
(1979) 12 AP CK 0004
In the Andhra Pradesh High Court

E. Sreeramulu

APPELLANT

Vs

K. Chengal Rayan and Others

RESPONDENT

Date of Decision : 29-12-1979

Acts Referred:

Constitution of India, 1950 — Article 225, 226

Citation : (1980) 2 LLJ 413

Hon'ble Judges : Seetharam Reddy, J;Lakshmiah, J

Bench : Division Bench

Judgement

Seetharam Reddy, J.—The question that arises in this appeal appears to be apparently simple but is rather complex in actuality because of the equivocality in the statutory provisions that enacted and also because of the evolutionary process in the judicial decisions; what criteria are to be adopted for promotion to a non-selection post, particularly in the absence of any guidelines in the statutory provisions occupying the field?

2. Before answering the question raised above, the salient features of the case may be noticed. The appellant herein is the 3rd respondent in the writ petition. The petitioners in the writ petition, who are three in number, are working as Sanitary Inspectors in the service of the 1st respondent, Tirumala Tirupathi Devasthanam, hereinafter referred to as "T.T.D." having joined the service in July, 1960, September, 1960 and December, 1963 respectively. The 2nd respondent in the writ petition joined the same category in February, 1963 and the 3rd respondent in 1966. On 13th July, 1979, by the impugned order, three persons including the respondents 2 and 3 herein, have been promoted to the posts of Senior Sanitary Inspectors, which posts were created for the first time. This promotion has to be made on the basis of seniority only as per the rules and not on the basis of selection. This resulted in deprivation of the rights of the petitioners who are admittedly seniors to the respondents 2 and 3. It was further averred by the petitioners that one of the three promotees, viz., Sri P Munirathnam, who is admittedly the senior most of all the personnel, has been

very rightly promoted and so no grievance could be made of against that promotion and, therefore, the said Munirathnam, has not been impleaded.

3. After assessing the rule position, and in the light of the various materials, placed before him, our learned brother Jeevan Reddy, J., quashed the impugned order while upholding the contention of the petitioners. Hence this writ appeal by the 3rd respondent alone.

4. The contention of Sri T. Ramachandra Rao, learned Counsel for the appellant, is two-fold: (1) under Rule 6 of the Tirumala Tirupathi Devasthanam Office Holders and Servants (other than Hereditary Office Holders) Recruitment Rules, 1978 hereinafter referred to as "the T.T.D. Recruitment Rules", seniority is not the sole criterion for promotion to the post of Senior Sanitary Inspector which is though categorised as a non-selection post, but apart from seniority, efficiency and merit also will have to be taken into consideration; and (2) u/s 83 of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1966, an alternative remedy by way of revision has been provided for and, therefore, without invoking the said jurisdiction, it is not competent for the petitioners to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India.

5. The relevant portion of Rule 6 of the Recruitment Rules, which deals with appointment and method of recruitment, reads:

The method of recruitment for appointment, qualifications and the age prescribed for the various posts shall be as specified in columns (3), (4) and (5) against each post in Annexure II to these rules.

As per Annexure II, the post of Senior Sanitary Inspector is a non-selection post promotion to which is from the category of Sanitary Inspector with at least five years of service.

6. The main plank of the counter filed on behalf of the 1st respondent, T.T.D. is that since the record of the petitioners was not good and also there were adverse remarks, their cases were rejected for promotion and, since there were no adverse remarks against the respondents 2 and 3 and also their record was good, they were promoted. It is further stated in the counter that seniors are not automatically entitled to promotion merely because it is stated that the post is a non-selection post and, therefore, the competent authority is entitled to look into the record and promote the seniors only if it is satisfied with their record of service. The counter of the 3rd respondent is more or less similar in terms. However, in the counter of the 2nd respondent, it has been admitted that he suffered certain punishments, though this has been denied by the Executive Officer of the T.T.D.

7. Rule 4 of the Recruitment Rules defines "Act" and "words and phrases" as under:

1. "Act" means the Andhra Pradesh Charitable and Hindu Religious Institutions

and Endowments Act, 1966.

2. "Words and Phrases" used in these rules but not defined shall have the same meanings assigned to them in the Act, the rules made thereunder or in the Andhra Pradesh State and Subordinate Service Rules or any other rules which has been made applicable to the office holders and servants of the Devasthanams either in these rules or in any other rules.

