field of choice. It was that principle which the Supreme Court in *Amar Kant Choudary v. State of Bihar*, 1984 (1) SLR 470 emphasised. The court held that if in the assessment of personal records, adverse remark against the senior was considered for superseding him, on expunction of those adverse remarks by the competent authority, the matter has to be reviewed and reconsidered. The court also emphasised that not only the adverse comments in his service records/confidential reports, but the commendations and favourable assessments also

have to be considered; and if the latter neutralises the former, there will be no reason to supersede that officer in favour of a junior with an apparently untarnished record.

41. It is evident from the pleadings and the documents which are produced, that the petitioners in W.P. 16477/86 and 16483/86 were assessed as very competent with consistently good records of service. I have perused the confidential reports of Sri Moghe and respondents 3 to 6 in W.P.16477/86 which counsel for the respondent-Corporation has produced. The case of Sri Gupta cannot be very much different in view of the relevant details which I have adverted to. It appears that Sri D.Y. Moghe had some adverse comments in his service record at the relevant time. Those related to allegations of shortages or discrepancies in the stores at Godavari Khani. Petitioner was asked to explain such deficiencies for the period from 1981 to 1984 in the letter of the Chairman-cum-Managing Director dated 20-/23-1-1986. A detailed enquiry was conducted by Sri K.R. Gupta, a former Director, Finance of the respondent Corporation. The Enquiry Officer completely exonerated him. In acceptance of those findings, the respondent Corporation decided to drop further action in the matter. It is evident that the departmental promotion committee had no occasion to consider the effect of exoneration of the petitioner in the enquiry against him. The confidential records reveal that during the period from 1981-82 to 1985-86, he was treated as definitely deserving promotions in his turn. He was assessed as definitely "above average" (1981-82 and 1984-85) and average-deserving promotion in due course (1982-83, 83-84). The first level review officer stated on 13-11-86 that "he is a good officer who has done well during 1985-86". Whereas the Chairman-cum-Managing Director endorsed on 25-12-85-

"A first rate officer who is sincere, hardworking and efficient. Has a loveable personality, with pleasing manners. Makes a happy member of a team. Did an excellent job in GDK 789 in machine mining. One of our very good officers. Proved an asset to SCCL."

I see considerable force in the submission of counsel that even if it was a case of pure selection, a senior officer with such glowing tributes to his credit would not have been superseded.

42. Adverse comment about Sri S.C. Gupta was in relation to accidents in the mines. Those resulted in two Criminal Prosecutions viz., CC.Nos. 193/ 86 and 97/87. This court by its judgment in CrI. Revision Case Nos. 521 and 569 of 1989 quashed the very complaints. The result was that there was no adverse entries in the confidential records of Mr. Gupta.

43. I find considerable force in the submission urged by counsel for the petitioners that apart from some stray instances, the records were consistently "good" or "very good". May be the employer was right at the relevant time in eliminating the two petitioners on the basis of the adverse entries in their records, but it appears to me that they were entitled to a fresh consideration of

their cases after those adverse entries were competently removed or the proceedings which resulted in such adverse remarks were dropped or quashed.

44. Selection of officers to senior managerial positions in industrial undertakings is a complicated process. It depends upon assessment and evaluation of manifold considerations, many of which consist of imponderables. Some human agency has to be trusted to conduct the process of evaluation and assessment. Human error, prejudices and predilections which are likely to influence assessment cannot be completely ruled out. A fool-proof system of assessment in this area is yet to be. What can be expected is only reduction of human frailties to the extent possible, by an intelligible formula which may result in as realistic an assessment on the basis of ascertainable and objective standards, as possible. What however is the basic minimum is that the principle must be discernible, the standards must be ascertainable and the process of assessment shall be fair and reasonable eliminating to the maximum extent possible, the element consisting of unwholesome prejudices and undue preferences.

45. The role of the court in this regard is only to ensure compliance with those minimum requirements. In *M.K. Menan v. The F.A.C.T. Ltd*, 1988 (1) KLT Sh. 7 . I had occasion to deal with the same question. What I had stated in that decision seems to be relevant in this case also, I had stated:

"It is true that judicial review of selection, elimination and promotion of employees shall not amount to an appellate scrutiny of the minute details. But in a case like the present, where the complaint is that the employee concerned was found suitable for promotion to a higher grade, continuation therein and grant of increments upto the maximum in the scale on the basis of selection and elimination after perusal of confidential records, Dossiers etc., but was eliminated in the matter of promotion, allegedly on the same considerations, this court has to probe deeper."

