

## **M.L. Joseph Francis, District and Sessions Vs Sri. Thomas P. Joseph, High Court of Kerala and S. Sainudeen, Law Secretary**

**Court:** High Court Of Kerala

**Date of Decision:** July 20, 2007

**Acts Referred:** Administrative Service/Indian Police Service (Appointment by Promotion) Regulations, 1955 " Rule 5(2)

Forest Service (Pay) Rules, 1968 " Rule 3(3)

Kerala State and Subordinate Services Rules, 1958 " Rule 1, 2, 2(16), 28, 28(10)

**Citation:** (2007) 3 ILR (Ker) 365 : (2007) 3 KLT 724

**Hon'ble Judges:** T.R. Ramachandran Nair, J; K. Balakrishnan Nair, J

**Bench:** Division Bench

**Advocate:** A.X. Varghese, for the Appellant; Bechu Kurian Thomas, for the Respondent

### **Judgement**

K. Balakrishnan Nair, J.

These nine Writ Appeals arise out of the common Judgment of the learned Single Judge dated 20.12.2006, in

Writ Petition (C) Nos.17897, 18004 and 18608 of 2006. Three of the Appeals have been filed by the High Court and the remaining, by the two

affected party respondents in the Writ Petitions. The promotions granted to those party respondents from the post of Selection Grade District

Judge to the Super Time Scale with retrospective effect, were challenged by three of their juniors in the cadre of Selection Grade District Judge,

but who were promoted to the super time scale, earlier. The learned Single Judge treated Writ Petition (C) No. 17897/06 as the main case. So,

for convenience, we are treating WA No. 715/07, which is one of the three Writ Appeals filed against the Judgment in the said Writ Petition, as

the main case for the purpose of referring to the exhibits.

2. The appellant in WA No. 715/07 is the third respondent and the first respondent is the petitioner in Writ Petition (C) No. 17897/06. The

appellant and respondents 1 and 3 in this Writ Appeal were Selection Grade District Judges. The third respondent and the appellant were seniors

in the said cadre, when compared to the 1st respondent. The post of Selection Grade District and Sessions Judge is one, borne on the Kerala

State Higher Judicial Service. The said service consists of two categories, namely, District and Sessions Judge, including Additional District and

Sessions Judge, forming Category (2) and Selection Grade District and Sessions Judge, forming Category (1). The method of appointment to the

post of Selection Grade District and Sessions Judge is by promotion from Category (2), made on the basis of merit and ability. Seniority is

considered only where merit and ability are approximately equal.

3. The Shetty Commission, appointed to make suggestions for improvement of the service conditions of the Judicial Officers, suggested creation of

a Super-time Scale for granting further promotion to Selection Grade District and Sessions Judges. The Kerala Government, accepting the

suggestions made by the Shetty Commission, issued GO (MS) No. 231/2001/Home dated 12.12.2001, providing inter alia, for creation of Super-

time Scale posts. As per the said GO, 10% of the Selection Grade District Judges, who have put in not less than three years" service in the

selection grade, will be allowed the super time scale. The promotion is to be made, based on merit-cum-seniority basis. It means, merit will be the

guiding factor and seniority will be considered, when merit is more or less equal. The said GO is produced as Ext.P2 in the Writ Petition. Based on

that GO, by Ext.P3 order of the High Court dated 01.09.2004, seven posts were created as Super Time Scale posts and Officers were promoted

to the vacancies that arose in those seven posts, from time to time, from 01.01.1996. By the said order, the third respondent was superseded by

five of his juniors from Sri. M.N. Krishnan to Sri. K. Chenthamarakshan, who were promoted to the Super-time Scale, between 30.04.2003 and

01.06.2004. Later, by Ext.P4 order dated 02.11.2004, the first respondent/petitioner, along with other petitioners in the connected two Writ

Petitions, was promoted to the Super Time Scale with effect from 13.10.2004, 14.10.2004 and 28.10.2004 respectively. The case of the

appellant and the third respondent herein, was also considered for placement in the Super Time Scale, but their case was deferred to be

considered on a later date.

