

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O. A. No.
F. A. No. 421

1991

DATE OF DECISION 14. 10. 92

C. Murugesan

Applicant (s)

Mr. P. Sivan Pillai

Advocate for the Applicant (s)

Versus

Union of India through the General Manager, Southern Railway, Madras-3 and others

Respondent (s)

Mr. M. C. Cherian

Advocate for the Respondent (s) 1-3

CORAM :

The Hon'ble Mr. P.S. Habeeb Mohamed, Administrative Member

The Hon'ble Mr. N. Dharmadan, Judicial Member

1. Whether Reporters of local papers may be allowed to see the Judgement? *Yes*
2. To be referred to the Reporter or not? *Yes*
3. Whether their Lordships wish to see the fair copy of the Judgement? *No*
4. To be circulated to all Benches of the Tribunal? *No*

JUDGEMENT

Mr. N. Dharmadan, Judicial Member

Applicant is a Chief Clerk (Mech. Branch) in the Railway. He is aggrieved by the promotion of respondents 4 to 12 as Office Supdt. ignoring his superior claims.

2. Applicant belongs to a Scheduled Caste community. He became Chief Clerk (Mechanical) in the scale of Rs. 1600-2660 w.e.f. 1.1.84. His next promotion is as Office Supdt. in the scale of Rs. 2000-3200, which is a non selection post to be filled up by selection on seniority-cum-suitability. In Annexure A-1 seniority list dated 24.2.89, the applicant is at Sl. No. 21. Sl. No. 20, 24 to 28 are deleted from the said list. Respondents 4 to 12 are at Sl. Nos. 22, 23, 29 to 35. They are promoted on a regular basis ignoring the seniority of the applicant. No higher authority declared

that the applicant is unsuitable for promotion nor is there any adverse entry in his ACR. According to the applicant, the post of Office Supdt. is a non-selection post and is governed by para 212 of Railway Establishment Manual, IREM for short.

3. The facts are admitted in the reply filed by the Railway. They contended that the post of 'Office Supdt.' is classified as a non-selection post filled up on the basis of seniority-cum-suitability. Suitability is determined by the competent authority on the basis of the records of service including ACRS. On an assessment of suitability in terms of para 212 of IREM, the applicant was not found suitable for promotion due to general suitability on the basis of service records and the notings in the ACRS and therefore, he was passed over. Barring Respondents 7 and 8, who are SC and ST all others are about 15 years or more older than the applicant and they entered service about 15 years earlier than the applicant. Respondents 4 to 12 were promoted as Office Supdt. on the following dates.

"	R-4	D. Muniraza	Order dt.	23.11.89
	R-5	V A Karthikeyan	-do-	3.9. 89
	R-6	D.U.Narsimhan	-do-	16.11.90
	R-7	Malla Narasimhalu	-do-	16.11.90
	R-8	M. Seshar	-do-	16.11.90
	R-10	T.S. Venkatraman	-do-	23.6. 91
	R-11	E. Jaisimha	-do-	23.11.90
	R-12	K.V. Ranganathan	-do-	23.11.90"

The applicant was considered for promotion in 1988, 1989 and 1990 along with respondents and he will again be considered for promotion after November, 1991 when promotion are to be made. The contention that the applicant was passed over due to illfeeling towards SC/ST was denied and stated that respondents 5 & 7 are SC candidates and respondent No. 8 is a ST. Applicant's representation against Ext. R-1 office order No. 10/89 dated 16.8.89 was considered and rejected as per order Ext. R-4 dated 20.11.89.

4

4. In the rejoinder, the applicant stressed that there was no declaration, before passing over or at any time previous to the time when promotion of the railway servant is being considered in terms of para 212 of IREM, that the applicant is unfit for promotion. Ext. R-1 and R-2 show that they were not communicated to the applicant. The suitability is to be assessed not on a competitive basis but only on qualifying basis. Applicant also produced P.B. No. Circular No. 177/76 as Annexure A-2 to establish that the Railway issued a clarification stating that 'Average' remark in the Confidential Report is not to be treated as an adverse remark and a disqualification for promotion.

