
(2015) 03 GAU CK 0015
In the Gauhati High Court
Case No : Writ Petition (C) No. 6191 of 2013

Shah Syed Ahadur Rahman	Vs	APPELLANT
Hon"ble Gauhati High Court		RESPONDENT

Date of Decision : 04-03-2015

Acts Referred:

Citation : (2015) 4 GLT 658

Hon'ble Judges : K. Sreedhar Rao, C.J.;Ujjal Bhuyan, J.

Bench : Division Bench

Advocate : S.N. Rahman, S.S.S. Rahman and S.B. Rahman, for the Appellant

Final Decision : Allowed

Judgement

Ujjal Bhuyan, J.—Petitioner is a judicial officer belonging to the Assam Judicial Service. He was appointed in the year 2002 and at the time of filing this petition, he was serving as Sub-Divisional Judicial Magistrate (SDJM), Charaideo, Sonari in the district of Sivasagar.

2. Petitioner seeks promotion from Grade III to Grade II in the Assam Judicial Service w.e.f. the year 2011. According to the petitioner, though his name figured in the zone of consideration for promotion in the year 2011, he was not promoted. In the promotion carried out in the year 2012 his name was not even included in the list of eligible candidates. Aggrieved, he has filed the present writ petition seeking the relief as indicated above.

3. From the documents annexed to the writ petition it is seen that a promotion exercise was carried out for promotion from Grade III to Grade II of the Assam Judicial Service in respect of 6 vacancies in the year 2011. In the zone of consideration which was short listed by applying the 1:3 ratio, petitioner was placed at Sl. No. 18. But he was not promoted.

4. In the next year i.e. in the year 2012, the High Court issued a notification dated 13-06-2012 notifying 50 officers in Grade III as being eligible for

promotion to Grade II on the basis of seniority-cum-merit. But name of the petitioner was not included in the list of 50 officers though the officers from Sl. No. 07 onwards were junior to him. The High Court issued another notification dated 13-06-2012 promoting 26 officers belonging to Grade III to Grade II.

5. According to the petitioner, the criteria for promotion from Grade III to Grade II as per the Assam Judicial Service Rules, 2003 is "seniority-cum-merit subject to overall suitability". Annual Confidential Rolls (ACRs) of last 5 years are to be considered and those officers having minimum two "good" grading in ACRs are considered for promotion provided their integrity and character is beyond doubt or there is no doubt.

6. ACRs of 2009, 2010 and 2011 were communicated to the petitioner. Petitioner was graded "good" in the years 2009 and 2010. In the year 2011, he was graded as "average" with the remark "integrity: doubtful". There was a further remark of the accepting authority to keep the petitioner under watch. Petitioner submitted representation dated 18-06-2012 for expunction of adverse remark in the ACR for the year 2011. Petitioner was informed by the Registrar (Vigilance) of the High Court vide letter dated 10-10-2012 that the remark "integrity: doubtful" was expunged while the grading of "average" and the other remark were left undisturbed.

7. Petitioner has contended that since he had two "good" grading and the adverse remark of "doubtful: integrity" having been expunged, he is required to be considered for promotion to Grade II at least alongwith the promotees of 2012.

8. Registrar General of the High Court has filed an affidavit. It is stated that petitioner does not have any legally enforceable vested right to be promoted. Petitioner's case for promotion was duly considered but he was not given promotion as he failed to fulfill the requisite criteria prescribed under the Assam Judicial Service Rules, 2003 as amended. Criteria for promotion from Grade III to Grade II are as follows:-

(i) the officer must have been in the cadre of Grade III for a period not less than 5 years;

(ii) seniority-cum-merit subject to overall suitability;

(iii) ACRs of last 5 years are to be considered and officers having minimum of two "good" grading in the ACRs will be considered provided their integrity and character is beyond doubt.

Petitioner was considered for promotion in the year 2012. For this purpose ACRs of last 5 years i.e. from 2007 to 2011 were considered. Out of the 5 years, petitioner had two "good" and three "average" gradings with an adverse remark of "integrity: doubtful" in the year 2011. Therefore, considering his overall suitability, petitioner could not be promoted from Grade III to Grade II in the year 2012. Merely having two "good" grading is not enough to get promotion if

integrity is found doubtful which is the most paramount consideration. The Promotion Committee duly considered all relevant factors and thereafter recommended promotion of the best deserving candidates. Finally it is stated that process of promotion has again been initiated for which judgments of the petitioner were also called for.

