

SARAT KUMAR DASH AND ORS.

v.

BISWAJIT PATNAIK AND ORS.

OCTOBER 27, 1994

[K. RAMASWAMY AND N. VENKATACHALA, JJ.]

SERVICE LAW—Promotion—Principle of 'merit-cum-suitability with due regard to seniority'—Seniority should have no role to play when candidates found to be meritorious and suitable for higher posts—When objective criteria evolved in awarding marks to candidates—No separate reasons in arranging order of merit need be given.

NATURAL JUSTICE—Principle of audi alterim partem—Omission to give reasons—Whether amounts to violation of principle of natural justice.

While the appellants and respondents were continuing as Drug Inspectors, four vacancies for the post of Asstt. Drugs Controller had arisen. Preceding regular appointment, the Government constituted a Departmental Promotion Committee which had considered and recommended the cases of respondents for *ad hoc* promotion to the posts and the Government had appointed the respondents and referred the matter to the Public Service Commission for recommendation for regular appointments. Before recommending to the PSC, since no rules or the criteria for consideration was prescribed, the Government decided to adopt 'merit-cum-suitability with due regard to seniority' as principle to consider the case of the persons for promotion. The names of 12 candidates, including *ad hoc* promotees were sent to the P.S.C. for consideration.

Adhering to the evolved criteria, considering the cases of the candidates, the names of the appellants and the 5th respondent were recommended for regular promotion. Accordingly, they came to be appointed by the Government. The respondents challenged their appointments. The Tribunal set aside the appointments on the findings that there was no rule prohibiting the PSC to give reasons in support of their recommendations; reasons were necessary for evaluation of the relative merits of the candidates, the Government independently had not applied its mind to the merits of the candidates; no speaking order was passed in making promotions; and the seniority was not given any due consideration.

A These appeals had been filed challenging the order of the Tribunal. It was contended by the appellants that in case of 'merit-cum-suitability with due regard to seniority', the principle of seniority has no role to play.

B The respondents contended that the PSC itself had evolved grading of outstanding, very good, good, satisfactory, average etc. from C. Rs. and it was not open to the PSC to evolve grading.

Allowing the appeal, this Court

C HELD : 1.1. In the case of merit-cum-suitability, the seniority should have no role to play when the candidates were found to be meritorious and suitable for higher posts. This principle inculcates dedicated service, and accelerates ability and encourage merit to excel merit. The seniority would have its due place only where the merit and ability are approximately equal or where it is not possible to assess *inter-se* merit and the suitability of two equally eligible competing candidates who come very close in the order of merit and ability. Under those circumstances, the seniority will play its due role and calls it in aid for consideration. But in case where the relative merit and suitability or ability has been considered and evaluated, and found to be superior, then the seniority has no role to play. In the instant case, the PSC had evolved the correct procedure in grading the officers and the marks had been awarded according to the grading. The grading was given by the Government and the PSC evolved the criteria of giving marks on the basis of the grading given by the Government. The principle of 'merit-cum-suitability with due regard to seniority' had been correctly applied to the facts in this case. It was also seen that the PSC had objectively evolved the criteria and determined the merit and suitability of the candidates. (229-E-G, 230-B, D)

D

E

F

R.S. Das v. U.O.I. and Ors., [1986] Suppl. SCC 617; National Institute of Mental Health and Neuro Sciences v. Dr. K. Kalyana Raman and Ors., AIR (1992) SC 1906 and Syed Khalid Rizvi and Ors. v. U.O.I. and Ors., [1993] Suppl. 3 SCC 575, relied on.

G 1.2. The principle of *audi alterim partem* is a basic concept of the principle of natural justice. However, the doctrine is not a cure to all the ills in the process. Its application depends upon the factual matrix to improve administrative efficiency and expediency and to meet out justice. The procedure adopted would be just and fair. The reasons are

H links between maker of the order or the author of the decision and the

order itself. The record is called to consider whether he has given due consideration to the facts placed before him before he arrives at the decision. Therefore, the reasons in the order or found from the record bridges the link between the maker of the order and the order itself or decision. Therefore the natural justice is not a rigid nor an inflexible rule. It should be applied to a given fact situation, depending upon the background of the statutory provisions, nature of the right which may be affected and the consequences that may entail. In the instant case to the tribunal evolved the objective criteria in awarding marks to the given grading of the candidates and on that basis recommended their cases for promotion. The grading is to obviate the need to record reasons. The finding of the Tribunal that the selection by PSC without recording reasons or need to record separately the reasons for evolving the criteria for selection is also clearly illegal. (230-G-H, 231-A-D)

1.3. It is incumbent upon the appointing authority, the Government, to have the opinion of the PSC and to consider the same. Since the Government had accepted the recommendations made by the PSC as found from the note file, there was no need for the Government again to record reasons in accepting the recommendations made by the PSC. (231-E)

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 8768-71 of 1994.

