

HIGH COURT OF CHHATTISGARH, BILASPURWrit Petition (S) No.4316 of 2010

Ramdhani Shukla, S/o Late B.D. Shukla, Aged about 48 years, Jr. Console Operator, T & S Grade 'B', G.M. Office, Chirmiri Area of South Eastern Coalfields Limited, District Koriya (C.G.)

---- Petitioner

Versus

1. South Eastern Coalfields Limited, through Chairman-cum-Managing Director, South Eastern Coalfields Limited, Seepat Road, Bilaspur (C.G.)
2. Director (Personnel), South Eastern Coalfields Limited, Seepat Road, Bilaspur (C.G.)
3. Chief General Manager, South Eastern Coalfields Limited, Chirmiri Area, District Koriya (C.G.)
4. Sunil Kumar Singh, Programmer Assistant / Console Operator T&S Grade-A, GM Office, SECL, Gevra Area, Korba, District Korba (C.G.)
5. Subhijit Goswami, Programmer Assistant / Console Operator T&S Grade-A, GM Office, SECL, Gevra Area, Korba, District Korba (C.G.)
6. Remant Kumar Gavel, Programmer Assistant / Console Operator T&S Grade-A, GM Office, SECL Gevra Area, Korba, District Korba (C.G.)

---- Respondents

For Petitioner: Mr. Chandresh Shrivastava, Advocate.

For Respondents No.1 to 3 / SECL: -

Mr. Sudhir Kumar Bajpai, Advocate.

For Respondents No.4 to 6: -

Mr. Rajkamal Singh, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

04/08/2021

1. Proceedings of this matter have been taken-up through video conferencing.
2. The petitioner in this writ petition seeks appropriate writ / direction commanding / directing the official respondents to consider the case of the petitioner for the promotional post of Console Operator T&S

Grade-A with effect from 4-9-2008 i.e. the date on which respondents No.4 to 6 (juniors) were promoted on the post of Console Operator T&S Grade-A and also seeks all consequential benefits like seniority, pay, etc., on the said post with effect from 4-9-2008.

3. The petitioner has filed this writ petition stating inter alia that he was initially selected in South Eastern Coalfields Limited (SECL) on the post of General Mazdoor Category-I on 26-11-1986 and later-on, he was promoted on the post of Junior Data Entry Operator T&S Grade-E and lastly, he was promoted as Junior Console Operator T&S Grade-B on 30-8-2002 in accordance with the Cadre Scheme. It is the further case of the petitioner that in the year 2008, vacancies arose for the post of Programmer Assistant / Console Operator T&S Grade-A and as per the Cadre Scheme, the petitioner and respondents No.4 to 6 were eligible and their cases have been considered as per the Cadre Scheme vide Annexure P-5, page 23 of the writ petition, in the meeting of Departmental Promotion Committee (DPC) convened on 21-7-2008 on the criteria applicable i.e. merit-cum-seniority and the said Committee adopted methodology, which provides that 60 marks were kept for merit and 40 marks for seniority and 70 marks were fixed as cutoff marks for eligibility in promotion. It is also the case of the petitioner that he secured 96 marks, whereas the private respondents i.e. respondents No.4 to 6 have secured 90 marks each, but the DPC recommended the names of 7 candidates including respondents No.4 to 6 for promotion on the basis of seniority excluding the petitioner and thereby adopted the criteria of seniority-cum-merit saying go-by to the applicable criteria of merit-cum-seniority, therefore, the petitioner is deprived of the promotional post on 4-9-2008, though he was later-on promoted on 25-1-2011, but he is

entitled to be considered and promoted on the post of Console Operator T&S Grade-A with effect from 4-9-2008 as his juniors – respondents No.4 to 6 were promoted on the said date and is also entitled for the promotional benefits.