5. The main argument of Sri P. Sivan Pillai appearing on behalf of the applicant is that para 212 of IREM has not been followed by the Railway while making the promotion to the post of Office Supdt. Para 212 of IREM reads as follows

"212-Non Selection Posts:

(a) Non-selection posts will be filled by promotion of the seniormost suitable railway servant, suitability, whether of an individual or a group of railway servants, being determined by the authority competent to fill the posts on the basis of the record of service and/or departmental tests, if necessary. A senior employee may be passed over only if he/she has been declared unfit for holding the post in question. A declaration of unfitness should ordinarily have been made sometime previous to the time when the promotion of the Railway servant is being considered.

(b) When, in filling a non-selection post, a senior railway servant is passed over, the authority making the promotion shall record briefly the reason for such supersession."

6. The Railway also admit that para 212 of IREM applies for the selection. Applicant is admittedly senior to the respondents 4 to 12. Respondents 4 to 12 had neither appeared before us either directly or through counsel nor did they file any pleading in this case. Their case was supported by the Railway. They sought to sustain their

earlier promotion on the ground of performance index Ext. R-3 of applicant and respondents 4 to 12. It is quoted below:

Sl. No.	Name	Designation & Station	CR Grading
1.	Shri C.Murugesan passed over vide O.O.No.10/89 dt. 16.8.89 and 22/90 dt. 16.11.90 (applicant)	Chief Clerk Palakkad	87-88 Average 88-89 Average 89-90 Average
2.	Shri D.Muniraza promoted vide O.O.No.Bangalore 24/89 dt.23.11.89(r-4)	Chief Clerk	87-88 Good 88-89 Good 89-90 Very good
3.	Shri V.A.Karthikeyan -do- promoted vide O.O. No.19/89 dt. 3/9/89(r-5)	-do-	86-87 Very good 87-88 Very good 88-89 Good
4.	Shri D.V.Narasimhan promoted vide O.O. Mysore No. 22/90 dt. 16.11.90 (r-6)	Chief Clerk	87-88 Very Good 88-89 Very Good 89-90 Very Good
5.	Shri Malla Narasimhalu -do- promoted vide O.O. 22/90 dt. 16.11.90 (r-7)	-do-	87-88 Good 88-89 Good 89-90 Good
6.	Shri M. Seshar promoted vide O.O. No.Madras 22/90 dt. 16.11.90 (r-8)	Chief Clerk	87-88 Good 88-89 Very Good 89-90 Good
7.	P.V. Rathnachalam (r-9)	Chief Clerk Thiruchirappalli	86-87 VeryGood 87-88 Good 88-89 Average
8.	T S Venkataraman promoted vide O.O. Madras No.33/91 dt.23.6.91 (r-10)	Chief Clerk	88-89 Outstanding 89-90 Good 90-91 Very Good
9.	S. Jayasimha Promoted vide O.O. Mysore No.23/90 dt.23.6.91 (r-11)	Chief Clerk	87-88 Average 88-89 Good 89-90 Good
10.	K.V. Ranganathan promoted vide O.O. No. 23/90 dt. 23.11.90 (r-12)	Chief Clerk	87-88 Good 88-89 Average 89-90 Good

7. The Railway does not specifically deny in the reply the allegation of the applicant that para 212 of IREM was not complied with when promotion to the post of Office Supdt. was effected. According to para 212 of IREM it is obligatory on the part of the Railway to comply with the following formalities:

- i) a senior employee can be passed over only if he/she has been declared unfit for holding the post in question;
- ii) a declaration of unfitness should ordinarily be made sometime previous to the time when the promotion of the Railway servant is being considered; and when
- iii) a senior railway servant is passed over, the authority making the promotion shall record briefly the reason for such supersession.

