

(2007) 09 AHC CK 0003
In the Allahabad High Court

Sri Krishna Kumar Gupta

APPELLANT

Vs

The Registrar General High Court, The District Judge and Sri
Sayed Zafar Husain

RESPONDENT

Date of Decision : 25-09-2007

Acts Referred:

Constitution of India, 1950 — Article 142, 226

Citation : (2008) 5 AWC 4683

Hon'ble Judges : V.K. Shukla, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

V.K. Shukla, J.—Present writ petition has been filed by the petitioner assailing the validity of the decision dated 1.5.2007 according promotion to Sri Syed Zafar Husain as Sadar Munsarim in the judgeship of District Bareilly.

2. Brief facts of the case is that in the judgeship of District Bareilly on account of attaining age of superannuation of Sadar Munsarim Sri Kailash Chandra Agarwal, post of Sadar Munsarim fell vacant and then senior most employee Sri Margoob Hussain was accorded promotion vide order dated 30.3.2007. Thereafter said Margoob Hussain also attained the age of superannuation and then exercise was undertaken for according promotion on the post of Sadar Munsarim. In the said exercise so undertaken, petitioner, who is un-disputedly senior, has been non suited and Sri Syed Zafar Husain has been accorded promotion as Sadar Munsarim on the recommendation of Committee, at this juncture present writ petition has been filed.

3. Counter affidavit has been filed and therein it has been stated that rightful decision has been taken and the post of Sadar Munsarim was selection post, promotion has been made on the basis of the merit with due regard to the seniority, in this background there is no occasion to interfere.

4. Counter affidavit has been filed on behalf of the District Judge. Bareilly and

therein to action taken, has been justified.

5. Rejoinder affidavit has been filed to the counter affidavit and supplementary has also been filed reiterating all most all the averments mentioned on the earlier occasion.

6. After respective arguments have been advanced, present writ petition has been taken for final disposal/hearing with the consent of the parties.

7. Original record on the basis of which impugned decision in question has been taken has also been produced.

8. Sri Sidhhartha Srivastava, Advocate, learned Counsel for the petitioner contended with vehemence that in the present case petitioner was senior and merely on the basis of assessment made in the A.C.R. and old stale reports opinion has been formed in respect of outstanding merit and promotion has been accorded, as such action, is unjustified action, and same cannot be subscribed by any means.

9. Sri Neeraj Upadhaya, Advocate, representing District Judge, Bareilly and Sri Yogesh Kumar Saxena representing private respondents on the other hand contended that selection is based on merit-cum-seniority and here on the basis of the merit, contesting respondents has been accorded promotion as such no interference be made in exercise of authority of judicial review.

10. Before proceeding to consider the respective arguments advanced, relevant rules which holds the field of promotion, Rule 20 of Subordinate Civil Courts Ministerial Establishment Rules, 1947 is being quoted below for being looked into

20. Promotion:- (1) The posts in a judgeship reserved for clerks in that judgeship and promotion to higher posts shall be made from amongst them, If, however, no suitable clerk is available in the judgeship for promotion to a particular post, promotion as a special case may be made from another judgeship with the sanction of the High Court or the Chief Court, as the case may be

(2) Except in cases of Amins, promotion shall be made according to seniority subject to efficiency up Rs. 80 grade in the case of persons getting pre-1931 scale of pay and the scale of Rs. 70-4-90 (Callas III in the case of persons getting pay on the post -1931 scale of Rs. 85-6-145 in the case of persons drawing the revised 1947 scale.

(3) Post other than those mentioned in Clause (2) above, for persons in the pre 1931 scale on post 1931 scale respectively shall be treated as selection posts, promotion to which shall be based on merit with the due regard to seniority.

Note- In passing over a person for inefficiency as well as promotion for a selection post due weight shall be given to his previsions record of service and seniority should be disregarded only when the junior official promoted is of outstanding merit as compared with his seniors.