4. The appellant and the third respondent were not promoted, apparently, for the reason of some adverse remarks in their confidential reports.

Later, the High Court, suo motu reconsidered the matter and by Ext.P6 order dated 06.01.2006, decided to promote the third respondent herein

as Super Time Scale District Judge, with effect from 01.05.2003 and the appellant, with effect from 01.09.2004. The result of the said promotion

was that they became seniors to the writ petitioner and also the petitioners in the connected Writ Petitions in the grade of Super Time Scale. The

1st respondent/petitioner submitted Ext.P7 representation dated 30.01.2006 before the High Court, objecting to the retrospectivity given to the

promotion of the third respondent and the appellant, and also praying to restore his seniority in the post of Super Time Scale District Judge. Their

respective dates of promotion as per Ext.P6 are 27.10.2004, 28.10.2004 and 31.10.2004. The petitioners in the connected Writ Petitions have

also filed similar representations. Those representations were considered together and rejected by the High Court by Ext.P8 order dated

19.06.2006.

5. The Writ Petition was filed, challenging Ext.P6 to the extent it promoted the third respondent and the appellant to the post of Super Time Scale

District Judge with retrospective effect and also Ext.P8. The first respondent/petitioner also sought a declaration to the effect that the promotions

granted to them shall not affect his seniority in the post of Super Time Scale District Judge. He contended that his seniority in the post of Super

Time Scale District Judge with effect from 13.10.2004 cannot be disturbed by Ext.P6. The appellant and the third respondent were superseded by

Exts.P3 and P4 respectively. Those orders have become final. He has a vested right of seniority over the appellant and the third respondent. The

same is adversely affected by Ext.P6, which is impermissible. The seniors were superseded because of the adverse remarks in their confidential

reports and those orders have become final. Having chosen not to challenge those orders, they are not entitled to get restoration of seniority now.

One of the two applications of the appellant for expunging the adverse remarks was dismissed also. Therefore, the impugned orders are

unsustainable, it is contended.

6. The High Court has filed a detailed counter affidavit in the Writ Petition, stating that the case of the appellant and the third respondent herein was

deferred, only owing to certain adverse remarks in their confidential reports. Those adverse remarks were subsequently expunged and therefore,

they were considered and promoted, taking into account, their up-to-date confidential reports also. Reference is made to Exts.R1(e) dated

14.06.2004, which is the minutes of the Administrative Committee, resolving to defer the case of the third respondent herein and also Ext.R1(f),

which is the minutes of the Administrative Committee dated 09.08.2004, deciding to defer the case of the appellant herein. The High Court fully

supports the impugned orders by saying that the incumbents whose case was reviewed and promotion was granted, are entitled to get restoration

of seniority. The appellant and the third respondent have filed separate counter affidavits, supporting the impugned orders. Their contentions were

more or less identical to the contentions of the High Court. The learned Single Judge, after hearing both sides, allowed the Writ Petition and

quashed Exts.P6 and P8 orders of the High Court, to the extent, they gave retrospective promotion to the appellant and the third respondent

herein. The learned Single Judge found that the appellant and the third respondent herein, were superseded and the petitioners, who were their

juniors, were promoted. Subsequently, the seniors were promoted, taking into account, the up-to-date confidential reports, which means, they

became eligible for promotion only on considering the confidential reports for the subsequent period also. Therefore, they are liable to be

promoted only prospectively. The learned Single Judge also found that the mere expunging of the adverse remarks will not make their confidential

reports meritorious. So, it was held that even if the adverse remarks are expunged, they cannot be treated as meritorious candidates. So, the High

Court was directed to issue fresh orders, giving promotion to them prospectively from 09.11.2005.

7. This Writ Appeal is filed, challenging the said Judgment, raising mainly the following grounds:

1. Placement in the Super Time Scale is only an up-gradation. There is no such category like Super Time Scale District Judge in the Special Rules.

