

(2005) 02 GAU CK 0011
In the Gauhati High Court
Case No : WA No. 466 of 2004

E. Bhubaneshwar Singh and Others

APPELLANT

Vs

State of Manipur and Others

RESPONDENT

Date of Decision : 07-02-2005

Acts Referred:

Citation : (2008) GLT 92 Supp

Hon'ble Judges : D. Biswas, Acting C.J.; Ranjan Gogoi, J

Bench : Division Bench

Advocate : B.P. Sahu, K.T. Singh and N.T. Singh, for the Appellant; S. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Ranjan Gogoi, J.—Whether appointment, by way of promotion, to a selection post can only be made by adhering to the principle of merit or its ancillary principle, i.e. merit-cum-seniority or suitability, is the moot question that arises in the present appeal. The aforesaid question arises in the following facts:

Under the Recruitment Rules in force in the State of Manipur governing appointment to the post of Sub-Inspector of Police(Civil), the post in question has been classified to be Class III (non-gazetted/non-ministerial). The Rules, however, give the post the status of a selection post, 50% of the posts in the cadre are to be filled up by promotion and the remaining 50% by direct recruitment. In so far as promotion is concerned 85% of the promotional quota is required to be filled up from serving Assistant Sub-Inspectors (Civil) who have satisfactorily completed the period of probation and have rendered 3 years of regular service in the feeder post. The candidates in the feeder post to be eligible for promotion are required to pass the pre-promotion selection test as prescribed. The remaining 15% of the promotional quota is to be filled up from serving Assistant Sub-Inspectors of Police (Civil) who have a record of conspicuous acts of gallantry in discharge of duties or who are outstanding sportsmen.

2. The duly constituted departmental promotion committee held its deliberation on 28.3.2003 for selection for promotion against 26 vacant posts of Sub-Inspector of Police. As it appears from the record of the proceedings of the said D.P.C., after consideration of the eligible candidates as per the zone of consideration, a select list of 26 persons, was recommended. The proceedings of the D.P.C. also reveal that in finalizing the select list of 26 persons, primarily, the criteria of merit was adopted. The names of the 7 Petitioners, who are the Appellants before us, figured in the select list prepared in the deliberations of the D.P.C. held on 28.3.2003. Thereafter, in course of the process of approval of the list prepared by the D.P.C., a question was raised as to whether the executive instructions contained in paragraph 5.3.1 of the Office Memorandum dated 29.4.1999 would be applicable to the selection made and on an examination of the matter, the competent authority in the State Government took the stand that the selection in question should have been made by adhering to the norms contained paragraph 5.3.1 of the said Office Memorandum dated 29.4.1999. Accordingly, by an order dated 28.6.2003, the select list was sent back by the Government for re-submission after adhering to paragraph 5.3.1 of the Office Memorandum dated 29.4.1999. A consequential order by the Inspector General of Police dated 26.7.2003 for recasting the proceedings of the D.P.C. was also issued. Pursuant to the aforesaid order, the D.P.C. was reconvened and in its deliberation held on 7.8.2003, the D.P.C. finalized a fresh list of 26 persons for promotion to the post of Sub-Inspector of Police (Civil) by adhering to the requirements contained in paragraph 5.3.1 of the Office Memorandum dated 29.4.1999. The names of the Petitioner Appellants not having figured in the said select list prepared by the D.P.C. on 7.8.2003. the writ petition out of which this appeal has arisen, was filed contending, inter alia, that as the Recruitment Rules had classified the post in question, i.e., Sub-inspector of Police (Civil) to be a selection post, the selection must necessarily be governed by the application of the principle of merit. It is contended that by the Office Memorandum dated 29.4.1999 a criteria of seniority-cum-merit has been prescribed. Paragraph 5.3.1 of the Office Memorandum dated 29.4.1999 is, therefore, contended to be ultra vires the provisions of the Recruitment Rules and on that basis the action of preparation of the second select list dated 7.8.2003, excluding the names of the Petitioners-Appellants, is contended to be legally untenable.

3. The learned Single Judge hearing the writ petition took the view that, as the Recruitment Rules did not lay down any the specific criteria of selection, having regard to the category of posts (Class-III) for which selection was required to be made, it was open for the Government to prescribe the requisite norms and criteria by an executive instruction. In the absence of any specific laid down norms in the Recruitment Rules in this regard, the claim raised with regard to the executive instructions being contrary to the statutory rules was found to be without any legal foundation. On the aforesaid basis, the learned Single Judge took the view that no illegality is dissemble in the direction issued for preparation of a fresh select list by adhering to paragraph 5.3.1 of the office Memorandum

dated 29.4.1999 and the action taken on that basis. The writ petition filed by the Appellants having been consequently dismissed, the present writ appeal has been filed.