11. Perusal of the aforementioned rules would go to show that as far as post of Sadar Munsarim is concerned, same being covered in Sub-rule 3 of Rule 20 of Subordinate Civil Courts Ministerial Establishment Rules, 1947, is selection post, promotion whereof, is to be made, based on merit with due regard to seniority. Note has been appended therein providing that for passing over a person for inefficiency as well as promotion for selection post due weight has to be given to his previous record of the service and seniority is to be disregarded only when junior official promoted is of outstanding merit as compared with his seniorities.

12. Criteria of merit-cum-seniority has been subject matter of consideration time and again and same is approved method of selection and promotion to selection grade post is not automatic on the basis of ranking in gradation list and promotion is based primarily on merit and not on seniority alone.

13. Hon''ble Apex Court in the case of Sant Ram Sharma Vs. State of Rajasthan and Another, held that promotion to selection grade posts'' is not automatic on the basis of ranking in Gradation list and the promotion is primarily based on merit and not on seniority alone. At page 1914 of the Judgment, it is stated as under (para 6):

The circumstance that these posts are classed as "Selection Grade Posts" itself suggests that promotion to these posts is not automatic being made only on the basis of ranking in the Gradation List but the question of merit enters in promotion to selection posts. In our opinion, the respondents are right in their contention that the ranking or position in the Graciation List does not confer any right on the petitioner to be promoted to selection post and that it is a well established rule that promotion to selection grades or selection posts is to be based primarily on merit aid not on 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.

14. Hon''ble Apex Court in the case of State of Orissa Vs. Durga Charan Das, the Constitution Bench held that the promotion to a selection post is not a matter of right which can be claimed merely by seniority.

15. Hon''ble Apex Court thereafter in the case of B.V. Sivaiah and Others etc. Vs. K. Addankl Babu and Others etc., held that 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.

16. Hon''ble Apex Court in the case of Union of India and Others Vs. Lt. Gen. Rajendra Singh Kadyan and Another, observed as under

Wherever fitness is stipulated as the basis of selection, it is regarded as a non-selection post to be filled on the basis of seniority subject to rejection of the unfit. Fitness means fitness in all respects "Seniority-cum-merit" postulates the

requirement of certain minimum merit or satisfying a benchmark previously fixed Subject to fulfilling this requirement the promotion is based on seniority. There is no requirement of assessment of comparative merit both in the case of Seniority-cum-fitness and seniority-cum-merit. Merit-cum-suitability with due regard to seniority as prescribed in the case of promotion to All-India Services necessarily involves assessment of comparative merit of all eligible candidates, and selecting the best out of them.

17. Hon''ble Apex Court in the case of Central Council for Research in The Central Council for Research in Ayurveda and Siddha and Another Vs. Dr. K. Santhakumari, has taken the view that where promotion is based on merit-cum-seniority basis by departmental promotion on the recommendation of Departmental Promotion Committee, then a candidate cannot challenge the select list on ground that therein his/her juniors were placed above him/her without following seniority-cum-fitness criterion. Relevant para 12 are being quoted below:

12. In the instant case, the selection was made by Departmental Promotion Committee. The Committee must have considered all relevant facts including the inter-se merit and ability of the candidates and prepared the selects list on that basis. The respondent though senior in comparison to other candidates, secured a lower place in the select list, evidently because the principle of "merit-cum-seniority" held been applied by the Departmental Promotion Committee. The respondent has no grievance that there was any mala fides on the part of the Departmental Promotion Committee. The only contention urged by the respondent is that the Departmental Promotion Committee did not follow the principle of "seniority-cum-fitness". In the High Court, the appellants herein failed to point out that the promotion is in respect of a selection post and the principle to be applied is "merit-cum-seniority". Had the appellants pointed out the true position, the learned Single Judge would not have granted relief in favour of the responded If the learned Counsel has made an admission or concession inadvertently or under a mistaken impression of law, it is not binding on his client and the same cannot ensure to the benefit of any party.

