

State of Mysore and Another

Vs

Syed Mahmood and Another

Civil Appeals Nos. 31 and 32 of 1968

(J. C. Shah, R. S. Bachawat, G. K. Mitter JJ)

04.03.1968

JUDGMENT

BACHAWAT, J.-

On the reorganization of States on November 1, 1956, the services of Syed Mahmood and Bhao Rao were allotted to the State of Mysore and they were employed there as junior statistical assistants. On January 16, 1958 the Head of the Department of Statistics under the directions of the Government of State of Mysore prepared a tentative seniority list of non-gazetted staff of that department treating junior statistical assistants and senior statistical inspectors of the former State of Hyderabad, junior statistical assistants and senior compilers of the former State of Mysore, statistical assistants and statistical inspectors from Bombay and the head compiler of Coorg as holding the equivalent posts of junior statistical assistants in the State of Mysore. In 1959, before revising this tentative seniority list the State Government directed that all the statistical assistants and statistical inspectors of Bombay State and the head compiler of Coorg should be treated as promoted as senior statistical assistants. As a result of this direction officers ranking below Syed Mahmood and Bhao Rao in the seniority list published on January 16, 1958 were promoted to the higher posts. In making their promotions, the State Government did not consider the fitness of Syed Mahmood and Bhao Rao for promotion at all. At a much later date, they were promoted as senior statistical assistants. On May 3, 1963, the State Government published a revised seniority list placing inspectors from Bombay and head compilers from Coorg in category of seniority of senior statistical assistants. Syed Mahmood and Bhao Rao filed separate write petitions in the High Court of Mysore asking for appropriate writs quashing the seniority list published on May 3, 1963, and directing the State Government to consider their case for promotion as senior statistical assistants with retrospective effect. As the objections to the seniority list published on May 3, 1963 were still under consideration by the State Government the High Court refused to quash this seniority list but it directed the State Government to promote Syed Mahmood and Bhao Rao as from the respective dates on which respondents junior to them were promoted as senior statistical assistants and to treat such promotions as effective up to May 3, 1963. The State of Mysore has filed the present appeals from the orders directing the promotion of Syed Mahmood and Bhao Rao after obtaining special leave.

Promotion to the posts of senior statistical assistants is made from the cadre of junior statistical assistants and progress assistants. Rules 4(3)(b) of the Mysore State Civil Services General Recruitment Rules, 1957 requires such promotions to be made by selection on the basis of seniority-cum-merit, that is seniority subject to the fitness of the candidate to discharge the duties of the post from among persons eligible for promotion. In 1959 the seniority of junior statistical assistants was governed by the seniority list published on January 16, 1958. Syed Mahmood and Bhao Rao were junior statistical assistants. While making selections for promotion to the posts of senior statistical

assistants from the cadre of junior statistical assistants in 1959, the State Government was under a duty to consider whether having regard to their seniority and fitness they should be promoted. But without considering their case at all, the State Government promoted junior statistical assistants ranking below them in point of seniority. The promotions were irregularly made and they were, therefore, entitled to ask the State Government to reconsider their case. In the circumstances, the High Court could issue a writ to the State Government compelling it to perform its duty and to consider whether having regard to their seniority and fitness they should have been promoted on the relevant dates when officers junior to them were promoted. Instead of issuing such a writ, the High Court wrongly issued writs directing the State Government to promote them with retrospective effect. The High Court ought not to have issued such writs without giving the State Government an opportunity in the first instance to consider their fitness for promotion in 1959.

Mr. Javali submitted that Syed Mahmood and Bhao Rao by virtue of their seniority were entitled to promotion at the time when persons junior to them were promoted. The argument overlooks the fact that promotion to the post of senior statistical assistant was based on seniority-cum-merit. In spite of their seniority officers junior to them could be promoted if they were unfit to discharge the duties of the post. Promotion could not be claimed as a matter of right by virtue of seniority alone.

Mr. Javali argued that even in the case of promotion based on seniority-cum-merit, an officer is entitled to promotion by virtue of seniority alone, and he relied on the decision in *State of Mysore v. H. M. Bellary* [[1964] 7 S.C.R. 471]. In that case, an officer of the Bombay Government was sent on deputation from his parent department to another department. After long and satisfactory service and a number of promotions in the new department, he was reverted to his parent department and was posted in a lower grade though in the meantime an officer next below him in the parent department had been promoted to a higher grade. The promotion to the higher grade was based on seniority-cum-merit. The Court held that under r. 50(b) of the Bombay Civil Services Rules and the circular of the Government of Bombay dated October 31, 1950, an officer on deputation in another department on reversion to his parent department was entitled to be restored to the position he would have occupied in his parent department had he not been deputed. Rule 50(b) treated the service of an officer on deputation in the new department as equivalent to service in the parent department. As he rendered satisfactory service and was considered fit for obtaining increments and promotions in the new department, he should be deemed to be fit for promotion in the parent department and was entitled to promotion in that department when an officer next below him there was getting promotion based on seniority-cum-merit. In official language, this is the "next below rule" under which an officer on deputation is given a paper promotion and shown as holding a higher post in the parent department if the officer next below him there is being promoted. In our opinion, this case is entirely distinguishable. It decided that under the relevant services rules the fitness for promotion of an officer on deputation in the new department was equivalent to fitness for promotion in the parent department and the officer was entitled to promotion in the parent department when the officer next below him there was obtaining promotion based on seniority-cum-merit. But it is not an authority for the proposition that the officer on deputation is entitled to promotion in either the new or the parent department as a matter of right by virtue of his seniority alone, or that he should be deemed to be promoted whenever the officer next below him is being promoted. 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. 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.

We are of the opinion that the State Government should be directed at this stage to consider the fitness of Syed Mahmood and Bhao Rao for promotion in 1959. If on such examination the State

Government arbitrarily refuses to promotion them, different considerations would arise. The State Government would upon such consideration be under a duty to promote them as from 1959 if they were then fit to discharge the duties of the higher post and if it fails to perform its duty, the Court may direct it to promote them as from 1959.

In the result, we allow the appeals and set aside the orders passed by the High Court. We direct the State Government to consider whether Syed Mahmood and Bhao Rao should have been promoted to the posts of senior statistical assistants on the relevant dates when offices junior to them were promoted, and if so, what consequential monetary benefits should be allowed to them. While granting special leave, this Court directed that the appellants shall pay the costs of the respondents in any event. Accordingly, the appellants are directed to pay the costs of these appeals to the respondents. One hearing fee.

# Appeals allowed.##

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