

CASE NO.:
Appeal (civil) 5773-5776 of 2000

PETITIONER:
K.K. Parmar & Ors.

RESPONDENT:
H.C. of Gujarat Th. Registrar & Ors.

DATE OF JUDGMENT: 12/05/2006

BENCH:
S.B. Sinha & P.P. Naolekar

JUDGMENT:
J U D G M E N T

S.B. SINHA, J :

The Appellants herein are assistants working in the High Court of Gujarat. Their promotion to the post of Section Officer was due. There were 25 vacancies in the post of Section Officer. A written examination was held for the said purpose. All the assistants eligible therefor appeared at an written examination. 29 employees did not obtain the requisite marks for appearing at the viva-voce examination. They filed a writ petition before the Gujarat High Court which was numbered as SCA No. 351 of 1998.

19 of them although cleared the written test but did not do well in viva-voce. They filed a writ petition before the High Court which was numbered as SCA No. 1298 of 1999.

The post of Section Officer is a selection post. The terms and conditions of service are governed by Gujarat (Recruitment and Conditions of Service of Staff) Rules, 1964 (for short "the 1964 Rules"). Rule 38 of the 1964 Rules relates to promotion which is set out hereunder:

"38(1) Promotions shall be made on merit, but seniority in the cadre shall be ordinarily taken into account as far as possible. A person, however, may receive special promotion for recognized merit irrespective of the grade to which he may belong or irrespective of the seniority within the grade.

(2) The post of Superintendent and any higher post shall be considered as selection post and no court servant shall have a claim to them merely by way of seniority."

An office order in the form of a 'resolution' was issued by the Government of Gujarat on or about 20th March, 1982 which is in the following terms:

"In Government Resolution, General Administration Department No. SLT 1177 G, DATED 20/05/1978 the principle of selectivity has been accepted for the purpose of appointment by promotion to the post of Heads of Departments. For this purpose a selection committee is also set up under Government Resolution, General Administration Department No. SLT 1177 G-2 dated 11/11/1980 consisting of (1) the Chief

Secretary (2) the Senior Most Secretary to Government next to Administrative Department concerned.

The Selection Committee will classify officers within the zone of consideration as outstanding, very good, good and unfit for promotion. The Selection list will then be prepared in the size equal to number of vacancies in the same order, subject to maintenance of seniority of classification also. Government is pleased to direct in consultation of Gujarat Public Service Commission zone of consideration shall be as under:-

No. of vacancies	No. of officers to be considered
1.	5
2.	8
3.	10
4. or more	three times number of vacancies

All Secretariat Departments should strictly ensure that these instructions are in variable followed while considering promotion to the post filled by promotion on selection basis."

The High Court of Gujarat also framed rules known as "The High Court of Gujarat (Recruitment & Conditions of Service of Staff) Rules, 1992 (for short "the Rules)". Rule 47 of the said Rules relates to promotion. Sub-rule (2) of Rule 47, sub-rule (1) of Rule 50 and sub-rule (1) of Rule 91 which are relevant for our purpose are set out hereunder:

"47.(2) (a) For promotion to the post of Section Officer from Assistant the promotion will be effected strictly on consideration of efficiency and proved merits. Merits shall be determined on the basis of the past performance and performance at the written and oral to be taken by the Selection Committee as may be appointed by the Chief Justice\005

50(1) In respect of all such matters regarding the conditions of service of Court servants for which no provision or insufficient provision has been made in these Rules, the rules and orders for the time being in force and applicable to servants holding corresponding posts in the Government of Gujarat, which are not inconsistent with these Rules, shall regulate the conditions of service of Court servants subject to such modifications, variations, and exceptions, if any, in the said rules and orders, as the Chief Justice may, from time to time specify.

Provided that no order containing modifications, variations or exceptions in Rules relating to salaries, allowances, leave or pensions shall be made by the Chief Justice except with the approval of the Governor.

91. Savings of the powers of the Chief Justice:-

(1) Nothing in these Rules shall be construed to limit or abridge the powers of the Chief Justice to deal with the case of any Court servant or any person to be appointed to the service in such manner as may appear to him to be fit and proper.

(2) The Chief Justice may from time to time alter, amend or repeal any of these Rules and make such further Rules or pass such orders as he may deem fit in regard to all matters herein provided or matters incidental or ancillary to these Rules or in regard to matters which have not been provided or sufficiently provided for in these Rules.

Provided that if such orders relate to pay, salaries, allowances, leave or pension of the servants of the High Court such orders shall be made with the approval of the Governor."