4. We have heard Shri B.P. Sahu, learned Counsel for the writ Appellants and Shri S. Sarma, learned Counsel appearing for the official Respondents. We have also scrutinized the pleadings of the parties as well as the record of the proceedings of the D.P.C. held on 28.3.2003 and 7.8.03.

5. That the provisions of the statutory rules lay down that the post of Sub-Inspector of Police (Civil) is a selection post, has already been noted. The proceedings of the first D.P.C. held on 28.3.2003 reveal that in the selection made, no pre-promotion selection test was held. A list of eligible candidates, as per the zone of consideration in force, was forward to the D.P.C. and the D.P.C. on scrutiny of the A.C. Rs of the preceding 5 years graded the officers under consideration in order of merit and prepared the select list in question. In the said select list, the names of the 7 writ Petitioners were included. Thereafter, as already noticed, a decision was taken at the Government level to have the select list re-cast by reconvening the D.P.C. and by requiring it to adhere to the provisions of paragraph 5.3.1. of the Office Memorandum dated 29.4.1999. The aforesaid paragraph 5.3.1 being relevant may be conveniently extracted at this stage.

Principles to be observed and preparation of panel:

5.3.1. The list of candidates considered by the DPC and the overall grading assigned to each candidate, would form the basis for preparation of the panel for promotion by the DPC. The following principles should be observed in the preparation of the panel.

(a) Having regard to the levels of the posts to which promotions are to be made, the nature and importance of the duties attached to the posts a bench-mark grade would be determined for each category of posts for which promotions are to be made by selection method. For promotion to all classes III and II posts/services, the bench-mark would be "Good". All officers whose overall grading is equal to or better than the bench mark should be included in the panel for promotion to the extent of the number of vacancies. They will be arranged in order of their inter se seniority in the lower category without reference to the overall grading obtained by each of them provided that each one of them has an overall grading equal to or better than the bench-mark of "Good". Wherever promotions are made for induction to Class-I posts or services from Lower Groups and promotion within Class-I posts/services carrying pay scale less than Rs. 3700-5000/- (Pre-revised), the bench mark would continue to be "Good". However, Officers graded as "Outstanding" would rank en-bloc senior to those who are graded as "Very Good" and officers graded as "Very Good" would rank en-bloc senior to those who are graded as "Good" and placed in the select panel accordingly up to the number of vacancies. Officers with same grading

maintaining their inter se seniority in the feeder post.

b) In respect of all posts which are in the level of Rs. 3700-5000/- (Pre-revised) and above, the bench mark grade should be "Very Good". However, Officers who are graded as "Outstanding" would rank en-bloc senior to those who are graded as "Very Good" and placed in the select panel accordingly up to the number of vacancies, Officers with same grading maintaining their inter se seniority in the feeder post.

c) Appointments from the panel shall be made in the order of names appearing in the panel for promotion.

6. Paragraph 5.3.1. of the Office Memorandum dated 29.4.1999 has laid down that in so far as promotion to Class II and III posts are concerned the bench-mark is "Good" and all officers whose overall grading is "Good", regardless of such higher grading that an officer may acquire on the basis of the appraisal of his AC Rs, are required to be placed in the select list in order of seniority and it is from the said list that promotions are required to be made. Paragraph 5.3.1 however, contemplates a different situation when promotions to the higher echelon in different services are under consideration. In such cases, officers are required to be graded as "Outstanding", "Very Good" and "Good" on the basis of the ACRs and service records. Officers, who are graded as "Outstanding", regardless of their seniority, will have precedence over those graded as "Very Good": similarly those who are graded as "Very Good" will have precedence over those graded as "Good".

7. From the above, what transpires is that in so far as the posts in Class II and III are concerned, the criteria prescribed by paragraph 5.3.1 of the Office Memorandum dated 29.4.1999 is essentially one of seniority-cum-merit whereas for the higher echelons in service, the criteria prescribed is one of merit-cum-seniority. Applying the requirements spelt out by paragraph 5.3.1 to the instant promotional process, the select list dated 28.3.2003 prepared on the basis of merit, as already noticed, was re-cast by adhering to the requirements of paragraph 5.3.1. and in this manner the Petitioners were excluded from the fresh select list prepared by the D.P.C. in its deliberation held on 7.8.03.