8. There is no provision in the Recruitment Rules, save Rule 6, which lays down the criteria or guidelines for promotions. It is quite apparent that Rule 6 deals only by demarcating the distinction between "selection post" and "non-selection post" and stops short. Beyond this, there is nothing to guide the competent authority to effect promotions, as Rule 6 does not define "selection post". So, the argument is that, in as much as Rule 6 does not make any provision with regard to guidelines except stating that Senior Sanitary Inspector's post is a non-selection post, it is inevitable to conclude that seniority is not the sole criterion but merit and efficiency also will have to be taken into consideration, though seniority will be the dominant factor in the matter of promotion to a non-selection post. This is the tenor of the argument adopted both by the learned Advocate-General appearing on behalf of the T.T.D. and also the learned Counsel for the appellant. In support thereof reliance was placed on the following decisions. In *State of Mysore Vs. C.R. Sheshadri and Others*, , the Supreme Court held,

If the service rule entitles him (Petitioner) to promotion on the ground of seniority alone, Government will, except for the strongest reason, grant the benefit of promotion with effect from the date Venkataraman (Respondent) became Deputy Secretary.

* * * * However, if the criterion 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.

The next case is *State of Mysore and Another Vs. Syed Mahmood and Others*, , wherein the Supreme Court held:

Promotion to the posts of senior statistical assistants is made from the cadre of junior statistical assistants and progress assistants. Rule 43(3)(b) of the Mysore State Civil Services General Recruitment Rules, 1957, requires such promotions to be made by selection on the basis of seniority-cum-merit, that is seniority subject to the fitness of the candidate to discharge the duties of the post from among persons eligible for promotion.

* * * * Where the promotion is based on seniority-cum-merit the officer cannot claim, promotions as a matter of right by virtue of his seniority alone. If he is found unfit to discharge the duties of the higher post he may be passed over and an officer junior to him be promoted.

In *Sant Ram v. State of Rajasthan*, it is held,

It is a well established rule that promotion to selection grades or selection posts is to be based primarily on merit and not seniority alone. The principle is that when the claims of officers to selection posts is under consideration, seniority should not be regarded except where the merit of the officers is judged to be equal and no other criterion is, therefore, available.

In *Shri Janki Prasad Parimoo and Others Vs. State of Jammu and Kashmir and Others*, the Supreme Court held:

"Selection" means that the man selected must be of merit. Where promotion is by seniority, merit takes the second place. But, when it is a selection, merit takes the first place and it is implicit in such selection that the man must not be just average.

9. Sri R. Venugopal Reddy, learned Counsel for the respondents 3 to 5, while supporting the judgment under appeal, argued that the method of promotion could be categorised into three. One is, where under the rules framed, the criteria for promotion are prescribed as under: (a) seniority, (b) seniority-cum-efficiency; and (c) merit and ability. The second mode is, where the rules are silent with regard to the criteria for promotion but the category of the post is stated, i.e., selection or non-selection post, in which case merit and ability will be the dominant factors and seniority will be taken into consideration only when merit and ability are equal; and in case of non-selection post, seniority will be the dominant factor and unless the candidate is positively declared as unfit, his case cannot be overlooked for promotion in preference to his junior. The third is where the rules do not lay down and criteria for promotion or categorise the post but merely say that promotion has to be made by selection. In this case also, the criteria that determine the promotion to a selection post are merit and ability, and seniority where merit and ability are equal. It was further argued that in the lower echelons, where seniority is prescribed for promotion, then there is no scope for merit or any process of assessment with regard to efficiency, seniority alone will have to be taken into consideration. For this, reliance was placed on *State of Mysore Vs. C.R. Sheshadri and Others*, referred to (*supra*) and also on *Hari Datt v. State of H.P.* (1974) S.L.J. 525 at 530, wherein a Full Bench of the Himachal High Court observed:

It has been said that a milder form of the principle of seniority is that seniority should determine the order in which an officer of a particular grade should be considered for promotion but those considered unfit may be passed over, and Officers below them may be considered. This means the seniority-cum-fitness principle, and what it implies is that the senior person unless unfit should get the promotion. *State of Mysore v. Syed Mehmood* (1968) S.L.R. 411. The principle has not been found satisfactory, because it implies essentially that seniority should be given preponderating weight. The principle of seniority-cum-fitness has been generally applied at the lower levels of service where the duties are of a routine nature (*Public Administrator in Theory and Practice* (1972) p.370). It has also been applied in promotions from a junior scale post to a senior scale post

within the same service. P.C. Wadhwa Vs. Union of India (UOI) and Another, . But when the question arises of appointment to a higher service consisting of posts carrying superior responsibility the emphasis shifts from seniority-cum-fitness to merit-cum-seniority. The principle of merit determines that the most meritorious or best qualified person is selected for promotion. In Dr. M.P. Sharma's "Public Administration in Theory and Practice" from which I have derived much assistance, there appears the following statement:

In principle, authoritative opinion seems to be agreed that

- (a) in promotion to the higher posts, merit should be the only consideration to the total exclusion of seniority;
- (b) in promotion to middle posts, merit should be the determining factor and seniority a secondary one ; and
- (c) in promotion to lower rung posts, seniority should carry weight, but even here a care should be taken to ensure that exceptional merit is rewarded by quick promotion.

