

AFR

HIGH COURT OF CHHATTISGARH, BILASPURWPS No. 5350 of 2009

1. Prahalad Singh Gunwan, S/o Late Shri Onkar Singh Gunwan, aged about 48 years, Assistant Grade II, Office of Chief Electoral Officer, Indiravati Khand, Mantralay Parisar, Raipur (CG).

---- Petitioner

Versus

1. The State of Chhattisgarh, through the Secretary, General Administration Department, Mantralay at DKS Bhawan, Raipur (CG).
2. The Chief Electoral Officer, Indrawati Khand, Mantralay Parisar, Raipur (CG).
3. Shri Sewak Ram Bandhe, the then Deputy Chief Electoral Officer, Indrawati Khand, Mantralay Parisar, Raipur (CG) presently posted as Deputy Secretary, State Election Commission, Raipur (CG).
4. Shri Kishore Kumar Dey, Assistant Grade I, O/o Chief Electoral Officer, Indirawati Khand, Mantralay Parisar, Raipur (CG).

---- Respondent

For Petitioner

Shri P.R. Patankar, Adv. & Shri
Vedant Bhelonde, Adv.

For Respondent/State

Ms Fouzia Mirza, Addl. Adv. General

Hon'ble Shri Prashant Kumar Mishra, JOrder On Board24/10/2019

1. Petitioner is aggrieved by the promotion of respondent No.4 on the post of Assistant Grade I in the set up of the office of

the Chief Electoral Officer, Chhattisgarh. The petitioner is also aggrieved by his non-promotion or supersession, as, according to the petitioner, he is senior to the respondent No.4 Kishore Kumar Dey yet while making recommendation his seniority was ignored and the respondent No.4 has been promoted.

2. It is noteworthy to mention here that the subject promotion is governed under the provisions of the छ.ग. विधि एवं विधायी (निर्वाचन) कार्य विभाग के द्वितीय, तृतीय श्रेणी (लिपिक वर्गीय) निर्वाचन सेवा भर्ती नियम 1976. Admittedly, the criteria for promotion is seniority-cum-fitness.
3. From the gradation list for the relevant year filed as Annexure – P/2 showing seniority as on 1-4-2009 it appears the petitioner Prahalad Singh Gunwan is placed at S.No.1 whereas the respondent No.4 Kishore Kumar Dey is placed at S.No.2.
4. When the meeting of the Departmental Promotion Committee (DPC) was convened for consideration of promotion on 15-6-2009, the DPC was alive of the fact that the petitioner is senior to the respondent No.4 yet the respondent No.4 was recommended for the reason that the petitioner did not satisfy the minimum benchmark.

5. It is argued by the learned counsel appearing for the petitioner that the DPC, in fact, applied the criteria of merit-cum-seniority because at the relevant time the petitioner was not visited with any penalty nor any departmental proceedings were pending against him, therefore, he was not unsuitable for consideration for promotion. In such eventuality, petitioner being senior to the respondent No.4 he ought to have been promoted.
6. Learned counsel appearing for the State, *per contra*, would submit that the fixation of minimum benchmark does not offend the criteria of seniority-cum-fitness. She would submit that the petitioner was duly considered by the DPC and he having failed to attain the minimum benchmark, the next senior candidate has been promoted.
7. The legal position as to the validity of fixation of minimum benchmark and its effect on the criteria of seniority-cum-fitness has been considered by the Supreme Court in a catena of decisions.
8. The Supreme Court in ***Chairman, Rushikulya Gramya Bank v Bisawamber Patro and Others***¹ held thus at paras 10 & 11 :

¹ (2013) 4 SCC 376

10. In Rajendra Kumar Srivastava, the Court framed the following two questions for consideration (SCC p. 340 para 8) :

“8. On the contentions urged, the following two questions arise for our consideration:

(i) Whether minimum qualifying marks could be prescribed for assessment of past performance and interview, where the promotions are to be made on the principle of seniority-cum- merit ?

(ii) Whether the first respondent Bank was justified in fixing a high percentage (78%) as the minimum qualifying marks (minimum merit) for promotion ?

11. Answering both the questions in the affirmative, the Court on an analysis of the earlier decisions observed and held that (Rajendra Kumar Srivastava case, SCC pp 341-42, paras 13-14) :

“13. Thus it is clear that a process whereby eligible candidates possessing the minimum necessary merit in the feeder posts is first ascertained and thereafter, promotions are made strictly in accordance with seniority, from among those who possess the minimum necessary merit is recognised and accepted as complying with the principle of “seniority-cum-merit”. What would offend the rule of seniority-cum-merit is a process where after assessing the minimum necessary merit, promotions are made on the basis of merit (instead of seniority) from among the candidates possessing the minimum necessary merit. If the criteria adopted for assessment of minimum necessary merit is bona fide and not unreasonable, it is not open to challenge, as being opposed to the principle of seniority-cum-merit. We

accordingly hold that prescribing minimum qualifying marks to ascertain the minimum merit necessary for discharging the functions of the higher post, is not violative of the concept of promotion by seniority-cum-merit.

Re. Question (ii)

14. The next question is whether fixing of 78% as minimum qualifying marks (that is, as the minimum necessary merit) is unreasonable and arbitrary. The Rules in this case provide that the mode of selection is by interview and assessment of performance reports for the preceding three years as officer Scale I. The seniority list of officers in Scale I was published on 4-12-1996. Thereafter, the promotion process was held by earmarking 60 marks for assessment of performance reports (at the rate of 20 marks per year) and 40 marks were allotted for interview. The officers possessing the minimum qualifying marks of 78%, were then promoted on the basis of seniority. What should be the minimum necessary merit for promotion, is a matter that is decided by the management, having in mind the requirements of the post to which promotions are to be made. The employer has the discretion to fix different minimum merit, for different categories of posts, subject to the relevant rules. For example, for promotions at lower levels, it may fix lesser minimum qualifying marks and fix a comparatively higher minimum qualifying marks for higher posts.”

