

**Ajit Kumar Singh Vs. the State of Madhya Pradesh**

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**Court :** Madhya Pradesh

**Decided On :** Sep-12-2012

**Appellant :** Ajit Kumar Singh

**Respondent :** The State of Madhya Pradesh

**Advocate for Def. :** Shri. A.S.Raizada, Shri. P.N.Tiwari

**Judgement :**

HIGH COURT OF MADHYA PRADESH : JABALPUR.

Writ Petition No.7341/2007 Ajit Kumar Singh.

versus State of M.P.& otheRs.PRESENT : Honble Shri Justice K.K.Trivedi.J.Shri V.S.Shroti, learned Senior counsel assisted by Shri Vikram Johri, for the petitioner.

Shri A.S.Raizada, learned counsel for respondent No.2.

Shri Umakant Sharma learned Senior counsel assisted by Shri P.N.Tiwari, learned counsel for the respondent No.3.

**ORDER**

(12.9.2012) Initially, this petition was filed challenging the validity of order dated 26.4.2007, by which the respondent No.3 was promoted on the post of Senior Accountant in a higher pay scale alleging that there was contravention of provisions of M.P.Public Service (Promotion) Rules, 2002 (hereinafter referred to

as 2002 Rules for short).but since during pendency of the writ petition, the respondent No.3 was further promoted on the post of Accounts Officer on 16.8.2011, an amendment was made in the writ petition and a relief in respect of quashment of such an order was also claimed.

It is contended by the petitioner that in the seniority list so issued, the petitioner was shown at Serial No.1 right from the date of his initial appointment.

He was shown senior to the respondent No.3 even when the promotion as Accountant Grade-I was granted and this position is clear from the seniority list of the Accountant 2 Grade-I, issued showing the position as on 1.1.2004.

It is contended that in terms of the provisions of the 2002 Rules, the promotion from the post of Accountant Grade-I to the post of Senior Accountant was to be made on the basis of seniority-cum-merit and as such, the petitioner could not have been superseded in the matter of promotion.

Placing on record the Departmental Promotion Committee proceedings, the petitioner has pointed out that the Departmental Promotion Committee made the application of criteria of merit-cum-seniority and selected the respondent No.3 for promotion only because he was said to be more meritorious than the petitioner, therefore, such a promotion was bad in law.

Since there was a vacancy available, later on, the order was issued giving benefit of officiating charge with the special pay at 20% of the pay of the promotional post to the respondent No.3 even though he had not completed the requisite years of services for such regular promotion on the post of Accounts Officer by the subsequent order dated 16.8.2011, therefore, the petitioner being a senior person has been put to work under a junior.

It is contended that such orders are bad in law and are liable to be quashed.

2: The respondents in response to the writ petition by filing a return, have contended that 2002 Rules have no application, inasmuch as, the statutory Rules have been made by the Corporation which specifically provides consideration of the cases for promotion on merit-cum- seniority basis.

It is contended that the merit of the persons who were within the zone of consideration was drawn and as it was found that the respondent No.3 was more meritorious than the petitioner, the promotion order was rightly issued in his respect.

It is contended that since nothing wrong is committed in this respect, when a 3 vacancy of the Accounts Officer occurred, keeping in view that the respondent No.3 could not have been regularly promoted, but was required to be given the charge of the post, the order was issued on 16.8.2011 and since he was discharging the dual duties, the 20% pay of the higher post was given to him as double duty allowance.

Since this is only a step gap arrangement, the posting of the respondent No.3 as Accounts Officer is not required to be quashed.

3: The respondent No.3 has filed his return and has contended that there is no basis of making a claim with respect to the seniority.

It is contended that in fact an order was issued on 5.8.2000 disturbing the settled position of seniority of the respondent No.3 which was protected vide order dated 7.2.1990.

A writ petition bearing W.P.No.6657/2000 was filed by the respondent No.3 against such order of Corporation and the said writ petition is pending consideration before this Court.

It is contended that since the respondent No.3 is to be treated as senior to the petitioner, the claim of promotion was rightly considered and granted, the writ petition is liable to be dismissed.

The similar facts as have been stated by the official respondents have been reiterated by the respondent No.3.

4: Heard learned counsel for the parties at length and examined the record.

5: Undisputedly, fiRs.and foremost question is whether the 2002 Rules are applicable in the Corporation or not.

Learned senior counsel for the petitioner has taken this Court to the preamble of the 2002 Rules.