From the Judgment and Order dated 18.6.93 of the Orissa .
Administrative Tribunal, in O.A. No. 1269 of 1989.

P.P. Rao, J.R. Das, A.K. Mishra, A.K. Panda, Raj Kumar Mehta, Vinoo Bhagat and N.K. Sharma for the appearing parties.

The following Order of the Court was delivered by :

Delay condoned.

Leave granted.

Heard the learned counsel. While the appellants and respondents-Biswajit Patnaik and Jagannath Prasad Mishra were continuing as Drug Inspectors, four vacancies for the post of Asstt. Drugs Controller, (Junior Class-I) have arisen. Preceding regular appointment, the Government constituted a Departmental Promotion Committee which had considered

A and recommended the cases of respondents for *ad hoc* promotion to the posts and the Government had appointed the respondents and referred the matter to the Public Service Commission for recommendation for regular appointments. Before recommending to the PSC, since no rules or the criteria for consideration was prescribed, the Government had decided to adopt 'merit-cum-suitability with due regard to seniority' as principle to consider the case of the persons for promotion. The names of 12 candidates, including *ad hoc* promotees were sent to the P.S.C. for consideration. We are informed that since two of them were already promoted to the higher posts of Grade-I Deputy Drug Controllers, their cases were not considered. Two of them were found to be unfit. The PSC had thought over the feasibility to apply the principle of 'merit-cum-suitability with due regard to seniority' secured the statutory rules applicable to similar selection posts in other departments and after due deliberation adopted the aforesaid principle. Thereafter, the PSC has evolved the procedure, as stated in the affidavit filed by the PSC pursuant to our order dated 4.8.1994, thus:

D "He (Chairman the UPSC) explained the system of evaluation of C.C.Rs adopted by the PSC. The Commission is considering the reports of 6 years immediately preceding the time of selection. While evaluating the C.S.R. they are graded and awarded marks as follows:

E (i) Outstanding : 10 marks

(ii) Very good : 9 marks

(iii) Good : 8 marks

(iv) Satisfactory : 7 marks

F (v) Average : 6 marks

G Adverse remarks are not given any marks and no minus marks are given. However, when the assessment contains a critical observation alongwith other favourable comments the Commission takes an overall view of the assessment and grades the C.R. as Average, Satisfactory, Good etc. However, when there is an adverse remark indicating that the integrity is doubtful, the officer is not considered suitable for promotion. Similarly if there are adverse remarks for two years the officer is not generally considered suitable.

H

The final grading is decided by taking the average of the marks awarded for six years. For final grading categories: A, B, C, D, E, are adopted. This is done in the following manner.

9.8 marks and above : Outstanding - Category A

7.8 to 9.79 : Good and very good - Category B

6.8 to 7.79 : Satisfactory - Category C

6 to 6.79 : Average - Category D

Less than 6 : unsuitable

In the final placement those who come within Category 'A' are placed in the top followed by those in category B.C.D. in each category the *inter se* seniority as per gradation list will be maintained. Those graded as 'Good' and 'Very Good' are both placed in the same category 'B' as the Commission follows the principle that an officer graded 'very good' should not supersede another graded as 'Good'.

In the case of the highest posts in the cadre and two levels of posts immediately below it (for example the post of Director and Joint Director, Level-I and Level-II) the Commission consider an officer suitable for promotion only if he is in category 'B' i.e. his final grading must at least be good. Following the above principle the Commission has evaluated the C.C. Rolls of the officers within the zone of consideration for the post of Asstt. Controller as in the Statement placed at Flag 'X'. Four officers Sri B.C. Panda, Sri S.K. Das, Sri R.N. Sahu and Sri G.S. Mohapatra come within 'B' category and hence they have been recommended against the four vacancies."

