

CASE NO.:
Appeal (civil) 4722 of 2006

PETITIONER:
Bhagwandas Tiwari & Ors.

RESPONDENT:
Dewas Shajapur Kshetriya Gramin Bank & Ors.

DATE OF JUDGMENT: 08/11/2006

BENCH:
ARIJIT PASAYAT & LOKESHWAR SINGH PANTA

JUDGMENT:
J U D G M E N T
(Arising out of S.L.P. (C) No. 6780 of 2004)

ARIJIT PASAYAT, J.

Leave granted.

Appellants call in question legality of the judgment rendered by a Division Bench of the Madhya Pradesh High Court, Indore Bench. By the impugned judgment the view taken by the learned Single Judge in Writ Petition No.799 of 2000 decided on 25.6.2001 was upheld.

Factual position is almost undisputed and essentially is as follows:

The aforesaid writ petition was filed by ten persons who at the relevant point of time were employees of the Dewas Shajapur Kshetriya Gramin Bank (hereinafter referred to as the 'Bank'). Challenge in the writ petition was to the order of promotion issued by respondent No.1-Bank and to the promotion granted to respondents 2 to 8. The writ petitioners and respondents 2 to 8 were at the relevant point of time were working as officers in Junior Management Grade I. On 26.11.1999, the bank issued a promotion policy whereby applications were invited from the officers working in Junior Management Grade I for being considered to the next promotional post known as Middle Management II. In terms of the policy, the promotion was to be made on the basis of seniority-cum-merit and the policy also provided criteria for consideration of cases for promotion. The relevant clause is clause 7 of the second schedule of the Regional Rural Banks (Appointment and Promotion of Officers and others Employees) Rules, 1988 (in short the 'Rules'). The said Rule came into operation with effect from 28.9.1988 and it was framed by the Central Government. Respondent No.1-Bank has been established under the provisions of Regional Rural Banks Act, 1976 (in short the 'Act'). Under Section 29 of the Act the Central Government is empowered to make rules after consultation with the National Bank for carrying out the provisions of the bank. Clause (b)(a) of sub-section (2) of Section 29 was inserted by Regional Rural Bank's (Amendment) Act, 1987 (in short the 'Amendment Act') empowering the Central Government to make Rules relating to the manner in which the officers and employees of Regional Rural Bank shall be appointed in exercise of power conferred

under Section 29 read with Section 17 of the Act. As per Rule 5 of the Rules all vacancies are to be filled up on deputation, promotion or direct recruitment in accordance with the provisions contained in the second schedule. Clause 7 of the schedule deals with the promotion as Area Manager or Senior Managers. Clause 7 reads as follows:

"Area Managers or Senior Managers:

(a) Source of recruitment

Hundred percent by promotion from amongst confirmed officers working in the bank.

Promotions will be on the basis of seniority-cum-merit. If suitable officers are not available internally, these posts could be filled by taking temporarily officers of the sponsor banks and other banks or organizations on deputation.

(b) Qualifications and eligibility

(i) A Graduate of recognized University or any equivalent qualifications recognized as such by Government of India, preference being given to Agriculture or Commerce or Economics graduates.

(ii) Eight years service as an officer in the regional rural bank concerned. Provided that the Board may, with the prior approval of National Bank, relax the period not exceeding two years, if suitable candidates of requisite experience are not available.

Note: The post of Area Managers and Senior Managers will be equivalent in rank and will be inter changeable.

(c) Mode of selection

Interview and assessment of performance for the preceding three years period as officer for promotion."

Standard prescribed as per Circular is as follows:

"(7) Standard: Standard of selection in promotion procedure shall be as under:-

(a) Performance of work
(work performance for the last 3 years)

-Maximum 30 Marks

(b) Period of service
(2 marks per year for the completed period of service subject to maximum 40 marks)

-Maximum 40 Marks

(c) Interview

-Maximum 30 Marks

Total maximum marks - 100 Marks

In order to be selected for promotion, obtaining minimum 45 marks shall be compulsory."

Grievance of the writ petitioners was that the principle of promotion on the basis of seniority-cum-merit was given a go-by and the respondent No.1-bank adopted the policy of merit-cum-seniority by fixing criteria that only those employees who have secured 45 marks out of 60 in respect of criterion A and C i.e. Performance of work and interview shall be selected for promotion.

According to the appellants there was no such requirement in the Circular and only requirement was obtaining minimum 45 marks in order to be selected for promotion. By prescribing minimum of 45 marks out of 60, basis shifted from seniority-cum-merit to merit-cum-seniority.

Learned Single Judge did not accept this contention and dismissed the writ petition. It was held that in view what has been stated by this Court in B.V. Sivaiah and Ors. v. K. Addanki Babu and Ors. (1998 (6) SCC 720), the stand adopted by the bank was in order. Reference was made to paragraphs 16, 18 and 37 of B.V. Sivaiah case (supra) to hold that criterion of seniority-cum-merit was really applied. While applying the said criterion, seniority alone is not to be considered, and merit cannot be ignored. A reference was also made to the decision in Jagathigowda, C.N. v. Chairman, Cauvery Gramina Bank (1996 (9) SCC 677).