9. Petitioner has submitted rejoinder affidavit to the affidavit of the Registrar General. He has contended that petitioner certainly has a right to be a considered for promotion. He has stated that the adverse remark of "integrity: doubtful" in his ACR for the year 2011 having been expunged, the same would mean that there was no adverse remark as against the petitioner. Therefore, an adverse remark which has since been expunged cannot be used against the petitioner to deny him promotion in as much as such a remark must be treated as non-existent in the eye of law.

10. We have heard Mr. B. Rahman, learned Counsel for the petitioner and Mr. S. Shyam, learned Standing Counsel, Gauhati High Court, who has produced the minutes of the meeting of the Committee for Recruitment of Judicial Officers held on 07-06-2012 [learned Standing Counsel has since been elevated as Additional Judge of this Court].

11. Considering the nature of the grievance expressed by the petitioner, it would be apposite to refer to the proceedings of the meeting of the Committee for Recruitment of Judicial Officers (for short the Committee hereafter) held on 07-06-2012. In that meeting, the matter regarding regular promotion from Grade III to Grade II in the Assam Judicial Service was considered. 25 vacancies in Grade II of the Assam Judicial Service were identified to be filled up by eligible and suitable Grade-III officers on promotion. As per Schedule E to the Assam Judicial Service Rules, 2003 (Rules), the zone of consideration was in the ratio of 1:3. Accordingly, candidatures of 75 officers in Grade III were scrutinized. As per Rule-7 of the Rules, promotion from Grade III to Grade II has to be on the basis of the criteria indicated in Schedule E. To be eligible, an officer in Grade III must have rendered service for a period of not less than 5 years in that grade. The criteria for promotion are-

- (i) seniority-cum-merit subject to overall suitability,
- (ii) ACRs of last 5 years having minimum two "good" grading in ACRs provided their integrity and character is beyond doubt or there is no doubt.

The Committee noted that Schedule F to the Rules which was incorporated by the Assam Judicial Service (Amendment) Rules, 2008 mandates the following criteria in the case of promotion from Grade III to Grade II-

- (a) ACR for last 5 years,
- (b) Evaluation of judgments,
- (c) Performance in oral interview.

The Committee further noted that the norm of performance in oral interview was disapproved by the Hon'ble Apex Court in its order dated 14-07-2009 passed in Civil Appeal No. 1867/2006 (Malik Mazhar Sultan and another-Vs-UP Public Service Commission and others). The Committee therefore noted that performance in oral interview would no longer be a criteria for judging suitability.

The Committee also noted that another Committee of three Hon'ble Judges had recommended on 10-02-2012 that the following marks should be allotted for the various gradings secured by an officer in his ACR-

The said Committee had recommended that the judgment segment of the assessment ought to be out of 50 marks in total and the Bench mark of suitability for this segment of the process ought to be 30 marks. It was further recommended that the judgments be examined by each member of the Selection Board and the average of the marks awarded be worked out for the purpose. In respect of ACRs, the said Committee recommended a Bench mark of 30 out of 50 marks for the block of five relevant years. In addition to the segment-wise Bench marks, the said Committee recommended a combined Bench mark (judgment and ACR) of 65 out of a total of 100. Once this Bench mark was achieved, seniority would then be the determinative factor.

The Full Court in its meeting held on 20-02-2012 resolved that 50 marks will be the Bench mark alongwith the requirements of rules of integrity and character beyond doubt. 25 marks will be the Bench mark for the ACRs and 25 mark will be for judgments.

The Committee thereafter applied the following criteria for recommendation of the candidates for promotion:-

- (i) Seniority-cum-merit subject to overall suitability.
- (ii) ACRs of five years with the Bench mark of 25 out of 50.
- (iii) Evaluation of judgments with the Bench mark of 25 out of 50.
- (iv) Total Bench mark of 50 comprised of the two segments of judgment and ACR (the candidates being required to individually secure 25 marks in each of the segments).
- (v) Seniority to be the determinative factor, once the candidates secured the composite Bench mark of 50.
- (vi) Integrity and character to be beyond doubt."

The members of the Committee thereafter individually evaluated the judgments of the officers within the zone of consideration and awarded them marks on a scale of 50. On the basis of the marks so awarded, the Registry calculated the average and prepared a compilation. Similarly, the ACR marks of the officers for the relevant 5 years were worked out by the Registry. The combined compilation of marks has been annexed to the proceedings of the meeting of the Committee

held on 07-06-2012 as Annexure-A. The Committee thereafter recommended 50 officers for promotion from Grade III to Grade II of the Assam Judicial Service. It is stated that the petitioner and three others were not recommended as they failed to achieve the Bench marks as fixed.