It is contended that 2002 Rules have been framed in exercise of powers conferred by proviso to Article 309 read with Article 16 and 335 of the Constitution of India and, therefore, the Rules 4 are made for the purposes of determination of basis of promotion in the public services and on the post, and are relating to reservation in favour of Scheduled Caste and Scheduled Tribe.

It is contended that the definition of the establishment as has been given in Rule 2(f) of the 2002 Rules, will make it clear that 'Establishment' means any office of the State Government or a local authority or Statutory authority constituted under any Act in which the State has not less than fifty one percent of the paid-up share capital.

Further, reading the definition of 'Service' as given in Rule 2(o) of 2002 Rules, it is pointed out by learned senior counsel for the petitioner that 'Service' means a service of group of posts in connection with the affairs of the State other than the Indian Administrative Service, Indian Police Service and Indian Forest Service organised and designated as such by Government.

Reading the provisions of Rule 3 of 2002 Rules, learned senior counsel for the petitioner pointed out that the 2002 Rules are made applicable to the establishment as defined in the Rules, but are not applied to the employment specified in Clauses (1).(3) and (5) of Section 3 of Madhya Pradesh Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon Aur Anya Pichhade Vargon Ke Liye Arakshan) Adhiniyam, 1994.

Taking this Court to the provisions of Rule 6 of 2002 Rules, learned senior counsel for the petitioner pointed out that the provisions are specifically made fixing the criteria for consideration of promotion in case the criteria of seniority-cum-merit is applicable.

Taking this Court to the provisions of Rule 7 of 2002 Rules, it is contended by learned senior counsel for the petitioner that for the purposes of consideration of

promotion on the basis of merit-cum-seniority, a different criteria is laid down.

Again the provisions of Rule 14 and 15 of 2002 Rules, have been read out and it has been contended by learned senior 5 counsel for the petitioner that no doubt is left in view of the specific provisions made that all Service Rules regulating the recruitment to the Public Service and the post shall be deemed to have amended to the extent as provided in the 2002 Rules and, therefore, from the date the 2002 Rules have come into force, only such Rules would be applicable and not the provisions of the Regulations or Rules made by the respondent No.2.

6: It is pointed out by learned senior counsel appearing for the petitioner that the Regulations have been made by the respondent-Corporation governing the services, commonly known as Rules.

It is contended that in such Regulations, for preparation of the list of persons recommended for promotion, only this much is said that selection for inclusion in such list shall be based on merit- cum-seniority and it is again provided that the names of persons included in the list shall be arranged in order of their seniority in the post from which the promotions are made.

Since such a prescriptions have been made in the Regulations, it cannot be said that strictly the criteria of merit-cum-seniority is applicable.

In view of this, it is contended that the consideration of the claim for promotion was wrongly done by the Departmental Promotion Committee and a junior was promoted.

7: It is contended by learned senior counsel for the petitioner that in view of the law laid down by the Apex Court as also by this Court in various cases, it has to be seen whether in fact the criteria of merit-cum-seniority was evolved or the criteria of seniority-cum-merit was to be followed.

It is further submitted that there is a hybrid mode of merit with due respect to the seniority as has been envisaged by several decisions rendered by the Apex 6 Court.

Placing reliance in the case of K.

Samantaray versus National Insurance Co.LTD.[(2004) 9 SCC 286]., learned senior counsel for the petitioner submitted that the criteria of considering the cases for promotion on the basis of merit-cum-seniority cannot be accepted in such instances.

In fact, in such circumstances, a deep probe is necessary in the Regulations itself and it is to be seen whether it was intended to deny the promotion only on the ground of merit or not.

It is contended that there is yet another criteria as has been held by the Apex Court, for consideration of the claims for promotion which is known as hybrid mode, i.e.seniority subject to the fitness of the candidate to discharge the duty of the post from amongst persons eligible for promotion.

It is contended that in view of these pronouncement of law, applying the mode of merit-cum-seniority only promotion was not to be granted to the respondent No.3.

In a Division Bench decision of this Court rendered in the case of Narmada Prasad versus State of M.P.and others [2005(3) MPLJ 570 ., it has been pointed out by the learned senior counsel for the petitioner that there is a distinction between the criteria of merit-cum- seniority and seniority-cum-merit.

The distinctions are not required to be merged.

Therefore, in the context of the provisions of 2002 Rules, the petitioner alone was to be given the promotion as he, too, has touched the fitment criteria prescribed.

Further reliance has been placed by the learned senior counsel for the petitioner in the case of Ram Bharose Kamal versus State of M.P.and others [2012 (3) MPLJ 464 .and it is contended that in view of the definite enunciation of law, the application of the Rules, it was impermissible to grant promotion to the respondent No.3 only on the basis of criteria of merit-cum-seniority, in complete violation of the provisions of Rule 6(7) of 2002 Rules.