8. The argument advanced on behalf of the Appellants has been, indeed, short and precise to put it even more succinctly the contention advanced before the Court is that as the Recruitment Rules have classified the post in question to be a selection post, there could have been no other criteria appalled but one of merit, while making the selection. Selection must necessarily be on the basis of positive merit as revealed by the service record and it is on comparative assessment of the relative merit of all the candidates within the zone of consideration that the selection of the most meritorious had to be made. Paragraph 5.3.1 having laid down a somewhat "diluted" form of assessment of merit by requiring an eligible candidate to have the grading of "Good" and thereafter seniority being the determining factor to the exclusion of better merit/gradings that may have been

secured, what has been prescribed by paragraph 5.3.1 is a criteria of minimum merit, whereafter precedence is given to seniority. As the second selection by D.P.C. held on 7.8.2003 has been on an application of the requirements spelt out by paragraph 5.3.1. not only the directions to apply the aforesaid provisions, i.e. paragraph 5.3.1 are contended to be contrary to the Rules; the entire exercise performed by the D.P.C. in its meeting held on 7.8.2003, it is argued, is opposed to what has been mandated by the Rules. In support, reliance has been placed on a judgment of the Apex Court in the case of Union of India and Others Vs. Lt. Gen. Rajendra Singh Kadyan and Another, Another decision of the Apex Court in the case of The Central Council for Research in Ayurveda and Siddha and Another Vs. Dr. K. Santhakumari, as well as the decision of this Court in the case of Bhusan Chandra Roy Medhi -Vs.- Hemanta Kumar Mahanta and others, reported in -2003 (2) GLT 584 has also been pressed into service.

9. Controverting the submissions advanced on behalf of the Appellants, Shri Sarma, learned Government Counsel, has vehemently argued that it is not a correct principle of law that appointment by way of promotion to a selection post can only be made by adhering to the principle of merit or its ancillary principle merit-cum-seniority. Selection, according to the learned Counsel for the Respondents, means an option to pick or to chose and the basis on which a selection is to be made can always be spelt out in the Rules and in the absence of any such provisions in the rules, by such executive instructions as may be in force. In the present case, it is argued, having regard to the level of the post to which promotion is required to be made, the government in its wisdom had thought it appropriate to prescribe a principle of seniority-cum-merit while at the same time prescribing the converse principle, i.e. merit-cum-seniority in case of higher posts. The Government has performed this exercise by issuing the Office Memorandum dated 29.4.1999, which was legally permissible and logically warranted in the absence of any specific enabling provision in the Service Rules.

10. The rival arguments, as noted above, having presented an issue of substantial importance requiring an authoritative pronouncement by the Court, we may now proceed to answer the same. Promotions to higher post in service may, under the Rules in force, be made "automatic" i.e. as a matter of right (subject to fitness); or by application of a principle of limited merit or exclusive merit. English Dictionary understands the word "Selection" or "Select" to mean an option, to pick or choose. Selection therefore, implies a process whereby one person is chosen for the post to the exclusion of another. Having regard to the avowed purpose of promotion by selection, the process necessarily implies a selection based on merit. Selection does not recognize a right of automatic promotion. Having regard to the necessity of taking care of all reasonable aspirations in public service, normally, the service rules provide for "automatic" promotion up to a certain level in the hierarchy whereafter the remaining promotions are to be made on the basis of selection. In this manner, the conflicting interests created by reasonable aspirations and the need of an efficient system of administration is counter balanced. As it is open to the State,

as the employer, to prescribe the levels to which promotion can be earned as a matter of right, subject to fitness and thereafter on the basis of merit, it must be equally open for the employer to decide and prescribe what percentage of higher posts should be filled up by minimum merit as opposed to relative merit. Merely because a post is classified as a selection post, such classification cannot take away the right of the employer to decide, having regard to the relevant circumstances, e.g., the level of the post, that a particular post should be filled up on the basis of minimum merit whereas another post which is still higher should be filled up by comparative assessment of merit. A selection post does not cease to be so merely because a test of minimum merit has been prescribed; after all the option to reject and pick or choose on the basis of merit which is cardinal to the concept of selection is still available to the employer, though in a limited manner.