46. I find that the facts of the present case are almost similar.

47. Each of the petitioners had a fairly successful innings in senior managerial positions in the respondent company. Their attainments were better than ordinary. The Chairman-cum-Managing Director of the Company as also the Secretary of the Department of Energy definitely thought so, on more occasions than one during the period relevant for assessment. They did not belong to the mediocrity keeping afloat only due to durability. They were something better. The respondent Corporation itself thought it fit to entrust them with the posts of General Managers on an officiating basis for fairly long periods of time. In their performance in higher officiating posts also, the petitioners did not lag behind. Petitioners therefore definitely had points to their advantage not only in the junior management positions but even in senior positions as also in the same post of General Manager for some time. It does not appear from the pleadings or the record produced by the respondents that these positive points in favour of the petitioners did also enter into the reckoning in assessing their suitability for

promotion, even assuming that it rested entirely on assessment of merit without any regard to seniority. The points of advantage seem to have been excluded only for the reason that there was some adverse comments in the confidential records of the petitioners. It is necessary in this connection to refer again to the decision of the Supreme Court in *Amar Kant Choudary v. State of Bihar* (19 supra). Dealing with an almost similar situation where more points of advantage and stray instances to their disadvantage were involved in the process of selection, the court made the following observations:

"It is not disputed that the classification of officers whose cases are taken up for consideration into "outstanding", "very good", "good" or "bad" etc. for purposes of promotion to the Indian Police Service Cadre is mainly based upon the remarks in the confidential rolls. On December 22, 1976, when the selection committee, met, the adverse remarks in the Confidential rolls for 1973-74 had not been communicated and the appellant's representation regarding adverse remarks in the confidential rolls for the year 1974-75 and censure against him had not been disposed of although it is alleged that one Sri Yamuna Ram against whom also adverse remarks had been made was included provisionally in the select list. When the Selection Committee met on March 11 and 12, 1981 despite State Government's suo motu decision not to retain adverse remarks for the year 1976-77 on records, the same had not been removed from the confidential rolls. This must have influenced the decision of the Selection Committee, it is also seen that the confidential rolls of the appellants for the year 1979-80 and 1980-81 which contained entries favourable to the appellant were not placed before the Selection Committee. On October 14, 1981 when the Selection Committee met, it does not appear to have considered the representation made by the appellant against his non-selection. In addition to all these, the State Government has expunged the adverse remarks by its order made from time to time. These facts are not controverted by the respondents."

48. It appears that positive aspects in favour of the petitioners were not considered during the selection process. I am not sure as to what the conclusions would have been if these aspects also had been brought to the notice of and considered by the Selection Committee.

49. The fact that there was contravention of the instructions relating to the maintenance of confidential record is not controverted. Mr. A. Ramaswamy, who as Director Personnel was a member of the Departmental Promotion Committee was the reporting officer of Sri Moghe and Sri Gupta, only for a period of one and half months. For the remaining period of ten and half months, Sri Gupta's immediate superior officer who would ordinarily have been the reporting officer, was Mr. Paranjape. According to the instructions relating to maintenance of Confidential records, only such of the controlling officers as were working in that capacity for a period of not less than four months could make entries in the confidential records of their subordinates. Instructions also indicate positively that if an officer had worked under different officers there should be 2/3 reports

for the year pertaining to period he worked under each controlling officer. I see force in the submission of counsel for the petitioners that this breach of procedure may possibly have weighed against the petitioner Sri S.C. Gupta in the matter of assessment and elimination.

50. Considering all these facts, I hold that the petitioners are right in their submission that they did not get a fair deal when their cases were considered by the Departmental Promotion Committee.

51. It is not for this court to make a reassessment and come to its own conclusions regarding selection or elimination. That is the process which the respondent itself has to undertake in strict compliance with the rules and departmental instructions. I cannot therefore accept the submission of counsel for the petitioners that this court may issue a direction to the respondent company to promote the petitioners in preference to their juniors. Counsel for the respondents is right in his submission that the only direction which the court may issue in the matter of selection is to direct the employer to reconsider the matter in accordance with the relevant rules.

52. In the light of the above, I allow both the Writ Petitions and direct the respondent Corporation to reconsider the cases of the petitioners viz., Sri D.Y. Moghe and Sri S.C. Gupta for promotion from E-7 grade to E-8 grade for 1986 in the light of the observations contained in this judgment and with reference to the fact that the adverse entries in their confidential records had been altered by reason of the judgment of this court in Crl. R.C. Nos. 521 and 569/89 and by reason of the orders of the Chairman and Managing Director, in the former case.

53. In evaluating the claims of the petitioners for promotion to E-8 grade in 1986, the Promotion Committee shall take into account only the entries in the confidential records which were made in strict compliance with the guidelines and exclude comments made by Sri A. Ramaswamy, since they were made contrary to the guidelines issued by the respondent Corporation. It will be open to the Corporation to obtain the confidential entries made by the controlling officer at the relevant point of time like Mr. Paranjape, for reassessment of their entitlement for promotion during the relevant period. The respondent Corporation shall consider the positive aspects of the record of service of the petitioners including commendation from their superiors in reassessing the claims of the petitioners for promotion in their turn.

54. The Writ Petitions are allowed as above. Parties shall suffer their respective costs.