
(1979) 01 KL CK 0008
In the High Court Of Kerala

Manager, P. and T. Motor Service

APPELLANT

Vs

Punnose

RESPONDENT

Date of Decision : 17-01-1979

Acts Referred:

Citation : (1979) 01 KL CK 0008

Hon'ble Judges : Gopalan Nambiyar, C.J.;Balagangadhran Nair, J

Bench : Division Bench

Judgement

Gopalan Nambiyar, C.J.—The Manager, Posts and Telegraphs, Motor Service, is the appellant in this appeal, against the judgment of a learned Judge of this Court, allowing O.P. No. 1607 of 1975 preferred by the 1st respondent. The 1st respondent was a driver in the Posts and Telegraphs Department and sought to quash the order awarding him the punishment of censure and recovery of Rs. 250 as damages representing the loss incurred by the Department on account of the respondent's misconduct in driving the vehicle. It was the respondent's case that he was denied promotion to the higher post after taking into consideration his service record which contained this punishment of censure and recovery of Rs. 250. After so taking these into account the 1st respondent contended that he was declared unfit for promotion. Promotion, it is common ground, had to be decided on considerations of seniority-cum-fitness.

2. The meaning and content of the expression "seniority-cum-fitness" has been judicially expounded by this Court on more than one occasion. In V Rev. Mother Provincial v. State of Kerala (1969) KLT 749, a Full Bench of this Court speaking through Raman Nayar, C.J. observed:

At the same time, we would like to make it clear that the test of seniority-cum-fitness prescribed in the sub-section does not mean that promotion is to be on the principle of seniority subject to fitness which is the test adopted for "non-selection" posts in the several service rules of the State. 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. We also think that, notwithstanding the wording of the sub-section which would appear to permit of direct recruitment only if there is no person available for promotion possessing the necessary qualifications, if the basis of the promotion is to be seniority-cum-fitness it would be open to the management to resort to appointment otherwise than by promotion if there is no person fit for promotion. An unfit person is not entitled to promotion merely because he possesses the necessary qualifications.

In *Rt. Rev. M. M. John v. Government of Kerala* (1971) KLT 875, a Division Bench of this Court was concerned with an amendment effected to Section 53 by the addition of an explanation to the new Sub-section (7). That explanation stated that fitness shall mean possession of qualifications prescribed in the Regulations. The Division Bench noticed the exposition made by the Full Bench in (1969) KLT 749, regarding seniority-cum-fitness, and pointed out that the decision had been affirmed by the Supreme Court in *State of Kerala v. Very Rev. Mother Provincial* (1970) KLT 630. The Division Bench pointed out that the effect of the explanation to Sub-section (7) was to nullify the interpretation placed by the Full Bench on the meaning of the expression "seniority-cum-fitness", which occurred in the body or the main part of the sub-section; and therefore, the explanation cannot stand as being inconsistent with the main provision. Again, in *Chandrasekhara Pillai v. Accountant-General* (1972) KLT 111, another Division Bench ruling of this Court pointed out the distinction between promotion to selection grade posts on grounds of merit-cum-seniority and promotion on the basis seniority-cum-fitness. It was pointed out that in the former case the comparative merit alone is to be considered, seniority being relevant only where considerations of merit are approximately equal. In *Benedict Mar Gregorios v. State of Kerala* (1976) KLT 458 a Full Bench of three Judges of this Court, of which both of us were members, had occasion, again to refer to the concept of seniority-cum-fitness. The Full Bench observed that the concept of seniority-cum-fitness had been explained by an earlier Full Bench of this Court in (1969) KLT 749, that thereafter, an amendment effected by Kerala Act 13 of 1971 fell to be considered by a Division Bench in (1971) KLT 875, which held that the amendment had made no change to the principle of seniority-cum-fitness as expounded by the Full Bench in (1969) KLT 749; and that a Full Bench of this Court in *W. A. No. 324 of 1973* had affirmed the view taken in (1969) KLT 749 and further pointed out that the Legislature itself had accepted the judicial interpretation placed by this Court on the concept of seniority-cum-fitness. In addition to these rulings, we have also noticed a decision of the Supreme Court in *State of Mysore and Another Vs. Syed Mahmood and Others*, . Considering the scope of the rule of promotion on "seniority-cum-merit", it was observed by the Supreme Court that in such a case the Officer concerned cannot claim promotion as a matter of right by seniority alone, and that if he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted, (vide para 4). In paragraph 5, the Court stated:

we are of the opinion that the State Government should be directed at this stage to consider the fitness of Syed Mahmood and Bhao Rao for promotion in 1959. If on such examination the State Government arbitrarily refuses to promote them, different considerations would arise. The State Government would upon such consideration be under a duty to promote them as from 1959 if they were then fit to discharge the duties of the higher post and if it fails to perform its duty, the Court may direct it to promote them as from 1959.