8. Admittedly the applicant is senior to respondents 4 to 12. He was considered for promotion to the post of Office Supdt. in 1988, 1989 and 1990. Respondents 4 to 12 were promoted in the year 1989, 1990 and 1991. The applicant was passed over only because of his service records and notings in ACR. Ext. R-3 clearly indicates this fact. Applicant was graded 'Average' for the years 1987-88, 88-89 and 89-90. On the other hand, others were graded in a better manner. But the Railway has no case that para 212 of IREM was scrupulously followed nor did they state that they declared the applicant unfit for holding the post of Office Supdt. The Railway did not state the reason for supersession except showing in Ext. R-3 that the applicant was graded 'Average' for all the three years. So it is clear that para 212 of the IREM had not been followed while making the promotion to the post of Office Supdt.

9. Now the question is whether the Railway is bound to follow the procedure in para 212 of IREM. Railway has no case that para 212 is not applicable. They are bound to follow this para. The Principles of/decision of the Supreme Court of America in Vatarelli Vs. Seaton (359 U.S. 535) should govern the situation. In that case, the Secretary of Interior Department dismissed a civil servant without observing the Department's regulation which

provided that he should be given a specific statement of charges against him. This regulation had no statutory force. The Court held the dismissal illegal and void because the Department failed to follow the regulation and disregarded the standard which it had voluntarily adopted for itself. Mr. Justice Frank further formulated the principle as follows:

"An executive agency must be rigoursly held to the standards by which it performs its action to be judged. Accordingly, if dismissal from employment is based on a defined procedure, even if generous beyond requirements that bind such agency, that procedure must be scrupulously observed. This judicial rule of administrative law is now firmly established and, if I may add, rightly so, He that takes the procedural sword shall perish with that sword."

W.H.R. Wade in 81.LQR Page 357 stated as follows:

"Departmental regulations may be regarded as delegated legislation having the force of law so as to bind the Department. And sometimes, there is broader constitutional argument that the regulations are a kind of crystallisation of due process, which when once it has been so formulated must thereafter be observed. Whatever the detailed reasoning the underlying attitude is that the court wants to see powers exercised according to ascertainable rules and standards that can be related to the case, whether or not they are prescribed with binding legal force. (emphasis supplied)

10. Relying on these principles, we have to hold that the Railway is bound by the procedure in para 212 of IREM and since they had not followed the procedure and the standard which they had once formulated^{xxxx} for following in the matter of promotion to the higher posts, the applicant's plea deserves to be upheld.

11. The next contention of the learned counsel is that comparative assessment of merits of candidates are not permitted in the promotion to the post of Office Supdt. which is to be made merely on the basis of seniority-cum-suitability. He further contended that the grading 'Average' cannot be acted upon for superseding his client.

12. Seniority-cum-suitability, seniority-cum-merit, seniority-cum-fitness are phrases invariably used in connection with non-selection posts. They convey almost same meaning. It has been pointed out by the Supreme Court in State of Mysore Vs. Seshadri (AIR 1974 SC 460) that Seniority-cum-fitness will not mean selection made on merit and ability. There is no question of any comparative assessment of candidates as such coming in. The suitability or fitness of the person concerned for promotion to the post, his qualification, health etc. might be relevant and they will have to be considered. An element of comparison is the candidate. ↴ there only for determining the fitness of. The Supreme Court observed as follows:

" In State of Mysore v. Syed Mahmood, (1968) 3 SCR 363 (366) AIR 1968 SC 1113) Bachawat J. speaking for the Court held in a case where the promotion of an officer was involved that the proper direction should be that the State Govt. should "consider the fitness of Syed Mahmood and Bhaq Rao for promotion in 1959.. 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." The Court concluded in that case thus:

" We direct the State Government to consider whether Syed Mahmood and Bhaq Rao should have been promoted to the posts of Senior Statistical assistants on the relevant dates when officers junior to them were promoted, and if so, what consequential monetary benefits should be allowed to them."