It was further observed:

There has been over a long period of history, a struggle for ascendancy between seniority and merit as principles determining promotion in public organisations of the State. It is now accepted that merit constitutes the more reasonable principle, specially at the higher levels of public responsibility. The Supreme Court in Sant Ram Sharma Vs. State of Rajasthan and Another, , gave the seal of their approval to the observations of Leonard D. White in his Introduction to the Study Public Administration : 4th Edn., pp. 380, 383:

The principal object of a promotion system is to secure the best possible incumbents for the higher positions, while maintaining the morale of the whole organisation. The main interest to be served is public interest, not the person; (sic)nter(sic) of members of the official group concerned. The public interest is best secured when reasonable opportunities for promotion exist for all qualified employees, when really superior civil servants are enabled to move up as rapidly the promotion ladder as their merits deserve and as vacancies occur, and when selection for promotion is made on the sole basis of merit. For the merit system ought to apply as specifically in making promotions as in original recruitment within limits, seniority is entitled to consideration as one criterion of selection. It tends to eliminate favouritism or the suspicion thereof; experience is a certain 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 maybe true.

10. Now, the crucial question, is whether there is any provision enacted in the

T.T.D. Recruitment Rules determining the criteria for promotion to the category of Senior Sanitary Inspector. In so far as Rule 6 is concerned, it only categorise the post of Senior Sanitary Inspector as selection post and nothing else. This, therefore, inevitably leads to Rule 4 of the said Rules for finding out the definition of "selection post". Rule 4, in terms, does not define what is "selection post", but it refers in its purport to the Andhra Pradesh State and Subordinate Services Rules, hereinafter referred to as "the Service Rules" for finding out the definition of "selection post". Rule 34 of the Service Rules reads:

34. Promotion.--(a) No member of a service or class of a service shall be eligible for promotion from the category in which he was appointed to the service unless he has satisfactorily completed his probation in that category.

(b) (i) Promotion to selection category or grade

Promotions in a service or class to a selection category or to a selection grade shall be made on grounds of merit and ability, seniority being considered only where merit and ability are approximately equal.

(ii) Promotions according to seniority--All other promotions shall, subject to the provisions of Rule 16, be made in accordance with the seniority unless--

(1) the promotion of a member has been withheld as a penalty; or

(2) a member is given a special promotion for conspicuous merit and ability.

It is, therefore, manifest from Rule 34(b)(ii) that promotions to all the posts other than selection category should be by seniority. This promotion by seniority, is, however, subject to (i) withholding of promotion of a member as a penalty; or (2) a special promotion for conspicuous merit and ability is given to a member.

11. In our judgment, therefore, promotion to the post of Senior Sanitary Inspector, under Rule 4 of the T.T.D. Recruitment Rules read with Rule 34 of the Service Rules, is by seniority, and, therefore, "seniority" holds the field.

12. On a conspectus of the case-law cited above, the principles that are propounded in the matter of promotion and that could be said to emerge are:

(1) If the promotion is to be made to a selection post, even in the absence of any guidelines, the criteria are merit and ability, and seniority will be looked into only when the merit and ability are equal. This is equally so in regard to the case of promotion to be effected to a post by selection;

(2) if the promotion is to a non-selection post, and if the criterion laid down as per the Rules is seniority-cum-efficiency, comparative merit may have to be assessed if length of service is equal and then seniority along with efficiency will have to be taken into consideration though the dominant factor for processual assessment is seniority. This does not mean that efficiency will be ignored or overlooked altogether. If the Rule is silent with regard to the criterion, even then seniority along with merit and efficiency will have to be considered. (3) If the

promotion is to a non-selection post and if the criterion under the Rule is seniority, then seniority alone will have to be taken into consideration unless the rule itself qualifies the said criterion; in other words, if the service rule entitles a person to promotion on the ground of seniority alone, the competent authority, except for the strongest reason, will promote him on the basis of seniority.

In short,

(a) Any promotion to the higher posts, merit should be the only consideration to the total exclusion of seniority;

(b) In promotion to middle posts, merit should be the determining factor and seniority a secondary one; and

(c) In promotion to lower rung posts, seniority should predominate.