So the seniority in the lower category will govern the seniority in the upgraded category also.

2. The adverse remarks relate to the period 01.09.2003 to 31.1.2004, which was written by the Controlling Judge on 14.06.2004. Even before

that, he became eligible and was liable to be promoted, it is submitted.

3. In view of the original seniority in the cadre of Selection Grade District Judge, the retrospective effect given to his promotion is valid.

4. The promotion was granted with the approval of the Full Court and therefore, the same should not have been lightly interfered with by the

learned Single Judge." On the above grounds, the appellant prayed for allowing the appeal.

8. We heard the learned Counsel Mr. A.X. Varghese for the appellant, learned Counsel Mr. Bechu Kurian Thomas for the 1st respondent,

learned Senior Counsel Mr. O.V. Radhakrishnan for the second respondent and the learned Counsel Mr. K. Ramachandran for the third

respondent. We also heard learned Counsel M/s. P. Ravindran and Ramesh Babu, appearing for the writ petitioners in the connected Writ

Petitions, who are party respondents in the connected Writ Appeals. The learned Counsel for the appellant Mr. A.X. Varghese reiterated the

aforementioned contentions of the petitioner. The learned Senior Counsel Mr. O.V. Radhakrishnan, who appeared for the High Court made the

following submissions:

When the adverse remarks in the confidential reports of the appellant and the third respondent were expunged, they were considered for

promotion and rightly given promotion with retrospective effect. Their case for promotion was only deferred and when it was subsequently

granted, the same was given with retrospective effect. The learned Senior Counsel also submitted that once promotion is granted to the appellant

and the third respondent retrospectively, the consequential proceedings which were issued in the meantime in favour of the juniors will have to be

modified accordingly. There is nothing wrong with the modification of their dates of promotion. Since the writ petitioners did not challenge the

promotion granted to their seniors, they cannot challenge the retrospectivity given to it alone. The retrospectivity is the natural consequence of the

promotion granted to them. The finding of the learned Single Judge that even after the removal of the adverse remarks, the appellant and the third

respondent did not qualify for promotion is unsustainable, as the learned Single Judge has not made comparative evaluation of the confidential

reports of the writ petitioners. Further, this Court cannot substitute its decision for the decision of the Selection Committee. The decisions relied on

by the learned Single Judge were not applicable to the facts of the case, it is submitted. The learned Counsel Sri. K. Ramachandran, who

appeared for the third respondent also supported the contentions of the appellant and also of the Senior Counsel, who appeared for the High

Court. Learned Counsel M/s. P. Ravindran, Ramesh Babu and Bechu Kurian Thomas, fully supported the findings and conclusions of the learned

Single Judge. According to them, the appellant and the third respondent were actually superseded and they have chosen not to challenge those

orders. So, the said orders gained finality. Further, they were given promotion now, taking into account, the up-to-date confidential reports also.

So, they can be promoted only prospectively. The adverse remarks in the confidential reports of the appellant for most of the relevant period are

remaining as such. Therefore, the very promotion given to the appellant is unjustified. At any rate, the retrospectivity given to the promotion is

unwarranted, it is submitted.

9. From the side of the appellant and the third respondent, the following decisions were cited:

D.K. Agarwal Vs. High Court of Judicature at Allahabad, , Gunendra Prasad Sengupta Vs. Union of India (UOI) and Others, , Mahender Singh

Vs. Union of India (UOI) and Another, and Radha v. State of Kerala 2005(4) KLT SN 17. The learned Counsel for the High Court relied on the

following decisions:

Badrinath Vs. Government of Tamil Nadu and Others, , Union of India and Others Vs. Lt. Gen. Rajendra Singh Kadyan and Another, , Syed

T.A. Naqshbandi and Others Vs. State of Jammu and Kashmir and Others, , Bishwanath Prasad Singh v. State of Bihar (2001) 2 SCC 305 &

Karam Pal and Others Vs. Union of India (UOI) and Others, .