The writ petitioners & Appellants principally raised two contentions:

(i) The High Court committed an illegality in allowing all the 91 candidates to appear at the viva-voce test although the zone of consideration therefor as envisaged under the Resolution dated 20th March, 1982 was confined to the three times number of vacancies and, thus, not more than 75 persons could have been allowed to be brought within the zone of consideration.

(ii) There had been a gross violation of sub-rule (2) of Rule 47 of the Rules in terms whereof merit was to be determined on the basis of (i) past performance, (ii) written test, (iii) oral test, but as no criteria was fixed relating to past performance of the candidate, the entire selection process was vitiated in law.

The said contentions found favour with the learned Single Judge of the High Court.

The said learned Single Judge repelled the contentions raised on behalf of the High Court that the Acting Chief Justice had exercised his power to modify the rules, stating:

"9. There is distinction between the exercise of powers by the Chief Justice in framing the rules with respect to the condition of service of Officers and servants of the High Court under Article 229, including the power of modification and variations of the rules of the State Government applicable to the High Court employees by virtue of power preserved under Rule 50(1) of the Rule of 1992 and the exercise of powers by the Chief Justice as Executive Head of the High Court establishment under the rules, framed by him. The Chief Justice as well has to follow the rules framed by him punctually and faithfully as others are to follow. Any breach of rule by the Chief Justice cannot be construed as exercise of power of modification of rules. Reverting to the direction dated 2.9.1997, in my view, the Hon'ble the then Acting Chief Justice was in error in considering that the 12 persons against whom there were adverse remarks, could be excluded from the zone of consideration. What is the effect of adverse remarks in the A.C.R., was a matter for the Selection Committee

to consider. A person cannot be excluded from the zone of consideration for the reason that there is adverse entry. Similarly, it was wrong to consider that six persons against whom departmental inquiry was pending, could be excluded from the zone of consideration. If the departmental inquiry is pending against a person in the eligibility list, the Selection Committee is required to follow a known procedure of "sealed cover". Thus, the very premises on which the zone of consideration has been extended is contrary to law."

However, having regard to the fact that only 14 candidates were selected against 25 vacancies, it was directed:

"Thus, it is only the consideration of candidates beyond the zone of consideration, i.e., beyond Sr. No. 75 in eligibility list being in violation and breach of G.R. dated 20.3.1982 which can held to be illegal. Consequently, it is held that selection of respondents No. 10 to 15 namely, Mr. G.S. Marapally, whose name appears at Sr. No. 76, Mrs. N P Tekani, whose name appears at Sr. No. 77 in the list of eligible candidates, respondent No. 12 Mr. V.K. Pathak, at Sr. No. 85, respondent No. 13 Mrs. Sujitra Rajan at Sr. No. 88, respondent No. 14 Mr. A.S. Raghupathy at Sr. No. 89 and respondent No. 15, Mrs. Gracy ST. at Sr. No. 90 is illegal and bad in law."

In regard to the contention of violation of Rule 47, the learned Single Judge opined:

"\005It is stated that upto 1979, promotions were given on the basis of seniority-cum-merit. The merit was considered on the basis of Confidential Reports and other service record. However, thereafter, a method of judging the capacity of the Senior Assistants due for promotion to hold the Supervisory post of Section Officer from their performance on the tables on which they were working was not found adequate and, therefore, it became necessary to evolve some method in addition to the consideration of the Confidential Reports and other service record whereby the suitability or otherwise of the candidate can be assessed properly in the interest of office efficiency. It is also submitted that the system of taking written and oral test to assess suitability or otherwise on a comparative evaluation of the eligible candidates thus came into existence after 1979. In November 1979, the Hon'ble the then Chief Justice directed to take interview of the Assistants concerned and prepare select list in the order of merit. They were also tested by asking them to prepare some submissions. Thereafter, in the year 1981, written test and oral interview were taken on 31.7.82, 22.2.83, 31.12.83, 24.8.85, 7.3.87, 20.2.88, 2.3.96 and 27.7.97. In para 14, it is stated that the Selection Committee also considered the Adverse Reports recorded in the ACR against the candidates. This fact does not find confirmation from the proceedings of oral test."

Noticing that no mark was allotted for the past performance, which played a significant role, it was opined that the High Court did not take cognizance of the mandate given by the Chief Justice as contained in Rule 47 opining:

"\005In fact the new mechanism ought to have been evolved immediately after coming into force of Rules of 1992, in conformity with the mandate of Rule 47. Thus, it is not only wrong on the part of the High Court to continue with the old procedure of selection, even after coming into force of the Rules of 1992, but it is in utter disregard of the Rule 47. Thus, the unreported decision cited on behalf of the High Court has no relevance in the context of the Rules of 1992."