13. Before attracting the application of the aforesaid principle, the circumstances of the case on hand may be noticed in a nutshell. By virtue of the impugned order dated 13th July, 1979, three persons, viz., one Muniratnam, Apparao, (2nd respondent in the writ petition) and E. Srinivasuly (appellant herein) were promoted to the three posts of Senior Sanitary Inspector in the serial order as stated above. Admittedly, there are adverse remarks against Muniratnam and there are also adverse remarks against the 2nd respondent to the writ petition as per his own admission in the counter though not admitted by the Executive Officer of the T.T.D. in his counter. So also, adverse remarks are found in the confidential reports against the three writ petitioners. However, the appellant herein is an exception. It is equally admitted that there are no remarks against any of these personnel declaring them as unfit or punishments in the nature of withholding promotion. In fact, from a perusal of the file placed before us it is quite apparent from their confidential reports of all the parties herein of the latest year of 1979, that there is a remark, "fit for promotion". In the light of this material, it is incomprehensible to us as to how the three aforesaid persons have been promoted. What positive criteria have been followed in the matter of promotion, is not clear. If the adverse remarks have been taken into consideration in the process of elimination, then the inclusion of Muniratnam in the list of promotes is understandable. In fact, even the name of the 2nd respondent in the list of promotes is reconcilable, because as per his own admission there are adverse remarks against him. Therefore, if strictly on the basis of adverse remarks only the three petitioners have been eliminated. Then only the appellant herein must find his place in the promotion list and not Muniratnam and also the 2nd respondent; and if seniority alone has guided the competent authority, then Muniratnam and the petitioners 1 and 2 ought to have been promoted. If promotions are to be effected by a process of selection, then there does not appear to be any choice with reference to any of the candidates as one does not find merit and ability from the material on record. So, this peculiar processual assessment is a maze to us. It is, therefore, irresistible to conclude that the mode adopted by the competent authority for promotion is

most elusive and inept. We, therefore, unhesitatingly join the judgment under appeal by which the impugned order was quashed.

14. In sum, the promotion to the post of Senior Sanitary Inspector within the meaning of Rule 6 and Rule 4 of the T.T.D. Recruitment Rules read with Rule 34 of the Service Rules, will have to be made on the basis of seniority. The senior, therefore, will have to be promoted unless there is penalty of withholding of promotion.

15. Adverting to the second contention of the learned Counsel for the appellant that u/s 83 of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, there is an alternative remedy of revision to the Government which is efficacious and, therefore, the respondents-petitioners should not be allowed to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, reliance was placed on K.K. Shrivastava and Others Vs. Bhupendra Kumar Jain and Others, wherein the Supreme Court held:

Where there is an appropriate or equally efficacious remedy the Court should keep its hands off. This is more particularly so where the dispute relates to an election. Still more so where there is a statutorily prescribed remedy which almost reads in mandatory terms,

* * * There is no foundation whatever for thinking that where the challenge is to an "entire election" then the writ jurisdiction springs into action.

16. The learned Counsel for the respondents has relied on a number of decisions for the proposition that existence of an alternative remedy is not a bar to the writ jurisdiction. Collector of Customs and Excise, Cochin and Others Vs. A.S. Bava, , is one such decision wherein the Supreme Court held:

There is no force in the first point. First, the point was not taken in the High Court. Secondly, it is settled that the existence of a remedy by way of revision does not bar the jurisdiction of the High Court to entertain a petition under Article 225.

Second is the decision in L. Hirday Narain Vs. Income Tax Officer, Bareilly, , wherein it is held:

We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income Tax Officer u/s 35 but was not moved, the High Court would be justified in dismissing as not maintainable the petition, which was entertained and was heard on the merits.

It is unnecessary to multiply the cases. We are of the view that the contention is not sustainable on two grounds. Firstly, the contention is raised for the first time in the writ appeal: and secondly, it is now well-settled that a revisional remedy is no bar to the invocation of jurisdiction under Article 226 of the Constitution of India. In the view we have taken, it is unnecessary to go into the question as to which of the provisions hold the field, whether Section 83 of the Andhra Pradesh

Charitable and Hindu Religious Institutions and Endowments Act, or the appellate or revisional provisions enacted in the Tirumala Tirupathi Devasthanams Act, 1979.

17. From the foregoing, in our judgment, it is quite evident that the impugned order is wholly repugnant to the Rules and, therefore, very rightly the judgment under appeal quashed the same holding it to be bad. Therefore, we see no reason to take a view at variance with the one under appeal. The contentions raised on behalf of the appellant and the 1st respondent are untenable and devoid of merit and, therefore, the same are rejected.

18. Resultantly, the writ appeal stands dismissed. No Costs.