4. Respondents No.1 to 3 / SECL have filed return principally stating that since the petitioner has been promoted on the post of Console Operator T&S Grade-A with effect from 25-1-2011, therefore, the writ petition has become infructuous. It has also been stated that though according to the seniority in the cadre of Junior Console Operator T&S Grade-B, the names of respondents No.4 to 6 were at serial Nos.10, 15 & 21 in the seniority list, they were kept above the petitioner who was at serial No.25. As such, non-promotion of the petitioner with effect from 4-9-2008 is in accordance with law and the petition deserves to be dismissed.
5. The private respondents No.4 to 6 have also filed return in line with the return filed by the SECL/respondents No.1 to 3.
6. Mr. Chandresh Shrivastava, learned counsel appearing for the petitioner, would submit that admittedly and undisputedly, the criteria for promotion on the promotional post of Console Operator T&S Grade-A was merit-cum-seniority and in the bench mark fixed, the petitioner secured 96 marks, but respondents No.4 to 6 have secured less marks than the petitioner, even then applying the criteria of seniority-cum-merit, they have been promoted excluding the petitioner which is per se contrary to the well settled principle in this behalf laid down by the Supreme Court in the matter of B.V. Sivaiah and others v. K. Addanki Babu and others¹ followed subsequently by their Lordships of the Supreme Court in the matter of Rajendra Kumar Srivastava and

1 (1998) 6 SCC 720

others v. Samyut Kshetriya Gramin Bank and others² and therefore appropriate writ be issued directing that the petitioner is entitled to be promoted as Console Operator T&S Grade-A with effect from 4-9-2008 and also entitled for all consequential service benefits.

7. Mr. Sudhir Kumar Bajpai, learned counsel appearing for the SECL / respondents No.1 to 3, would submit that the petition has become infructuous as the petitioner has already been granted promotion with effect from 25-1-2011 on the post of Console Operator T&S Grade-A. Even otherwise, though the petitioner has secured 96 marks, but since the private respondents No.4 to 6 were seniors to the petitioner in seniority list on the post of Console Operator T&S Grade-B, therefore, they were kept above the petitioner and the petitioner was granted promotion subsequently with effect from 25-1-2011, as such, the writ petition has no merit.
8. Mr. Rajkamal Singh, learned counsel appearing for respondents No.4 to 6, would adopt the submissions of Mr. Bajpai, learned counsel for the SECL/respondents No.1 to 3, and would submit that respondents No.4 to 6 were rightly promoted on the post of Console Operator T&S Grade-A.
9. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.
10. Cases of the petitioner, respondents No.4 to 6 and other persons were considered for promotion on the post of Console Operator T&S Grade-A on 28-8-2008 in the meeting of the DPC. According to the Cadre Scheme which is applicable for promotion on the said post i.e. Cadre Scheme for Electronic Data Processing Personnel (Cadre

Scheme No.X) notified on 22-7-1985, promotion for the posts up to Grade-B shall be on the basis of seniority-cum-merit and from Grade-B to Grade-A shall be on the basis of merit-cum-seniority. Accordingly, the DPC proceeded to consider the cases of eligible candidates including the petitioner, private respondents and other persons and fixed 70 marks out of 100 as minimum qualifying marks and the person getting 70+ will be entitled for consideration on the promotional post of Console Operator T&S Grade-A. In respect of Annual Confidential Report (ACR), 20 marks for Outstanding, 18 marks for Very Good and 16 marks for Good were determined. Accordingly, the DPC considered the cases of seven candidates and DPC statement was drawn by the DPC which is available at page 12 of the writ petition in which though the petitioner's name was at serial No.8, but he has secured 96 marks, however, Sunil Kumar Singh, Subhijit Goswami and Remant Kumar Gavel – respondents No.4, 5 and 6 herein, respectively, secured 90 marks each out of 100 and they have been promoted. The submission of learned counsel for the SECL is that since they stood as seniors in the seniority list in the cadre of Junior Console Operator T&S Grade-B, therefore, they have been promoted leaving / excluding the petitioner from the promotional post of Console Operator T&S Grade-A, though the criteria is merit-cum-seniority.