8. The submissions made by learned senior counsel for the petitioner are examined in the context of the submissions made by learned counsel for the respondent No.2.

The respondent-Corporation has utterly failed to establish that it has made the Rules and the provisions of 2002 Rules would not be attracted or made applicable in the matter of promotion of employees of the Corporation.

In view of the specific provisions made, which squarely covers the establishment of respondent No.2, it has to be held that 2002 Rules are applicable in the Corporation services.

In view of the law laid down by the Apex Court, if the provisions of the 2002 Rules are examined, there is no doubt left that the 2002 Rules are applicable in the Corporation services.

It was wrong on the part of respondent Corporation to make application of the criteria of their Regulations which otherwise was not and cannot be said to be only the merit-cum-seniority criteria.

As has been held by the Apex Court, there are certain fundamental requirements to be prescribed in the Regulations to make application of merit-cum-seniority criteria.

None are available in the Regulations made by the Corporation.

There was a direct conflict with the provisions of 2002 Rules and the Regulations and as has been held, only the 2002 Rules will prevail and will be made applicable in case of promotion.

Thus, it has to be held that the Departmental Promotion Committee though considered the cases of eligible persons including the petitioner was not right in making the application of criteria of merit-cum-seniority only for preparing the select list.

Such an act of the Departmental Promotion Committee cannot be affirmed.

9: not it is to be seen whether the rightful consideration was done in the matter of promotion or not.

Though it is 8 evolved by the Departmental Promotion Committee that criteria of merit-cum-seniority alone would be applicable and for that purpose benchmark of 13 was fixed and yet the petitioner has also achieved the said benchmark, but it is to be seen whether the respondent No.3 could be promoted otherwise or not.

The only claim made by the petitioner in the petition is that he was senior to the respondent No.3.

Such a claim has been adjudicated in the Writ Petition No.6657/2000, which has been decided by this Court.

It has been held in the said case that the respondent No.3 herein, who is one of the petitioner in the said case is to be treated as senior to the petitioner in this case.

Though the criteria was wrongly applied by the Departmental promotion Committee of the respondent No.2, yet it is a fact that the respondent No.3 had earned the good marks.

not since he has been declared as senior to the petitioner herein by this Court by passing the order in the aforesaid writ petition, the error of making the application of criteria for promotion becomes irrelevant.

The petitioner since is not treated to be senior to the respondent No.3, even if the criteria of seniority-cum-merit is made applicable, only the respondent No.3 would be entitled to promotion on the post of Senior Accountant, therefore, it is not necessary to quash the order of promotion of the respondent No.3 as has been issued by the respondent No.2 on 26.4.2007 Annx.P/3.

9: not the other aspect is whether the respondent No.3 could be given the current charge of the post of Accounts Officer or not.

Undisputedly, there was a post of Accounts Officer and this post is required to be filled in by promotion of a Senior Accountant.

Eight years of service as Senior Accountant is necessary for such promotion.

The respondent No.3 was promoted only on 26.4.2007 as Senior Accountant and he has not completed eight years of service on the said post.

However, only a current charge of the post has been given to the respondent No.3 by the respondent No.2.

The mode of recruitment provided under the Regulations framed by the respondent Corporation includes transfer/deputation of the officers of the State Government or any other department.

The other modes are direct recruitment and promotion.

If the respondent No.3 was not fulfilling the eligibility conditions, ordinarily he should not have been given the current charge of the post of a higher office.

The officiating charge has been given for a period of one year on 16.8.2011 and that period is not over.

It would have been much much better for the respondent No.2 to take any Accounts Officer on deputation from the other services to man the post of Accounts Officer instead of giving the charge of the post to an officer who has not fulfilled the eligibility conditions for posting on such a post.

In view of this, it is directed that the respondent No.2 will look into this and will make the posting of a senior officer of any other departments as Accounts Officer, who is fulfilling the eligibility conditions for such posting, within two months from the date of receipt of this order.

Till this arrangement is made, the respondent No.3 be allowed to continue on the post of Accounts Officer.

10 : The writ petition is disposed of accordingly.

There shall be no order as to costs.

(K.K.TRIVEDI) Judge 12/9/2012 A.Praj.

10 HIGH COURT OF MADHYA PRADESH : JABALPUR.

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versus State of M.P.& otheRs.

ORDER

Post it for /09/2012 (K.K.Trivedi) Judge /09/2012

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