11. In *Union of India and Others Vs. Lt. Gen. Rajendra Singh Kadyan and Another*, relied upon by the learned Counsel for the Appellants, the Supreme Court was considering the question as to whether the post of Army Commander was a selection or a non-selection post. Holding the post to be a selection post, the Apex Court further held that promotion to the said post from the post of Lt. General (Crops Commander) was required to be made on the basis of a comparative assessment of merit. In doing so, the Supreme Court took into account the criteria of appointment in force under orders of the President of India dated 20.10.1986. The judgment of the Apex Court does not indicate, in any manner, any proposition to the effect that a selection post can only be filled up on a comparative assessment of the merit of the eligible officers. Rather, the observations made in paragraph 26 of the judgment would seem to suggest that the Apex Court was of the view that comparative assessment of merit is only one of the criteria in ascertaining whether a post is a selection post. In our considered view, the necessary corollary to the above proposition is not that a selection post can only be filled up on the basis of positive/relative merit. That apart, in understanding the judgment of the Apex Court, the post in question with which the Apex Court was concerned should also be kept in mind.

12. The judgment of the Apex Court in the case of *The Central Council for Research in Ayurveda and Siddha and Another Vs. Dr. K. Santhakumari*, relied upon by the learned Counsel for the Appellants lays down a proposition more or less to the same effect, as notice above, but in a situation where the service Rules had clearly provided that selection is to be made by application of the principle of merit-cum- seniority.

13. The two judgments of the Apex Court referred to above, therefore, according to us, ought not to be understood to have laid down any principle of general application that a selection post can only be filled up on an assessment of relative merit as has been contended on behalf of the Appellants. Rather, we find ample justification for the view that we have taken from a constitution Bench judgment in the case of *State of Orissa V. Durga Charan Das* reported in AIR 1966 SC 1537

which decision has been incidentally referred to in the case of Central Council of Research in Ayurveda and Siddha (supra).

14. In Durga Charan Das (supra), the Apex Court was in seisin of the question as to whether the concerned promotion Rules in the State of Bihar imposed a less stringent criteria of promotion than the promotion Rules in the State of Orissa so as to prejudicially affect the Respondent Durga Charan Das in respect of the computation of his pension. The dispute arose in the following facts:

The Respondent Durga Charan Das was an employee in the Old Bihar and Orissa Secretariat prior to the formation of Secretariat in Orissa. After the province of Orissa was formed, he was transferred to the Orissa Secretariat where he was confirmed as a Registrar on 14.10.1958 before retiring from service on 17.10.1959. One J.L. Dutta, who was junior to the Respondent Durga Charan Das in the old Bihar and Orissa Secretariat and who had been transferred to the Bihar Secretariat was confirmed as Registrar on 23.8.1956. The Respondent raised a claim that his pension should at least (underlining is ours) be computed with effect from 23.8.1956 when his erstwhile junior was confirmed as the Registrar in Bihar. The aforesaid claim was sought to be justified before the Apex Court, inter alia, on the ground that while promotion under the Orissa Rules was to be by a process of selection by the Public Service Commission, similar promotion under the Bihar Rules was on the basis of seniority. The Apex Court negatived the aforesaid plea and in this regard the following observations contained in paragraph 13 would have a material bearing to the present case.

(13) Mr. Andley also suggested that under the relevant Bihar Rule, promotion would go entirely by seniority. Whereas under the Orissa Rule, it is on considerations of seniority coupled with merit. We do not think Mr. Andley is right in assuming that selection under Rule 2(1) of the Bihar Rule could have been intended to be made only by reference to seniority. The very concept of selection involves the "consideration of seniority coupled with merit", which is generally described as the seniority-cum-merit (underlining is ours).

15. From the above, it is crystal clear that though selection necessarily involves consideration of merit, the quantum or percentage thereof may vary depending on the fact situation. The principle of seniority cum-merit cannot be understood to be abhorrent to the concept of selection.

16. This would bring us to a consideration of the last precedent cited at the Bar, i.e., the decision of this Court, in the case of Bhusan Roy Medhi (supra). Obviously, the criteria of merit-cum-seniority would require cognizance of the question of seniority only in a situation where merit is roughly equal. That being the only proposition of law laid down, we fail to see how the decision in Bhusan Roy Medhi (supra) can be of any assistance to the Appellants.

17. For the aforesaid reasons, we take the view that it would be correct for us to hold that paragraph 5.3.1 of the Office Memorandum dated 29.4.1999 and the application of the principle contained in the said paragraph of the said Office

Memorandum, does not, in anyway, violate the provisions of the Recruitment Rules in force and there is no infirmity in the Government decision to apply the provisions of the aforesaid paragraph 5.3.1 of the O.M. dated 29.4.1999 to the selection in hand. Consequently, we find no illegality or infirmity in the proceedings of the D.P.C. held on 7.8.2003 and the recommendation made. Consequently, we dismiss the appeal but having regard to the totality of the facts and circumstances of the case, we make no order as to cost.