

CASE NO.:
Appeal (civil) 6511 of 2004
of 2004

PETITIONER:
State of Uttar Pradesh

RESPONDENT:
Jalal Uddin and Ors.

DATE OF JUDGMENT: 05/10/2004

BENCH:
ARIJIT PASAYAT & C.K. THAKKER

JUDGMENT:
J U D G M E N T

(Arising out of SLP) No. 5002 of 2004)

ARIJIT PASAYAT, J.

Leave granted.

The State of Uttar Pradesh calls in question legality of the judgment rendered by a Division Bench of the Allahabad High Court. The writ petition was filed by the present respondent No.1 with the prayer that he should be promoted as Principal of the Government Degree College. Grievance was made that though his juniors have been promoted but he had not been promoted. Relying on earlier judgment of the High Court in N.K. Agarwal v. Kashi Gramin Bank, Varanasi (2003 (2) UPLBEC 1333), the writ petition was allowed. Direction was given that present respondent No.1 should be promoted as Principal of a Government Degree College with effect from the earliest date on which his juniors were promoted, his seniority was to be fixed with effect from that date and he shall be given arrears within two months. According to the High Court, the criteria for promotion have to be so as given in Rule 16 of the U.P. Higher Education (Group A) Service Rules, 1985. According to the said rules, seniority subject to rejection of unfit was the criteria in terms of Rule 16(1)(b).

In support of the appeal, learned counsel for the appellant-State submitted that the High Court completely ignored the relevant rules and based its judgment on a rule which was no longer operative. The 1985 Rules had become inoperative in view of the Uttar Pradesh Government Servant Criteria for Recruitment by Promotion Rules, 1994 (in short the '1994 Rules') as modified/amended from time to time. The said rules have been framed in exercise of powers conferred by proviso to Article 309 of the Constitution of India, 1950 (in short the 'Constitution'). In Rule 2 it was clearly stipulated that the rules had over-riding effect over any other rules made by the Government under the proviso to Article 309 of the Constitution or otherwise. It is clearly stipulated that the rules shall have effect notwithstanding anything to the contrary contained in any other rules as noted above. The High Court proceeded to decide the case on the basis of 1985 Rules which was not permissible to be done.

In response, learned counsel for the respondent No.1 submitted that even under the 1994 Rules the respondent was entitled to be promoted and even though specifically the 1994 Rules have not been referred to, the same was kept in view while deciding the writ

petition. The distinction between the seniority-cum-merit and merit-cum-seniority consideration is too well known and needs no reiteration.

In all services, whether public or private there is invariably a hierarchy of posts comprising of higher posts and lower posts. Promotion, as understood under the Service Law Jurisprudence, is advancement in rank, grade or both and no employee has right to be promoted, but has a right to be considered for promotion. The following observations in *Sant Ram Sharma v. State of Rajasthan and Ors.* (AIR 1967 SC 1910) are significant:

"The question of a proper promotion policy depends on various conflicting factors. It is obvious that the only method in which absolute objectivity can be ensured is for all promotions to be made entirely on grounds of seniority. That means that if a post falls vacant it is filled by the person who has served longest in the post immediately below. But the trouble with the seniority system is that it is so objective that it fails to take any account of personal merit. As a system it is fair to every official except the best ones; an official has nothing to win or lose provided he does not actually become so inefficient that disciplinary action has to be taken against him. But, though the system is fair to the officials concerned, it is a heavy burden on the public and a great strain on the efficient handling of public business. The problem, therefore, is how to ensure reasonable prospect of advancement to all officials and at the same time to protect the public interest in having posts filled by the most able man? In other words, the question is how to find a correct balance between seniority and merit in a proper promotion-policy."

The principles of seniority-cum-merit and merit-cum-seniority are conceptually different. For the former, greater emphasis is laid in seniority, though it is not the determinative factor, while in the latter merit is the determinative factor. In *The State of Mysore and Anr. v. Syed Mahamood and Ors.* (AIR 1968 SC 1113), it was observed that in the background of Rule 4(3)(b) of the Mysore State Civil Services (General Recruitment) Rules, 1957 which required promotion to be made by selection on the basis of seniority-cum-merit, that the rule required promotion to be made by selection on the basis of "seniority subject to fitness of the candidate to discharge the duties of the post from among persons eligible for promotion". It was pointed out that where the promotion is based on seniority-cum-merit the officer cannot claim promotion as a matter of right by virtue of his seniority alone and 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. But these are not the only modes for deciding whether promotion is to be granted or not.

These aspects were highlighted in *K. Samantaray v. National Insurance Co. Ltd.* (AIR 2003 SC 4422). It has to be noticed that in the counter affidavit filed by the State, a clear reference was made to the 1994 Rules and the amendment made in 1996. Though the High Court referred to some paragraphs of the counter affidavit, it did not take note of 1994 Rules and its effect on the controversy. We are therefore of the considered opinion that when relevant rules have not been kept in view the proper course would be to direct the High Court to hear the writ petition afresh. The applicability and the effect of 1994 Rules to the facts of the present case shall be considered by the High Court in the proper perspective.

We make it clear that we have not expressed any opinion in that regard.

The appeal is allowed to the aforesaid extent with no order as to costs.

JUDIS