Adhering to the evolved criteria, considering the cases of the candidates, the names of the appellants and B.C. Panda, the 5th respondent in these appeals are recommended for regular promotion. The Government had a doubt whether J.P. Misra and S.K. Das do not stand on the same footing and requested the PSC for reconsideration of the case of J.P. Misra. The PSC reaffirmed its recommendation of S.K. Das. Accordingly, they came to be appointed by the Government. The respondents challenged their

- A appointments in the Tribunal on diverse grounds in O.A. Nos. 1269/89, 171/90 and 1235/89. The Tribunal in its order, dated June 18, 1993 set aside the appointments on the findings that there is no rule prohibiting the PSC to give reasons in support of their recommendations; reasons are necessary for evaluation of the relative merits of the candidates the Government independently had not applied its mind of the merits of the
- B candidates; no speaking order was passed in making promotions; and the seniority was not given any due consideration. At different places the PSC has stated in its counter affidavit of the respondents being 'unsuitable' and 'less suitable'. There is a world of difference between 'unsuitable' and 'less suitable' which would show their non application of mind to the relevant facts. Under those circumstances, neither the PSC itself nor the Govt. are
- C clear in their view, as to the correct criteria to be applied in recommending the candidates or making appointments to the posts of Asstt. Drug Controller (Junior Class-I).

- D It is contended by Shri P.P. Rao, the learned senior counsel for the appellants that the Tribunal has committed grievous error in placing reliance on the decision of this Court in *Union of India v. M.L. Cooper and Ors.*, [1974] 1 SCR 797. Therein, unamended Rule 5 (2) of the statutory rules provides that in case of supersession of the officer of the police service of the State, the PSC was required to record reasons. Under those
- E circumstances, this Court has directed that recording of reasons was necessary. He further contends that in the Judgment itself, this Court held that in case of 'merit-cum-suitability' with due regard to seniority, the principle of seniority has no role to play and the ratio therein was not properly understood by the Tribunal. We find force in the contention.

- F It is seen that the Government, in the absence of statutory rules, have applied, by administrative order, the principle of 'merit-cum-suitability with due regard to seniority. It is settled law that in case of promotion to the posts of higher cadre, it has always been the settled criteria applied by the Govt. is 'merit-cum-suitability with due regard to seniority' or 'merit and ability' but not 'seniority' or 'seniority-cum-suitability'. In fact, this question was considered by PSC, as stated earlier, before its evaluation of
- G the respective merits. They secured the rules in the comparable services of the State where the principle of 'merit-cum-suitability with due regard to seniority' is the statutory rule and thereby, the PSC had accepted the recommendation of the Government to apply the above rule to adjudge the relative merits of the candidates and in fact they did so apply.

- H In *Cooper's* case this Court has stated with regard to the principle thus:

“When Regulation 5 (2) says that the selection for inclusion in the list shall be based on merit and suitability in all respects with due regard to seniority, what it means is that 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. But, to say, as the High Court has done that seniority is the determining factor and that it is only if the senior is found unfit that the junior can be thought of for inclusion in the list is, with respect, not a correct reading of Regulation 5 (2). I do not know what the High Court would have said had Regulation 5 (2) said: “Selection for inclusion in the select list shall be based on seniority with due regard to merit and suitability.” Would it have said that the interpretation to be put upon the hypothetical Sub-regulation (2) is the same as it put upon the actual Sub-regulation?”

In case of merit-cum-suitability, the seniority should have no role to play when the candidates were found to be meritorious and suitable for higher posts. Even a junior most man may, steal a march over his seniors and jump the queue for accelerated promotion. This principle inculcates dedicated service, and accelerates ability and encourages merit to improve excellence. The seniority would have its due place only where the merit and ability are approximately equal or where it is not possible to assess *inter-se* merit and the suitability of two equally eligible competing candidates who come very close in the order of merit and ability. Under those circumstances, the seniority will play its due role and calls it in aid for consideration. But in case where the relative merit and suitability or ability has been considered and evaluated, and found to be superior, then the seniority has no role to play. In our view the PSC has evolved correct procedure in grading the officers and the marks have been awarded according to the grading. It is seen that the four officers have come in the grading of ‘B’. In consequence, the PSC had adopted the seniority of the appellants and Panda in the lower cadre in recommending their cases for appointment in the order of merit.