The learned Single Judge further held:

"\005Thus, the Hon'ble Chief Justice, in his wisdom, while exercising the powers under Article 229 of the Constitution of India, in framing rule 47 of the Rules of 1992, provided combination of three components, i.e., past performance, written test and oral test for determination of merit in the matter of promotion on selection post. However, the mechanism evolved prior to 1992 has been carried forward, unmindful of the fact that it does not contain the important component of "past performance". Without over-emphasizing the importance of "past performance", it cannot be disputed that for recruitment from among the persons of matured personality, appraisal of past performance is the basic and essential requirement. It is also not in dispute that the system of writing Annual Confidential Report is in existence in the High Court establishment. It is of course true that it has been subject to criticism to certain extent, but for that efforts can be made to bring change therein by substituting a new and more open Participatory Appraisal system. The comparative merit could be assessed by taking into consideration, the Annual Confidential Reports. Dealing with seniority in judging the merit, it is true that seniority occupies the back seat in case of selection purely by merit, still, it cannot be ignored completely\005"

The High Court noticed the marks obtained by the 15 employees in the written examination and held that in adopting the selection process, merit has taken a back seat, in the following terms:

"It is indeed a travesty of selection that persons of average merit have superseded large number of employees in the cadre of Assistants in the name of merit. Most of the selected candidates scored minimum marks i.e. 40% which is just above 1/3 of the maximum i.e. III Division marks. Fixing qualifying mark as 40% and ultimate selection on merit are two different things. A person in scoring total 40% marks, by no stretch of imagination can said to be a person of proven merit. In Janki Prasad's case (supra), the Apex Court, with respect to scoring of just 1/3 of maximum marks, i.e., 30% observed, "it would be absurd to make selection with such a cutting score."

The Division Bench of the High Court, on the other hand, was of the opinion that the said Resolution dated 20th March, 1982 will have no application whatsoever. As regard alleged violation of Rule 56, the Division Bench held:

"\005The fact that service records were called for and were placed before the selection committee is not in dispute and, therefore, it would be reasonable to presume that service records were considered by the selection committee. However, non-assignment of marks would not indicate that the selection was made by the selection committee in an arbitrary manner. Rule-47(2) of the Rules is, in our view, complied with and there has been no material indicating irregularity or illegality committed by the selection committee when it did not indicate separate marks for past performance. As pointed out earlier, merits has to be assessed on the basis of past performance, written test and oral test. When a candidate has to appear at written and oral test his merits can be ascertained with reference to marks obtained by him at the tests. However, no test is being held for past performance and what is required to be done is to scrutinise and examine the past record for which assignment of marks may not be necessary in all cases. What procedure should be adopted for assessing merits while considering, three criteria has to be left to the selection committee and it is not open to the Court hearing a petition under Article 226 of the Constitution to lay down that a particular procedure ought to have been adopted by the selection committee. No conclusion is possible that in absence of allotment of separate marks for past performance, Rule 47(2) stands breached\005"

Taking note of an unreported judgment of the said High Court, the Division Bench stated:

"The selection committee had followed the procedure of holding written test of 60 marks followed by oral test of 20 marks and the criteria adopted for the selection was that the candidate who scored 40% marks in aggregate should be considered eligible for selection. Therefore, to be eligible for selection a candidate was required to obtain minimum 32 marks out of 80 in aggregate at the written as well as oral tests. However, it was found that several candidates had obtained less than 11 marks at the written test and on submission being made, the selection committee directed that those who had secured less than 11 marks at the written test should not be called for oral test because even if 20 marks were secured at the oral test by those candidates, the total would not be 40% marks. We find that since the oral test was of 20 marks, even if a candidate securing 11 marks at the written test was given full 20 marks, he would not reach the qualifying standard of 32 marks out of 80 and, therefore, only such of the candidates who had secured 12 or more marks at the written test, were called for oral test. In our view, this cannot be said to be illegal at all. It would have been an exercise in futility to call those candidates

for interview who had secured less than 12 marks at the written test..."

Mr. Sanjay Kapur, learned counsel appearing on behalf of the Appellants submitted that the High Court on its administrative side, committed a manifest illegality in promoting some Assistants to the posts of Section Officers in violation of the aforementioned Resolution of the State dated 20th March, 1982 as also in flagrant violation of Rule 47 of the said Rules.

Ms. Hemantika Wahi and Ms. Meenakshi Arora, learned counsel appearing on behalf of the Respondents, however, supported the judgment of the Division Bench.