3. From the principle of the above decisions, it is clear that an element of assessment of suitability is certainly involved in deciding the question of promotion on the basis of seniority-cum-fitness. Both the elements of seniority and suitability have to enter into the reckoning, and in deciding the suitability of the candidate for promotion his service record is certainly an element to be taken into consideration or account. Without an element of assessment, we do not see how, as stated by the Supreme Court, in the decision noticed, a senior may be passed over by a junior on considerations of suitability or fitness (see *State of Mysore and Another Vs. Syed Mahmood and Others*, . In that view, the learned Judge was wrong in directing that the censure and the recovery entered against the petitioner in his service record should be ignored and that his promotion should be ordered unhampered by the censure in his service record.

4. The learned Judge after referring to the Full Bench judgment of this Court in (1969) KLT 749, observed:

No doubt a different meaning to the words seniority-cum-fitness had been given in *Rev. Mother Provincial v. State* (1969) KLT 749, wherein a Full Bench of this Court which was considering the validity of the provisions of the Kerala University Act, Chief Justice Raman Nayar speaking for the Bench gave a meaning to the expression seniority-cum-fitness something that is different from the meaning usually attributed to it in the ordinary service rules.

We have not been able to follow why the learned Judge felt that the judicial exposition of the concept of seniority-cum-fitness rendered by a Full Bench of this Court in (1969) KLT 749, was something different from the meaning ordinarily attributed to these words in the service rules. Counsel were not able to supply any warrant for the comment. The decision of the Full Bench was affirmed by the Supreme Court; and the principle stated was followed by more than one Division Bench ruling and by a later Full Bench of this Court.

5. The learned Judge referred to the decision of the Supreme Court in *State of Mysore Vs. C.R. Sheshadri and Others*, , as authority for the position that seniority-cum-fitness will not mean selection made on merit and ability, and that there was no question of any comparative assessment as such coming in. It was also stated that in such cases, no doubt, the suitability or fitness of the person concerned for promotion, his qualification, health, etc. might be relevant and will have to be considered. Counsel for the respondent very fairly drew our attention to a later judgment of the learned Judge himself in O.P. No. 205 of 1977 where

the learned Judge stated thus:

4. I have considered this question in *Punnose v. The Manager, P & T Motor Service, Cochin* (1977) KLT 521 , where I said that in the matter of promotion on the basis of seniority-cum-fitness there is no question of selection made on merit and ability and there is no question of any comparative assessment as such coming in. In such cases no doubt the suitability or fitness of the person can be considered for promotion to the post, his qualification, health, etc., might be relevant and will have to be considered. In that case I have referred to the decision of the Supreme Court in *State of Mysore Vs. C.R. Sheshadri and Others*, . Going through the Supreme Court case again, I think I made a mistake because in the particular case the Supreme Court was dealing with a matter where the promotion was on the basis of pure seniority and not on seniority cum-fitness. There is certainly difference where the promotion is based on the pure seniority and promotion based on seniority-cum-fitness. In cases of promotion based on seniority cum-fitness apart from pure seniority, the person's fitness, to hold the post to which he may be promoted, his physical fitness, his acquirement of qualifications prescribed for the promoted post or such other positive factors from which it would be obvious that he is unfit for promotion would have to be taken into account. But there is no question of comparative assessment of merits of various candidates, coming in, which I am emphasising at the risk of repetition. Nor could the imposition of a minor penalty render a person unfit for promotion. It might be that if a person is punished for some serious misconduct of such a nature which would caution a higher authority from giving any responsible post to the person who may be considered unfit for promotion.

We cannot subscribe to the learned Judge's view that in judging fitness for promotion an element of comparison of suitability of the claimants does not enter into the picture at all. As stated already, without at least some assessment and comparison, there can be no question of passing over a seniority by the junior.

6. We are unable to sustain the direction given by the learned Judge that the 1st respondent was entitled to have his promotion to the post of selection grade driver on the basis of seniority and without any element of selection being involved at all.

7. We allow this appeal and set aside the judgment of the learned Judge and direct that O.P. No. 1607 of 1975 will stand dismissed. There will be no order as to costs.