12. From Annexure-A appended to the proceedings of the meeting of the Committee dated 07-06-2012, it is seen that petitioner secured an average of 22.2 marks in judgment writing and 28 as ACR marks. Thus petitioner achieved the Bench mark in ACR as well as the aggregate Bench mark of 50 ($28 + 22.2 = 50.2$). However, petitioner failed to achieve the Bench mark of 25 in judgment writing. From a cursory glance of the marks awarded by the Hon'ble Members of the Committee, it is seen that there is vast variation in the marks awarded by at least two Hon'ble Members, the second Member awarding 10 whereas the third Member awarding 41.

13. Having noticed the above, we may now revert back to the affidavit filed by the Registrar General. Though it is stated in the affidavit that the Promotion Committee had considered the relevant factors and the statutory criteria while considering promotion and that the petitioner failed to fulfill the requisite criteria, the affidavit has not disclosed the methodology adopted in the promotion process. The affidavit is silent about the Bench marks fixed by the Committee in the meeting held on 07-06-2012 and the failure of the petitioner to meet the Bench mark in the judgment writing segment. The above aspects ought to have been disclosed in the affidavit. A judicial officer should know how he was assessed and why he was not recommended for promotion. Fairness and transparency demands that the concerned officer should know the procedure that was adopted while considering his case for promotion and why he failed to make the cut. Moreover, this will also help the officer in identifying areas of weakness and to take corrective steps. Compounding the matter further, the Register General in the affidavit has stated that out of the 5 years, the petitioner had two "good" and three "average" gradings including an adverse remark of "integrity: doubtful". He says that the High Court therefore did not promote the petitioner from Grade III to Grade II in 2012 after taking into consideration his over all suitability. It is reiterated that mere two "good" grading is not enough to get promotion if integrity is found doubtful. Considering the nature and responsibility in the higher positions of judicial service, it is more important to lay emphasis on personality and character as well as suitability of an officer. The Promotion Committee had considered all the above factors.

14. Thus from a reading of the affidavit of the Registrar General, one gets the impression that one of the factors for which petitioner was not promoted was the adverse remark of "integrity: doubtful" in the petitioner's ACR for the year 2011. The second impression one gets is that more emphasis was placed on personality, character and suitability of an officer while considering promotion.

15. Coming to the first impression i.e. that the petitioner was not promoted because of the adverse remark of "integrity: doubtful" in his ACR for the year

2011, it is seen that petitioner had submitted a representation for expunction of the said adverse remark. Petitioner was informed by the Registrar (Vigilance) vide letter dated 10-10-2012 that the High Court had expunged the adverse remark "integrity: doubtful" while maintaining the grading of "average" and the other remark of the accepting authority that the officer may be kept under watch.

16. The effect of expunction of adverse remark, though latter in point of time, would be that such remark never existed. In the present case, it would mean that the adverse remark "integrity: doubtful" which has been stated to be the most para-amount consideration while considering promotion in the affidavit of the Registrar General, was nonexistent. Therefore, on that basis, the High Court could not have formed an opinion that petitioner was not fit for promotion.

17. In the case of the U.P. Jal Nigam Vs. S.C. Atri and Another, , the Apex Court held that the effect of subsequent expunction of adverse entry in character roll would be that on the date when the officer was considered for promotion, there existed no adverse entry in his character roll. Subsequently, it cannot be said that the officer was not promoted on account of his unsuitability.

18. Coming to the second impression as indicated above, i.e. more importance and emphasis was given on personality, character and suitability while considering promotion, the same may be examined alongwith the recommendation of the Committee dated 07-06-2012.

19. Under the Rules, the criterion for promotion is "seniority-cum-merit subject to over all suitability". In addition, ACRs of last 5 years are considered and an officer must have minimum two "good" grading provided integrity and character is beyond doubt or there is no doubt. By the amendment in 2008, in addition to the ACRs, evaluation of judgments furnished and performance in oral interview were also prescribed.