A bare perusal of the purported Resolution adopted by the Government of Gujarat on 20th March, 1982 clearly shows that the same was applicable only in relation to the Head of the Departments. A rule framed by the State in exercise of its power under proviso appended to Article 309 of the Constitution of India may be applicable to the employees of the High Court but the executive instructions issued would not be and in particular when the same is contrary to or inconsistent with the Rules framed by the Chief Justice of the High Court in terms of Article 229 of the Constitution of India. The Resolution dated 20th March, 1982 ex facie applies to the cases of appointment by promotion to the posts of Head of the Department. It, therefore, had no application to promotion to the post of Section Officers, who are not Head of the Department.

In terms of the said Resolution, the selection committee itself was required to classify officers within the zone of consideration as 'outstanding', 'very good', 'good' and 'unfit for promotion'. Such a procedure is not adopted in the matter of appointment to the posts pertaining to the administrative side of the High Court. It is the Chief Justice of the High Court who is concerned with the performance of the officers. The said Resolution dated 20th March, 1982 provides that the Public Service Commission was to be consulted so far as the appointment of the employees is concerned. The Public Service Commission does not come into picture at all in the matter of promotion of the assistants to the posts of Section Officers. We, therefore, have no hesitation to hold that the said Resolution has rightly been held to be inapplicable by the Division Bench of the High Court.

The Registry of the High Court brought the said Resolution to the notice of the then Acting Chief Justice that only 75 eligible Assistants fall within the zone of consideration but it was directed that as 91 employees included 12 such employees against whom adverse remarks were made and 6 out of such employees against whom enquiries were pending and, thus, restricting 75 employees within the zone of consideration, it would mean that only 75 - 18 = 57 would be considered. It was, therefore, directed:

"There is no reason to exclude 76 to 91 (16) eligible persons when 18 persons also being considered."

Mr. Kapur may be right in his submission that applicability of the said Resolution had never been questioned. The High Court on its administrative side admittedly proceeded on the basis that the said Resolution of the State was applicable and only on the said premise placed the matter before the then Acting Chief Justice for his direction as to whether only 75 Assistants should be invited to appear before the Selection Committee being within the zone of consideration in terms of the said Resolution. Even applicability of the said Resolution was not questioned before the learned Single Judge, but the same would not, in our considered view, mean that only because at one point of time the High Court committed a mistake in proceeding on the basis that the said Resolution of the State was applicable to its own employees, the

said contention cannot be permitted to be raised at all. If, per se, no illegality has been committed by the then Acting Chief Justice of the High Court in allowing all the 91 eligible employees to be brought within the zone of consideration, only because the Registry thought that the said resolution would be applicable, the same by itself, in our considered opinion, would not render the selection process invalid.

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.

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.

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.

Whereas 60 marks were fixed for the written test and 20 marks for the oral, no mark whatsoever was allotted towards past performance. An endeavour has been made by the learned counsel for the Respondents to contend that as the Appellants were aware that no marks had been allotted in regard to the past performance but despite the same, they, having taken part in the examination, were estopped and precluded from questioning the same. We do not agree.

Sub-rule (2) of Rule 47 of the Rules specifies the mode and manner in which respective merit of the candidate is to be determined. The High Court or for that matter the selection committee could not have ignored the same. In any event, it was for the members of the selection committee, in absence of any marks having been allotted under the rules for judging the past performance of the candidates, to devise a mode therefor. The candidates had no say in the matter. Annual Confidential Reports of the employees concerned must have been placed before the selection committee with a view to enable it to prepare a select list. If they had not adopted any criteria in that regard, the concerned employees cannot be blamed therefor.

The same, however, may not by itself be sufficient to set aside the entire selection process. The records have not been placed before us. The Appellants might not have obtained the requisite marks for passing the examination either in the written test or at the oral test or both. If any of the Appellants, failed to obtain qualifying marks fixed in terms of the Rules, viz., 40 marks, the question as to whether their past performance was otherwise better than the candidates who had been selected would take a back seat. However, only such candidates who had not only passed both written and oral tests, their past performances were required to be taken into consideration.

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 v. State of Rajasthan and Others, (1971) 2 SCC 452]

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.

In Union of India v. M.L. Capoor and Others, [AIR 1974 SC 87], this Court opined:

"\005The Selection Committee has an unrestricted choice of the 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 the governing factor\005"

Our attention has further been drawn to the fact that out of 29 Assistants, 4 have already retired and 17 have already been promoted. Only the cases of 8 Assistants are pending promotion.

In view of the principles laid down by this Court, therefore, the cases of those 8 Assistants who had not been promoted, in our opinion, should be directed to be considered afresh. We do so. In the event, they are found to be suitable for promotion, having regard to the fact that the Chief Justice of the High Court is the appointing authority, the High Court may consider the question as to whether such promotion, if any, should be given retrospective effect or not.

These appeals are allowed to the aforementioned extent. There shall be no order as to costs.