18. Hon''ble Apex Court in the case of Harigovind Yadav Vs. Rewa Sidhi Gramin Bank and Others, has taken the view that policy which did not prescribe a minimum standard for assessing merit which promoted candidates on the basis of comparative merit, with reference to total marks obtained by the eligible candidate, followed the merit-cum seniority principle, and same was not in consonance with the principle of seniority-cum-merit. Relevant para Nos. 26 and 27 are being quoted below:

26. The next question that arises for consideration is the relief to be granted. The appellant was first considered for promotion during 1991 and was not promoted, by wrongly adopting the principle of merit-cum-seniority. The said procedure was found to be erroneous by the single Judge, Division Bench and by this Court. The Bank was directed to consider the case of Appellant for promotion on the basis of

seniority-cum-merit. Thereafter, in the contempt proceedings initiated by the appellant, the Bank undertook to comply with the order directing consideration of the appellant's case by the procedure of seniority-cum-merit. But the Bank, again by adopting the merit-cum-seniority method, failed to promote the appellant and promoted third respondent. The procedure adopted by the Bank had been found to be faulty on three occasions by this Court and the High Court, one of which was in the case of Appellant himself. The appellant had been denied promotion for more than 16 years by repeatedly adopting such an erroneous procedure. In the circumstances, we do not think it necessary to drive the appellant once again to face the process of selection for promotion. This Court in *Comptroller and Auditor-general of India, Gian Prakash, New Delhi and Another Vs. K.S. Jagannathan and Another*, observed thus: There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy-decision of the Government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the court may itself pass an order or give directions which the government or the public authority should have passed or given had it properly and lawfully exercised its discretion.

27. Having regard to the factual background of the case and having regard to the fact that even under the merit-cum-seniority basis adopted by the bank the appellant had secured high marks and he was denied promotion on the ground that he failed to secure minimum marks in the interview, there is no need to refer the matter for fresh consideration. With a view to do complete justice, in exercise of our power under Article 142 we hereby direct the first respondent bank to promote the appellant as a Field Supervisor, from the date the third defendant was promoted as Field Supervisor and place him above the third Respondent. However, he will be entitled to monetary benefits flowing from such promotion only prospectively, though the pay is to be fixed with reference to the retrospective date of promotion.

19. Hon'ble Apex Court in the case of *K.K. Parmar and Others Vs. H.C. of Gujarat thr. Registrar and Others*, has taken the view that Selection Committee cannot ignore past performance. Moreover, it was for the Selection Committee to devise mode for assessing past performance such as consideration of ACRs and

having not done so, the candidates cannot be blamed on the ground that they having appeared in the examination were estopped from questioning the selection process. Scope of judicial review and the meaning of the merit has also been considered in the said judgment. The relevant para Nos. 21, 22, 23, 27, 28 are being quoted below.

21. The superior court exercising its power of judicial review is not concerned as to whether a wrong provision of law has been taken recourse to, but is only concerned with the question as to whether the authority passing the order had the requisite jurisdiction under the law to do so or not. In the event, it is found that the impugned order is not ultra vires or illegal or without jurisdiction, the same would not be interfered with only because it at one point of time proceeded on a wrong premise. A jurisdictional question, in our opinion, can always be permitted to be raised. We, therefore, do not find any substance in the said contention of Mr. Kapur.

22. In so far as the second contention raised on behalf of the appellants is concerned, apparently the same has merit. Merit was the only consideration for promotion to the post of Section Officer. They were selection posts. Selection was, therefore, required to be made strictly on the basis of respective merit of the candidates as also on the basis of their past performance. No employee had a claim to those posts only on the basis of their seniority.

23. Sub-rule (2) of Rule 47 of the Rules categorically provides for the mode and manner as to how the merit should be determined. In terms thereof, merit of a candidate was to be determined on the basis of; (i) past performance, (ii) performance at the written test and (iii) performance at the oral test to be taken by the selection committee

27. Merit of a candidate is not his academic qualification. It is sum total of various qualities. It reflects the attributes of an employee it may be his academic qualification. He might have achieved certain distinction in the University. It may involve the character, integrity and devotion to duty of the employee. The manner in which he discharges his final duties would also be relevant factor. See Guman Singh and Others Vs. State of Rajasthan and Others,

28. For the purpose of judging the merit, thus, past performance was a relevant factor. There was no reason as to why the same had been kept out of consideration by the Selection Committee. If a selection is based on the merit and suitability, seniority may have to be given due weight but it would only be one of the several factors affecting assessment of merit as comparative experience in service should be.