The decision of the High Court, thus, appears to be clearly contrary to the view taken by this Court in Rajendra Kumar Srivastava.

9. The Supreme Court in *Palure Bhaskar Rao and Others v P.*

*Ramaseshaiah and Others*² held thus at paras 17 & 18 :

17. Merely because a person is senior, if the senior is not otherwise eligible for consideration as per the rules for promotion, the senior will have to give way to the eligible juniors. The instant case is a classic example for the said principle. The Reserve Sub-Inspectors selected and appointed on transfer as Sub-Inspectors (Civil) carries seniority from the date of appointment as Reserve Sub-Inspectors. But the eligibility for appointment by way of a transfer to the post of Inspector under the A.P. Police Service requires 6 completed years of service after being recruited to the category of Sub-Inspector of Police (Civil). In other words, though the Reserve Sub-Inspector selected and appointed on transfer as Sub-Inspector (Civil) may be senior most in the category of Sub-Inspector of Police, but still he will be ineligible for consideration of appointment as Inspector in case he does not have 6 years of service as Sub-Inspector of Police (Civil). All his juniors who have 6 years of service as Sub-Inspector of Police and having been recruited to that post from different categories are entitled to steal a march over him as the rule now stands. The rule making authority in its wisdom has provided such a classification and we do not find any material on record to upset the said wisdom.

18. The view taken by us as above is fortified by the decision of this Court in the case of *R. Prabha Devi v. Union of India*, wherein it has been held that (SCC pp 241-42, para 15) :-

“15. The rule-making authority is competent to frame rules laying down eligibility condition for promotion to a

2 (2017) 5 SCC 783

higher post. When such an eligibility condition has been laid down by service rules, it cannot be said that a direct recruit who is senior to the promotees is not required to comply with the eligibility condition and he is entitled to be considered for promotion to the higher post merely on the basis of his seniority. The amended rule in question has specified a period of eight years' approved service in the grade of Section Officer as a condition of eligibility for being considered for promotion to Grade I post of CSS. This rule is equally applicable to both the direct recruit Section Officers as well as the promotee Section Officers. The submission that a senior Section Officer has a right to be considered for promotion to Grade I post when his juniors who have fulfilled the eligibility condition are being considered for promotion to the higher post, Grade I, is wholly unsustainable. The prescribing of an eligibility condition for entitlement for consideration for promotion is within the competence of the rule-making authority. This eligibility condition has to be fulfilled by the Section Officers including senior direct recruits in order to be eligible for being considered for promotion. When qualifications for appointment to a post in a particular cadre are prescribed, the same have to be satisfied before a person can be considered for appointment. Seniority in a particular cadre does not entitle a public servant for promotion to a higher post unless he fulfills the eligibility condition prescribed by the relevant rules. A person must be eligible for promotion having regard to the qualifications prescribed for the post before he can be considered for promotion. Seniority will be relevant only amongst persons eligible. Seniority cannot be substituted for eligibility nor it can override it in the matter of promotion to

the next higher post. The rule in question which prescribes an uniform period of qualified service cannot be said to be arbitrary or unjust violative of Article 14 or 16 of the Constitution. It has been rightly held by the Tribunal:

“When certain length of service in a particular cadre can validly be prescribed and is so prescribed, unless a person possesses that qualification, he cannot be considered eligible for appointment. There is no law which lays down that a senior in service would automatically be eligible for promotion. Seniority by itself does not outweigh experience.”

The aforesaid view of this Court in the case of R. Prabha Devi has been reiterated and followed in State of Punjab v. Inder Singh and Shiba Shankar Mohapatra. v. State of Orissa.

10. It is, thus, settled that the DPC is entitled to fix the minimum benchmark for promotion and thereafter, all suitable candidates who crossed the minimum benchmark would be considered for promotion on the basis of their seniority.
11. In the case at hand, the DPC, while fixing the minimum benchmark, decided that the candidates having eligible to be considered for promotion must have secured at least 'Good' grade in the last five years Annual Confidential Reports (ACRs) and should not have obtained two continuous or more than two 'C' (ग) Grade in the last five years and should not have obtained any ACR of 'D' (घ) grade. The ACR of last

five years of all the candidates have been reproduced in the DPC proceedings itself showing that the petitioner has obtained 'C' (१) Grade in 2005, 2006 & 2007. Thus, he having secured two continuous 'C' (१) Grade and more than two 'C' (१) Grade in the last five years he did not attain the minimum benchmark and was, thus, disqualified for being considered for promotion on the basis of seniority-cum-fitness. Thus, in view of the settled legal position, the petitioner having been considered by the DPC, but he failed to achieve the minimum benchmark, it is not a case of supersession, but it is a case of being found unfit for promotion on the criteria of seniority-cum-fitness.

12. For the reasons stated hereinabove, no case for interference is made out. Accordingly, the writ petition is dismissed, leaving the parties to bear their own cost(s).

Sd/-

Judge
Prashant Kumar Mishra

Gowri

HIGH COURT OF CHHATTISGARH, BILASPUR

WPS No. 5350 of 2009

Prahalad Singh Gunwan

Versus

The State of Chhattisgarh & Others

HEAD NOTE

Prescribing the minimum benchmark to ascertain the minimum necessary merit and thereafter, making promotion on the basis of seniority-cum-merit amongst the qualified candidates does not offend the principle of seniority-cum-merit.