10. On behalf of the writ petitioners, the decisions relied on are the following:

Mir Ghulam Hussan and Others Vs. The Union of India (UOI) and Others, , Chairman, Railway Board and others Vs. C.R. Rangadhamaiah and

others, , Union of India and Others Vs. Lt. Gen. Rajendra Singh Kadyan and Another, , Harigovind Yadav v. Rewa Sidhi Gramin Bank (2006)

SCC 1277, K. Samantaray Vs. National Insurance Co. Ltd., , B.V. Sivaiah and Others etc. Vs. K. Addankl Babu and Others etc., , Sankar Deb

Acharya and Others Vs. Biswanath Chakraborty and Others, .

11. The strength of Super Time Scale Posts is limited to seven posts. After the initial placement of seven Officers, other Officers were promoted as

and when vacancies arose in the said seven posts, as a result of elevation to the High Court, retirement etc. So, an incumbent can be promoted

regularly, only when a substantive vacancy arises, provided he is qualified and suitable at the relevant time. So, the claim of the appellant that once

he is promoted, his placement in that cadre will relate back to the original date, when his turn arose, cannot be accepted. When retrospective effect

is given to a promotion, the incumbent is entitled to get monetary benefits from the said date. One cannot claim retrospective effect automatically

on up-gradation with effect from the date, his turn arose and receive public money as salary. If he is not eligible on that date, he can be assigned

date of promotion only with effect from the date on which he became entitled to be promoted, going by the criteria of merit and seniority. It is not

clear from the records produced, the annual confidential reports of which period were taken into account. As per the provisions of the Rule 28(b)

(i)(4) of Part II KS & SSR, the confidential reports of Officers for at least the preceding three years have to be considered by the DPC. In this

case, the learned Senior Counsel appearing for the High Court submitted that the confidential reports for the preceding three years were relied on

for ordering promotion, but, it is not clear, whether they were preceding three calendar years or preceding three years with reference to the date of

effect of the promotion. Going by the provisions in Rule 28 of KS & SSR, the confidential reports must be made up-to-date, by the 30th June of

every year. By the end of that year, the DPC list for the next year should be published. The relevant provisions in this regard are Rule 28(b)(i)(4)

(a), (b) and (d). The above provisions are quoted below for convenient reference:

(a) Select lists shall be prepared during a calendar year for the vacancies estimated to arise in the next calendar year ;

(b) During the first six months of the year, action shall be taken to make all the Confidential Reports up-to-date, adverse remarks communicated

and orders for expunging such remarks issued wherever necessary. Simultaneously, seniority lists shall also be made up-to-date and probation of

officers in the field of choice declared. Confidential Reports and Seniority lists shall be made up-to-date before 30th June....

(d) During September/October, the Departmental Promotion Committees will be convened and select lists prepared which will be notified before

30th November and in any case not later than December 31. If any officer becomes qualified after the preparation of the select list, but, before the

occurrence of the vacancy, the Departmental Promotion Committee shall meet subsequently and his name shall be considered for inclusion in the

select list.

Going by the above Rule, in the case of the appellant, who was promoted during the year 2004, his confidential reports upto 30.06.2003 can be

reckoned. Similarly, in the case of the third respondent, who was promoted with effect from 01.05.2003, his confidential reports upto 30.06.2002

can be reckoned. But, there is yet another overriding principle that the claim of an incumbent for promotion has to be considered with reference to

the conditions on the date of occurrence of the vacancy. The said salutary principle finds statutory expression in the last part of Rule 28(b)(i)(4)(d),

which is quoted above. The said principle is again reiterated in Rule 28(b)(i)(10), which reads as follows:

The claims of a person who qualifies himself for a post, after the select list in respect of that post has been prepared but before the date of

occurrence of the vacancy in the higher post shall not be over looked.