13. The Full Bench of Kerala High Court in Mercy Mathew Vs. University of Kerala, 1976 KLT(SN) 41 held as follows:

"If a junior is better equipped than the senior, the junior can be preferred and automatic promotion of the seniormost, if he is not found to be unfit in the sense unsuitable, is not what is meant by the legislature according to the interpretation placed on the provision. There is an element of comparison in determining the fitness."

The Chandigarh Bench of the CAT held as follows in Sandesh Kumar Sharma and another Vs. Union of India and others (1989) 9 ATC 799:

"The criteria of seniority-cum-merit obviously implies that if the eligible candidates have been graded as having the same merit, for instance 'Outstanding' 'Very Good' or 'Good' as the case may be, they will be empanelled in the order of their respective seniority. It is only among persons of equal merit that promotion is given to the seniormost on the principle of seniority-cum-merit. However, if the lower person is graded higher, there is no justification whatsoever for ignoring him merely because he happens to be junior to the one who has been rated lower in the assessment made by the DPC. Determination of merit involves the process of evaluation and assessment of comparative merit of various candidates on the basis of their performance and qualities as reflected in their respective service records, etc. The principle is that when the claims of officers to selection posts are under consideration, seniority should not be regarded except where the merit of the officer is judged to be equal and no other criterion is therefore available. (See State Bank of India V. Mohd. Mynudin, (1987) 4 SCC 486)."

14. However, the administrative authority should record the reason for supersession so that it may be clear that there is an application of mind. In Gurdial Singh Fizzi v. State of Punjab and others, 1979 (2) SCC 368, the Supreme Court held as follows:

"Reason according to Beg J. (with whom Mathew J concurred) are links between materials on which certain conclusions are based and the actual conclusions.... The officer was not found suitable is the conclusion and not a reason in support of the decision to supersede him."

15. In this connection, it is to be remembered that a Railway employee cannot claim promotion as of right on the basis of seniority even in the cases where the promotion is based on seniority-cum-merit. The Supreme Court in State of Mysore V. Syed Mahamood, 1968 SC 1113 held as follows:

"Where promotion is based on seniority-cum-merit, the officer cannot claim promotion 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 may be promoted." See also the statement in State of Mysore Vs. M.H. Bollary, AIR 1965 SC 868)

16. An assessment on the basis of grading with reference to service records and ACR is in the realm of selection purely on merits and not a selection applying the principles of seniority-cum-suitability or seniority-cum-fitness.

When all candidates are on equal footing, a junior who is better equipped in regard to qualification, health, physical fitness, suitability for the post, etc. can be preferred. In other words, supersession is permissible applying an element of comparison between candidates in the limited area for ascertaining the fitness, but it should be done after recording the reasons thereof. From 1988 onwards, the applicant was superseded without recording satisfactory reasons simply on the ground of grading him as 'Average.' This is a wrong approach made by the Railway and it is neither supportable nor acceptable. The applicant could have been denied promotion by comparing him with others in the limited area as indicated above after giving satisfactory reasons thereof and also following the procedure contemplated in para 212 of IREM. Since the Railway had not followed any such procedural formalities provided in para 21 of IREM and clearly stated satisfactory reasons for supersession of the applicant and communicated the same to him, we were not inclined to accept the contentions of the respondents stated in their reply and the arguments advanced by the learned counsel for the Railway at the time of final hearing opposing the application.

17. In the result, we quash the promotion of the respondents 4 to 12 as Office Supdt. in the scale of Rs. 2000-3200 and direct the respondents 1 to 3 to consider the applicant and respondents 4 to 12 along with other eligible candidates strictly following para 212 of IREM and above observations. This shall be done within a period of four months from the date of receipt of a copy of this judgment. It goes without saying that the respondents 1 to 3 are free to implement the directions and make promotions on the basis of final outcome of the selection by passing suitable orders based on the promotions after the selection and grant consequential benefits, if any, due to the applicant in accordance with law.

18. The application is allowed.
19. There will be no order as to costs.

N.K. Mulla
14. 8. 92

(N. Dharmadan)
Judicial Member

P.S. H. Mulla

(P.S. Habeeb Mohamed)
Administrative Member

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