- A Mr. Mehta, the learned counsel for the respondent - J.P. Mishra contended that the PSC itself has evolved grading of outstanding, very good, good, satisfactory, average etc. from C.Rs, which is not open to the PSC to evolve grading. We cannot accept that contention to be correct. Firstly, this contention was not raised in the Tribunal and secondly, from the file produced before us by the PSC, it is clear that they have seen the
- B grading was given by the Government and they PSC evolved the criteria of giving marks on the basis of the grading given by the Government. With regard to the merit and ability this Court has consistently been following the view as extracted herein from Cooper's case in other decisions vide *R.S. Das vs. U.O.I. and Ors.*, [1986] Suppl. SCC 617, *National Institute of Mental Health and Neuro Sciences v. Dr. K. Kalyana Raman and Ors.*, AIR [1992] SC 1906, para 7 and *Syed Khalid Rizvi and Ors. v. U.O.I. and Ors.*, [1993] Suppl. 3 SCC 575, paras 8 and 9 at pages 584 to 586.
- C

- Accordingly, we hold that the principle of 'merit-cum-suitability with due regard to seniority' has been correctly applied on the facts in this case. We have also seen that the PSC has objectively evolved the criteria and
- D determined the merit and suitability of the candidates. In *S.R. Dass* case, the amended Rule 5 (2) of the Regulation of IAS (Appointment by Promotion) Regulations, 1955, Rule 5 (4) evolved the principle to classify eligible officer as, outstanding, very good, good or unfit, as the case may be, on an overall-relative assessment of their service record, Rule 5 (5) directed to
- E prepare list and include the candidates for appointment to the required number of vacancies. Considering the Rule at p.631 in para 16 and following the ratio in *Copper's* case, this Court held that the grading was for the purpose of being placed in the select list to ensure that select list is drawn up on the basis of merit and suitability and to obviate the necessity of giving reasons for the supersession of any officer. In para 18 at p.632, it
- F was further held that there was no necessity to record any reason, in view of the amended statutory provisions. Therefore, the criticism of the Tribunal that due regard to the seniority was not given is not correct.

- The next question is whether omission to record reasons amounts to violation of the principles of natural justice. The principle of *audi alterim partem* is a basic concept of the principle of natural justice. The
- G omnipotency inherent in the doctrine is that no one should be condemned without being heard or given an opportunity to the person effected to present his case before taking the decision or action. In the field of administrative action, this principle has been applied to ensure fair play and justice to the effected person. However, the doctrine is not a cure to all the
- H ills in the process. Its application depends upon the factual matrix to

improve administrative efficiency and expediency and to meet out justice. A
The procedure adopted would be just and fair. The reasons are links
between maker of the order or the author of the decision and the order
itself. The record is called to consider whether he has given due
consideration to the facts placed before him before he arrives at the
decision. Therefore, the reasons in the order or found from the record
bridges the link between the maker of the order and the order itself or B
decision. Therefore, the natural justice is not a rigid nor an inflexible rule. It
should be applied to a given fact situation, depending upon the background
of the statutory provisions, nature of the right which may be effected and
the consequences that may entail. It is already seen that the Tribunal
evolved the objective criteria in awarding marks to the given grading of the
candidates and on its basis recommended their cases for promotion. In R.S. C
Dass case, this Court held that the grading itself is a reason and no separate
reasons in that behalf in arranging the order of merit need be given. The
grading is to obviate the need to record reasons. The finding of the Tribunal
that the selection by PSC without recording reasons or need to record
separately the reasons for evolving the criteria for selection is also clearly D
illegal.

It is incumbent upon the appointing authority, the Government to have
the opinion of the PSC and to consider the same. Since the Government had
accepted the recommendations made by the PSC as found from the note
file, there is no need for the Government again to record reasons in
accepting the recommendations made by the PSC. The finding of the E
Tribunal that the bald and vague order of appointment is arbitrary,
therefore, is illegal. Thus we are of the considered opinion that the Tribunal
has grievously erred in directing the Government to reconsider the matter
afresh.

The appeals are accordingly allowed. The orders of the Tribunal are set F
aside and the O.As. filed in the Tribunal stand dismissed. No costs.

A.G.

Appeals allowed.