In certain cases, the claim for promotion will be considered long after the occurrence of vacancy. In such cases, Rule 28(b)(iA) deals with the

assessment of qualifications which includes the rating in the confidential reports. Rule 28(b)(iA) reads as follows:

Preparation of select list subsequent to the occurrence of vacancy : When a select list is prepared subsequent to the occurrence of a vacancy, no

person who was not qualified for inclusion in the select list at the time of occurrence of the vacancy shall be included in the select list for

appointment against that vacancy.

In this case, the High Court has the advantage of evaluating the eligibility of the third respondent and the appellant long after the date of occurrence

of the vacancy. So, their confidential reports for a period of three years immediately preceding the dates on which their turn arose, can be

considered. The provisions of the KS & SSR are applicable to promotions in the Kerala Higher Judicial Service. It is a service listed as Item 15A

in the First Schedule to the KCS (CC & A) Rules. Rule 1 of Part II of the KS & SSR, which contains the General Rules, would show that it will

apply to members of all services classified under the First Schedule mentioned above and also to those posts, not coming under a particular

service, included in the First Schedule. Rule 1 of Part II KS & SSR reads as follows:

The rules in this Part shall apply to all State and Subordinate Services and to the holders of all posts, whether temporary or permanent in any such

service, appointed thereto before, or after the date on which these rules come into force as provided in Sub-rule (b) of rule 1 in Part I except to

the extent otherwise expressly provided (a) by or under any law for the time being in force or (b) in respect of any member of such service by a

contract or agreement subsisting between such member and the State Government. Provided that the rules in this Part shall also be applicable to

holders of all posts in Government Service even though the posts they hold are not classified as coming under a particular service by including in

Schedule I or Schedule II of the Kerala Civil Services (Classification, Control and Appeal) Rules 1960.

The Special Rules for every service under the State are treated as coming under Part III KS & SSR. To put it precisely, Part I KS & SSR

contains the definitions, Part II contains the General Rules and Part III contains the Special Rules. The Special Rules are defined in Rule 2(16) of

Part I KS & SSR, which reads as follows:

Special Rules shall mean the rules in Part III applicable to each service or class of service"". Rule 2 of Part II General Rules deals with the relation

between the Special Rules and the General Rules. The said Rule reads as follows : ""Relation to the Special Rules : If any provision in the general

rules contained in the Part is repugnant to a provision in the Special Rules applicable to any particular service contained in Part III, the latter shall,

in respect of that service, prevail over the provision in the general rules in this Part.

The above provisions are mentioned only to show that Rule 28 of Part II KS & SSR applies to promotion to the post of Super-time Scale District

and Sessions Judge, even if that post is not included in the Special Rules. By executive orders, the Government can create a new post and lay

down the qualifications and method of appointment for that post validly. Promotion to such a post shall also be governed by Rule 28. So, the first

ground taken by the appellant, which is noticed in paragraph 7 of this Judgment, cannot be upheld.

12. If an incumbent is superseded or his case is not considered or deferred for the reason that the confidential reports are adverse in a particular

year and those remarks are expunged subsequently, the incumbent is entitled to get promotion with retrospective effect. The contention advanced

on behalf of the writ petitioners that those who were promoted in the meantime cannot be touched, is plainly untenable. If a person is wrongly or

illegally superseded or not considered and the said illegality is set right, the incumbent must be conceded right to get the promotion with

retrospective effect. The provisions of Rule 28 of the KS & SSR concerning promotion, support this view. Further, Rule 29 of Part II KS & SSR



also confers power on the Government to suo motu revise any promotion. The said Rule 29 reads as follows:

Revision of orders of appointment to selection posts - Subject to the provisions of Note (iiia) of Sub-clause (7) and para (a) of Sub-clause (8) of

Clause (i) of Sub-rule (b) of Rule 28, an order appointing a member of a service or class to a selection category or grade by promotion or by

transfer may be revised by the State Government. Such revision may be made by the State Government either suo motu at any time or on a

petition submitted by any aggrieved member within six months from the date of passing the order:

Provided that the said period of six months may be extended by the State Government if sufficient cause is shown for the delay in the submission of

the petition.