20. On the touchstone of the rules which are applicable in the present case and dictum noted above, claim of the petitioner is being looked into. This fact is undisputed that post in question is selection post and promotion has to be based on the principle of merit with due regard to the seniority i.e. on the principle of merit-cum-seniority where merit has to be given precedence. As per note

appended due weight has to be given to previous record of service and seniority has to be disregarded only when junior persons compared with his senior is of outstanding merit. In the present case criteria of selection, which had been adhered to by the Committee constituted for considering the matter of promotion was respective service record of the incumbent in question. This fact is not disputed that petitioner is senior viz-a-viz contesting respondent Sayed Zafar Hussain. "Merit-cum seniority" lays greater emphasis on merit and ability, and it is only when merit and suitability are roughly equal then seniority will be determining factor. Selection Committee has unrestricted choice of best available talent from amongst 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 governing factor.

21. Qua petitioner selection Committee, has found that he has been accorded pay scale of Rs. 4500/- to 7000/- w.e.f. 01.02.1997 and since last ten years there is no adverse comment and no enquiry is pending. Character Roll has also been seen where for year 2000 "good" entry has been provided for and for year 2002-03, 2003-04 and 2004-05 "satisfactory" entry has been provided for. Qua Sayed Zafar Hussain, it has been mentioned that he is in pay scale of Rs. 4500/- to 7000/- w.e.f. 01.02.1997, and his character roll reflects that for year 2001, "outstanding" entry was awarded. Similarly for year 2002, "outstanding" entry was awarded. In the year 2002-03 "good" entry was awarded, and in year 2005-06 "outstanding" entry was awarded. Note has also been taken of the award given by his Court on 25.03.1996. On the basis of comparative assessment of merit, Committee has resolved to accord promotion to Sayed Zafar Hussain. Sayed Zafar Hussain has been awarded outstanding entries in respect of his functioning by various officers from time to time and as far as petitioner is concerned, no such entry of outstanding performance has been awarded to the petitioner. In the ACRs, which are maintained, said entries find place. Said ACRs have not only been made foundation and basis of making comparative assessment of merit, but in respect of service of respondent, the other positive factor, which was there, same has also been taken into account by the Selection Committee. Under the rules, no criteria for judging the merit has been provided for. In the absence of there being any provision in the rules, the Selection Committee was fully competent to assess the facts revealed by service records of all eligible candidates, so that merit and not seniority is governing factor. Merit is sum total of various qualities, and same reflects attributes of an employee, in different spheres of life. Same may involve character integrity and devotion to duty of the employee towards his employer, and manner in which he/she discharges duty is also relevant factor. See Guman Singh and Others Vs. State of Rajasthan and Others, Here respondent No. 3 by his sheer work has earned outstanding entries, which has given edge to the respondent No. 3, at the point of time of assessing merit and consequently he has outscored on merit. Once objective consideration has been there and there is no element of malafides against member of Selection Committee then once Selection Committee seized of

the matter on the basis of record maintained has found that qua contesting respondents, there were much more outstanding entries, and has proceeded to form opinion that said junior incumbent was of outstanding merit as compared with his senior, then as far as this Court is concerned in exercise of its authority of judicial review this Court cannot set aside the aforementioned selection proceedings, by means of which promotion has been accorded.

22. Much capital has been sought to be made out of the fact that on the earlier occasion all these entries were there but in spite of the same Syed Zafar Hussain was not promoted and this time senior incumbent has been non suited. It is prerogative of the Selection Committee to consider the matter of selection. Here in the present case, it may be true that in the opinion of the earlier Selection Committee, said material though available may not have weighed, but that does not mean that subsequent Selection Committee is debarred of consideration of relative merit of the candidates.

23. In the present case, looking into the record of the case, which has been produced and there being outstanding entries in favour of respondent No. 3 and other material on the basis of which he has been preferred, no interference is warranted.

24. Consequently, writ petition lacks substance and same is dismissed.