20. In Malik Mazhar Sultan (supra), the Apex Court took the view that while considering promotion from Civil Judge (Junior Division) to Civil Judge (Senior Division), the officers should not be subjected to oral interview. It was clarified that the direction given in the earlier judgment in Malik Mazhar Sultan and Another Vs. U.P. Public Service Commission and Others, that performance in oral interview should also be a criterion for promotion should be considered as deleted. It was further clarified that if any High Court/State Government had framed any rules subjecting an officer to oral interview and to consider his promotion on the basis of his performance in the oral interview, the same should be treated as deleted. The Apex Court stated that performance is evaluated on the basis of past ACRs and in case of necessity the judgments can also be perused for the purpose of evaluation. It was clarified by the Apex Court that normally promotions are given based on evaluation of the ACRs and seniority. The first judgment i.e., Malik Mazhar Sultan and Another Vs. U.P. Public Service Commission and Others, was of a Bench of two judges whereas the later judgment was of a three judge Bench.

21. In *B.V. Sivaiah and Others etc. Vs. K. Addankl Babu and Others etc.*, , the Apex Court examined the principle of "seniority-cum-merit" applied in matters of promotion. It held that the criterion of "seniority-cum-merit" lays greater emphasis on seniority. Reference was made to the decision in *State of Kerala and Another Vs. N.M. Thomas and Others*, where the Apex Court explained the criterion of "seniority-cum-merit" in the following terms:-

"With regard to promotion the normal principles are either merit-cum-seniority or seniority-cum-merit. Seniority-cum-merit means that given the minimum necessary merit requisite for efficiency of administration, the senior though the less meritorious shall have priority." On the other hand, the principle of "merit-cum-seniority" lays greater emphasis on merit and ability and seniority plays a less significant role. Seniority is to be given weight only when merit and ability are approximately equal. It was finally held that the criterion "seniority-cum-merit" in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration, the senior even though less meritorious shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit, the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion.

22. In *Union of India and Others Vs. Lt. Gen. Rajendra Singh Kadyan and Another*, , the Apex Court reiterated the above and held that the criterion "seniority-cum-merit" postulates the requirement of certain minimum merit or satisfying a Bench mark previously fixed. Subject to fulfilling this requirement the promotion is based on seniority. There is no requirement of assessment of comparative merit in the case of "seniority-cum-merit".

23. From a careful analysis of the above judgments it is evident that when the criterion of "seniority-cum-merit" is applied, once minimum necessary merit requisite for efficiency of administration is achieved, the senior even though less meritorious shall have priority. Comparative assessment of merit is not required. The requirement of minimum merit can be prescribed by fixing a Bench mark. The underlying emphasis when the criterion of "seniority-cum-merit" is applied is of minimum merit. What then can be construed to be minimum merit while applying the criterion of "seniority-cum-merit" which lays greater emphasis on seniority? Though minimum merit is not capable of any precise definition and would depend on the fact situation of the particular case, in the context of the criterion of "seniority-cum-merit", the minimum merit should be such that the emphasis on seniority does not get diluted.

24. In this case we are considering promotion from Grade III to Grade II in the Assam Judicial Service. This is the first promotion in the service. Petitioner had entered judicial service in the year 2002. He seeks consideration for promotion to Grade II in the year 2012 i.e. after 10 years of his entry into the service. In the context of such promotion, a three judge Bench of the Apex Court in the later

judgment in Malik Mazar Sultan (Supra) held that in such cases normally promotions are given based on evaluation of the ACRs and seniority. In case of necessity, judgments can also be perused for the purpose of evaluation.

25. From a conjoint reading of the affidavit filed by the Registrar General and the proceedings of the meeting of the Committee, it is quite discernible that the overriding emphasis that was given while undertaking the promotion exercise was on merit. Registrar General in his affidavit has infact stated that it is more important to lay emphasis on personality and character as well as on suitability while considering promotion. The Committee by prescribing separate Bench marks of 25 out of 50 in the segments of judgment writing and ACR and a further Bench mark of 50 in the aggregate perhaps laid more emphasis on merit than what was required to determine minimum merit in the context of the statutory criterion of "seniority-cum-merit subject to overall suitability". There appears to have been some dilution of the statutorily prescribed criterion of "seniority-cum-merit" by administrative decisions. In addition we may also point out the wide divergence in the award of marks allotted by two Hon"ble Members in respect of the petitioner while evaluating judgments.

26. Therefore, in the facts and circumstances of the case as noticed above, we are of the considered opinion that the case of the petitioner for promotion from Grade III to Grade II in the Assam Judicial Service in the selection carried out in the year 2012 is required to be considered afresh by a Review Promotion Committee. Ordered accordingly. Any promotion if given to the petitioner in the meanwhile will not come in the way of the fresh consideration of the case of the petitioner for promotion to Grade II in the year 2012 by the Review Promotion Committee.

27. Writ petition is accordingly allowed. No cost.