

CASE NO.:
Appeal (civil) 3595 of 2001

PETITIONER:
THE CENTRAL COUNCIL FOR RESEARCH IN AYURVEDA & SIDDHA & ANR.

Vs.

RESPONDENT:
DR. K. SANTHAKUMARI

DATE OF JUDGMENT: 04/05/2001

BENCH:
S. Rajendra Babu & K.G. Balakrishnan

JUDGMENT:

Balakrishnan, J.

Leave granted.

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The respondent herein was the Assistant Research Officer (Ayurveda) in the Indian Institute of Panchakarma, Cheruthuruthy, in Kerala. This Institute is functioning under the Central Council for Research in Ayurveda and Siddha. The Departmental Promotion Committee prepared a panel of eligible candidates for being promoted as Research Officers. The respondent alleged that she was included as Sl. No. 15 in the select list whereas her juniors were included as Sl. Nos. 1,9,11,12,13 and 14. The respondent contended that the promotion had to be effected on the principle of seniority-cum-fitness and therefore, the placing of respondent at Sl. No. 15 for being promoted, as Research Officer was illegal. The respondent filed a Writ Petition no. 1036/96 before the High Court of Kerala. A counter affidavit was filed on behalf of the appellants herein and they admitted that the method of filling up the said post of promotion from the eligible Assistant Research Officers was seniority-cum-fitness. The learned Single Judge held that as the promotion to the post of Research Officer was to be effected on the basis of principle of seniority-cum-fitness and seniority was the prime factor for promotion and since the respondent was found suitable for promotion, she was entitled to get promotion in accordance with her seniority and, thus, the writ petition was allowed and aggrieved by the same, the appellants filed a writ appeal before the Division Bench of the High Court which ended in dismissal. Judgment in that Writ Appeal is challenged before us.

We heard the learned Counsel for the appellants, Mr. T.C. Sharma and the learned senior counsel, Mr. T.L.V. Iyer, on behalf of the respondent. In the appeal filed before this Court, it is stated that promotion to the post of Research Officer was to be made in accordance with the prescribed recruitment rules and the Departmental Promotion

Committee was to select the candidate. It is submitted by the Counsel on behalf of the appellants that the post of Research Officer is a 'selection post' and as per the recruitment rules, 'selection post' is to be filled up on the principle of merit-cum-seniority. The relevant clause 5.9 of Recruitment Rules says as under:

"Selection" posts shall be filled on the basis of merit-cum-seniority. "Non-Selection" posts shall be filled in on the basis of seniority subject to rejection of unfit persons. For this purpose the Council shall circulate the duly compiled seniority lists of the candidates periodically. All appointments by departmental promotion shall be on the recommendations of the Departmental Promotion Committee.

The respondent in the counter affidavit filed before us has alleged that the promotion to the post of Research Officer is on the basis of seniority-cum-fitness and the relevant consideration is fitness of the candidate for appointment to the post. A comparative assessment of merit is irrelevant and cannot be made for the appointment to the post in question.

Unfortunately, in this case, the appellants herein contended before the High Court that the promotion to the post of Research Officer was to be made on the principle of "seniority-cum-fitness". The counter affidavit on behalf of the appellants herein mistakenly admitted this position and the relief sought for by the respondent was allowed by the learned Single Judge. Now, the appellants have produced relevant amended recruitment rules which show that the post of Research Officer (Ayurveda) carrying scale of pay of Rs. 8000-13500 is a 'selection post' and promotion to a 'selection post' is to be done on the basis of the principle of merit-cum-seniority.

The principle of merit-cum-seniority is an approved method of selection and this Court in Sant Ram Sharma Vs. State of Rajasthan and Others AIR 1967 SC 1910 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:-

"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 Gradation 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 and 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."

The Court further held that such mode of selection is not violative of Article 14 of the Constitution.

In State of Orissa Vs. Durga Charan Das, AIR 1966 SC 1547, the Constitution Bench of this Court held that the promotion to a selection post is not a matter of right which can be claimed merely by seniority.

In Union of India Vs. Mohan Lal Kapoor 1973 (6) SCC836 at p. 856, it was held as under:

"For inclusion in the list, merit and suitability in all respects should be the governing consideration and that seniority should play only a secondary role. It is only when merit and suitability are roughly equal that seniority will be a determining factor, or if it is not fairly possible to make an assessment inter se of the merit and suitability of two eligible candidates and come to a firm conclusion, seniority would tilt the scale."

In B.V. Sivaiah Vs. K. Addanki Babu 1998(6) SCC 720, this Court 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.

In Union of India and Others Vs. Lt. Gen. Rajendra Singh Kadyan and another 2000 (6) SCC 698 in paragraph 12 at page 707, it was 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."

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 select 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" had been applied by the Departmental Promotion Committee. The respondent has no grievance that there was any malafides 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 respondent. 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 enure to the benefit of any party.

This Court in *Uptron India Ltd. Vs. Shammi Bhan* AIR 1998 SC 1681 pointed out that a wrong concession on question of law made by counsel is not binding on his client and such concession cannot constitute a just ground for a binding precedent.

Therefore, even if the appellants had mistakenly contended in the High Court that the principle of seniority-cum-fitness was to be followed for promotion to the post of Research Officer, the departmental rules clearly show that the promotion was in respect of a 'selection post' and the promotion was to be made on the basis of the inter-se merit of the eligible candidates. In that view of the matter, the respondent was not entitled to get promotion to the post of Research Officer on the strength of her seniority alone. The seniority list prepared by the Departmental Promotion Committee was not challenged by the respondent on other grounds and we also do not find any ground to assail that select list. Thus, the Writ Petition is liable to be dismissed by setting aside the orders made therein and in the writ appeal arising therefrom. Therefore, the appeal succeeds and is allowed, however, without costs.