The Division Bench upheld the judgment of learned Single Judge by observing that the doctrine has been rightly applied in the present case. Though there was no mention in the Circular that the employee has to secure more than 45 marks out of 60, that appears to be the intention.

Stand of the appellants before the High Court was reiterated at the time of hearing of this appeal.

Learned counsel for the respondents on the other hand submitted that there was no departure from the criterion of seniority-cum-merit. A candidate was required to obtain 45 marks out of 60 because there was no question of obtaining marks so far as service is concerned, that was only a conclusion.

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 the context of Rule 5(2) of the Indian Administrative Service/Indian Police Service (Appointment by Promotion) Regulations, 1955 which prescribed that "selection for inclusion in such list shall be based on merit and suitability in all respects with due regard to seniority" Mathew J. in Union of India v. Mohan Lal Capoor and Ors. (1973 (2) SCC 836), has said:-
"For inclusion in the list, merit and suitability in all respects should be the governing consideration and that seniority should play 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 till the scale".

Similarly, Beg J. (as the learned Chief Justice then was) has said (SCC p.851, para 22):

"22. Thus, we think that the correct view, in conformity with the plain meaning of words used in the relevant rules, is that the entrance" or "inclusion" test, for a place on the select list, is competitive and comparative applied to all eligible candidates and not minimal like pass marks in an examination. The Selection Committee has an unrestricted choice of the best available talent, from amongst eligible candidates, determined by reference to a reasonable criteria applied in assessing the facts revealed by service records of all eligible candidates so that merit and not here seniority is the governing factor."

On the other hand, as between the principles of seniority and merit, the criterion of 'seniority-cum-merit' lays greater emphasis on seniority. In *State of Mysore and Anr. v. Syed Mahmood and Ors.* (1968 (3) SCR 363), while considering Rule (a)(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, this Court has observed that the rule required promotion to be made by selection on the basis of "seniority subject to the fitness of candidate to discharge the duties of post from among persons eligible for promotion". It was pointed out that where 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. In *State of Kerala and Anr. v. N.M. Thomas and Ors.* (1976 (2) SCC 310), A.N. Ray, C.J. has thus explained the criterion of "seniority-cum-merit" (SCC p.335, para 38):- "With regard to promotion the normal principles are either merit-cum-seniority or seniority-cum-merit. Seniority-cum-merit means that given the minimum necessary merit requisite for efficiency of administration, the senior though the less meritorious shall have priority."

The above position was highlighted in *Sivaiah* case (supra). At para 18 of the said judgment it was noted as follows:-

"We thus arrive at the conclusion that the criterion of "seniority-cum-merit" in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration, the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit, the competent authority can lay down the minimum

standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit."

The impugned judgment of the learned Single Judge and Division Bench of the High Court missed one basic factor. The circular nowhere refers to the minimum marks being relatable to criteria A and C and nowhere there is a stipulation of obtaining minimum 35 marks as a compulsory measure. If really the intention was to apply the said minimum marks to said criteria it would have been specifically provided that way. It is noted by the High Court that in the circular or in the 115th or 117th report of the respondent No.1-Bank there was no mention about this aspect. The doctrine of reading down the provisions has really no application to the facts of the case. If the stand of respondents is accepted, it would mean addition of a condition which is not specifically provided for. That is impermissible.

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), and in State of U.P. v. Jalal Uddin and others (2005 (1) SCC 169).

There is no basis, in the instant case, for the stand that for assessing merit a minimum number of marks has been prescribed. The contention that minimum marks were 45 out of 60, means that an employee is to secure 75% of marks. Such a high percentage can not be a measure of prescribing minimum marks to assess merit. It obviously would be a case of shifting the focus to merit-cum-seniority. In para 37 of Sivaiah case (supra), this Court noted that minimum marks prescribed for assessing merit do not depart from the seniority-cum-merit principle. But the factual position is different here. There is no mention that 45 marks out of 60 relate to the prescription of minimum marks for assessing the merit. In Jalal Uddin's case (supra) it was noted that in seniority-cum-merit greater emphasis is on seniority though it is not the determinative factor. In the case of merit-cum-seniority, merit becomes a determinative factor. In fact, the position noted by this Court in paragraphs 19, 20, 24 and 25 of Sivaiah case (supra) dealt with almost identical fact situation, apart from paragraph 16 of the judgment.

Appellants have no grievance so far as respondents 2, 3 and 4 are concerned as their date of joining is earlier and they have secured higher marks. The appeal stands dismissed, so far as they are concerned.

The appeal is bound to succeed to the extent indicated. The respondent no.1 shall issue fresh orders for promotion in line with the judgment after working out the necessary details. There will be no order as to costs.