11. The Constitution Bench of the Supreme Court in the matter of Janki Prasad Parimoo and others v. State of Jammu & Kashmir and others³, has clearly held that selection means that the man selected for promotion must be of merit. Where promotion is by seniority, merit takes the second place but when it is a selection, merit takes the first

place and it is implicit in such selection that the man must not be just average.

12. Thereafter, again, the Supreme Court in the matter of Ajit Singh and others (II) v. State of Punjab and others⁴ (Constitution Bench), pointed out distinction in operation of norms of seniority on the one hand and any rule requiring consideration of merit on the other hand and observed as under: -

“23. ... if the promotion is by rule of “seniority-cum-suitability”, the eligible seniors at the basic level as per seniority fixed at that level and who are within the zone of consideration must be first considered for promotion and be promoted if found suitable. In the promoted category they would have to count their seniority from the date of such promotion because they get promotion through a process of equal opportunity. Similarly, if the promotion from the basic level is by selection or merit or any rule involving consideration of merit, the senior who is eligible at the basic level has to be considered and if found meritorious in comparison with others, he will have to be promoted first. If he is not found so meritorious, the next in order of seniority is to be considered and if found eligible and more meritorious than the first person in the seniority list, he should be promoted. In either case, the person who is first promoted will normally count his seniority from the date of such promotion. (There are minor modifications in various services in the matter of counting of seniority of such promotees but in all cases the seniormost person at the basic level is to be considered first and then the others in the line of seniority.) That is how right to be considered for promotion and the “seniority” attached to such promotion become important facets of the fundamental right guaranteed in Article 16(1).”

13. In B.V. Sivaiah (supra) distinction between seniority-cum-merit and merit-cum-seniority has been defined. It has been held by their Lordships of the Supreme Court that the principle of merit-cum-seniority lays greater emphasis on merit and ability while seniority

plays a less significant role. It has been observed in paragraphs 9, 10 and 18 of the report as under: -

"9. 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*⁵ has said: (SCC p. 856, para 37)

"[F]or 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."

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 at an examination. The Selection Committee has an unrestricted choice of the best available talent, from amongst eligible candidates, determined by reference to reasonable criteria applied in assessing the facts revealed by service records of all eligible candidates so that merit and not mere seniority is the governing factor."

10. On the other hand, as between the two principles of seniority and merit, the criterion of "seniority-cum-merit" lays greater emphasis on seniority. In *State of Mysore v. Syed Mahmood*⁶ while considering 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, this Court has observed

⁵ (1973) 2 SCC 836

⁶ AIR 1968 SC 1113

that the rule required promotion to be made by selection on the basis of "seniority subject to the 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.

18. 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."

14. The principle of law laid down in B.V. Sivaiah (supra) has been followed with approval by the Supreme Court in Rajendra Kumar Srivastava (supra) and it has been held in paragraphs 11 and 13 as under: -

"11. It is also well settled that the principle of seniority-cum-merit, for promotion, is different from the principle of "seniority" and the principle of "merit-cum-seniority". Where promotion is on the basis of seniority alone, merit will not play any part at all. But where promotion is on the principle of seniority-cum-merit, promotion is not automatic with reference to seniority alone. Merit will also play a significant role. The standard method of seniority-cum-merit is to subject all the eligible candidates in the feeder grade (possessing the prescribed educational qualification and period of service) to a process of assessment of a specified minimum necessary merit and then promote the candidates who are found to possess the minimum necessary merit strictly in the order of seniority. The minimum merit necessary for the post may be assessed either by subjecting the candidates to a written examination

or an interview or by assessment of their work performance during the previous years, or by a combination of either two or all the three of the aforesaid methods. There is no hard-and-fast rule as to how the minimum merit is to be ascertained. So long as the ultimate promotions are based on seniority, any process for ascertaining the minimum necessary merit, as a basic requirement, will not militate against the principle of seniority-cum-merit.

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.”

15. In the matter of Haryana State Electronics Development Corporation Limited and others v. Seema Sharma and others⁷, their Lordships of the Supreme Court pointed out the distinction between the principles of “merit-cum-seniority” and that of “seniority-cum-merit”. It was held as under: -

“7. The Court is of the opinion that the principle of merit-cum-seniority and that of seniority-cum-merit are two totally different principles.

8. The principle of merit-cum-seniority puts greater emphasis on merit and ability and where promotion is governed by this principle seniority plays a less significant role. However, seniority is to be given weightage when merit and ability more or less are equal among the candidates who are to be promoted.

9. On the other hand, insofar as the principle of seniority-cum-merit is concerned it gives greater importance to seniority and promotion to a senior person cannot be denied unless the person concerned is found totally unfit on merit to discharge the duties of the higher post. The totality of the service of the employee has to be considered for promotion on the basis of seniority-cum-merit (see *Jagathigowda, C.N. v. Cauvery Gramina Bank*⁸)."

16. Similar proposition has been laid down by the Supreme Court in the matter of **U.V. Mahadkar v. Subhash Anand Chavan and others**⁹ and also in the matter of **Palure Bhaskar Rao and others v. P. Ramaseshaiah and others**¹⁰.
17. The distinction pointed out in respect of the principles of seniority-cum-merit and merit-cum-seniority in **B.V. Sivaiah** (supra) and **Haryana State Electronics Development Corporation Limited** (supra) was followed with approval by the Supreme Court in the matter of **Sujata Kohli v. Registrar General, High Court of Delhi and others**¹¹.
18. Reverting to the facts of the case in the light of the principle of law laid down by their Lordships of the Supreme Court in the aforesaid judgments (supra), it is quite vivid that in the instant case, admittedly and undisputedly, the criteria for promotion on the post of Console Operator T&S Grade-A was merit-cum-seniority and accordingly, the DPC also proceeded to evaluate the comparative merit of seven candidates including the petitioner & respondents No.4 to 6 and in that process, the DPC fixed 70 marks as minimum qualifying marks for consideration on the said promotional post (Console Operator T&S Grade-A) and upon comparative assessment, it is also not in dispute that the petitioner secured 96 marks i.e. more than respondents No.4

8 (1996) 9 SCC 677

9 (2016) 1 SCC 536

10 (2017) 5 SCC 783

11 (2020) 14 SCC 58

to 6 which each of them got 90 marks, but respondents No.1 to 3 / SECL promoted respondents No.4 to 6 on the promotional post of Console Operator T&S Grade-A, though they secured less marks than the petitioner and did not promote the petitioner holding that respondents No.4 to 6 were seniors to the petitioner on the post of Junior Console Operator T&S Grade-B, and thereby applied the principle of seniority-cum-merit, whereas the principle applicable was merit-cum-seniority. Once comparative merit has been assessed and the petitioner has secured more marks than respondents No.4 to 6, the petitioner would be entitled to be considered and promoted on the said promotional post, as he has secured more marks than respondents No.4 to 6 and after his promotion, if post is still vacant then respondents No.4 to 6 could have been considered and promoted. As such, the SECL / respondents No.1 to 3 fell into legal error in the last stage of DPC proceeding by holding that the petitioner is not entitled to be promoted though he has obtained 96 marks and respondents No.4 to 6 have obtained 90 marks each.

19. Therefore, the petitioner would be entitled for consideration and promotion on the post of Console Operator T&S Grade-A with effect from 4-9-2008, the date on which respondents No.4 to 6 were promoted. Since the petitioner has now been promoted with effect from 25-1-2011, it is directed that consequential order of consideration and promotion of the petitioner on the post of Console Operator T&S Grade-A will be issued by the SECL / respondents No.1 to 3 holding that the petitioner is entitled for promotion on the said promotional post with effect from 4-9-2008 and he will be placed above respondents No.4 to 6. The petitioner would also be entitled for all consequential benefits including seniority on the post of Console

Operator T&S Grade-A from 4-9-2008 to 25-1-2011, as on that date he had already been promoted to the said post of Console Operator T&S Grade-A.

20. The writ petition is allowed to the extent indicated herein-above leaving the parties to bear their own cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

Soma