The above quoted Rule, by virtue of Rule 7 of the Special Rules and also for the reasons mentioned earlier, mutatis mutandis applies in this case

also. So, the High Court can suo motu revise any promotion at any time. Therefore, the claim of the appellant that he is entitled to get automatic

retrospective effect for his promotion and the rival contention of the 1st respondent that an incumbent, who is superseded once can never get

retrospective promotion cannot be accepted. So, we hold that the High Court has power to review the promotions and order promotions with

retrospective effect in appropriate cases.

13. So, the point that arises for decision is whether the retrospective effect given to the promotion of the appellant and the third respondent is

justified on the facts of the case and whether the interference made by the learned Single Judge with the same should be upheld or not. The

technical contention raised by the learned Senior Counsel for the High Court that the writ petitioners should have challenged the promotion in toto,

otherwise their challenge to the retrospectivity alone should be repelled is plainly untenable. Even if an order is bad, one need challenge it only to

the extent it is adverse to him.

14. The dates of promotion to the posts of Selection Grade District and Sessions Judge and Super Time Scale of the parties concerned as per

Ext.P6 are given below for convenient reference:

Name Selection Grade Super Time Scale

S. Sainudeen (3rd respondent) 15/03/99 01/05/03

M.L. Joseph (Appellant) 15/03/99 01/09/04

Thomas. P. Joseph (First respondent ) 27/10/04 03/07/00

P. Bhavdasan 12/07/00 28/10/04

S.S. Satheesachandran 12/07/00 31/10/04

The promotion given to the third respondent in the ""short duration vacancy"" from 09.09.2002 to 03.10.2002 is ignored, as no regular promotion

can be given to such a short duration vacancy, but only to substantive vacancies. See the definition of vacancy of short duration in Note (2) to Rule

5 of Part II KS & SSR, which provides that leave vacancies and vacancies of less than 6 months" duration shall be treated as vacancies of short

duration.

15. Going by the materials produced in this Writ Appeal, we do not find that the Administrative Committee has given any reason for giving

retrospectivity to the promotion of the appellant and the third respondent. From the counter affidavit filed by the High Court, it is seen that the

confidential reports upto the date of Ext.P6 order were also taken into account for ordering promotion. It means, the incumbents were promoted,

not taking into account, the confidential reports for three years immediately preceding the date when their turn arose as per their seniority position

in the lower post. The learned Senior Counsel appearing for the High Court has filed a statement, containing the details of the confidential reports

for the relevant periods. For convenient reference, the same is extracted below:

1) Thomas P. Joseph was promoted as Super-time Scale District Judge with effect from 27.10.2004.

Confidential Reports of Thomas. P. Joseph for the relevant period (3 years)

01.01.2001 to 17.05.2001 : Good

19.05.2001 to 30.11.2001 : Good

10.12.2001 to 31.12.2001 : Good

01.01.2001 to 31.12.2002 : Good

01.01.2003 to 31.08.2003 : Very efficient

01.09.2003 to 31.12.2003 : Good

01.01.2004 to 06.05.2004 : Very Good

2) P. Bhavadasan was promoted as Super-time scale District Judge with effect from 28.10.2004.

Confidential Reports of P. Bhavadasan for the relevant period (3 years)

06.09.2000 to 02.07.2001 : Good

03.07.2001 to 05.09.2001 : Satisfactory

06.09.2001 to 30.09.2002 : Good

10.10.1002 to 31.12.2002 : Good

01.01.2003 to 31.08.2003 : Good

01.09.2003 to 31.12.2003 : Good

01.01.2004 to 03.05.2004 : Good

04.05.2004 to 30.10.2004 : Good

3) S.S. Satheesachandran was promoted as Super -time Scale District Judge with effect from 28.10.2004.

Confidential Reports of S.S. Satheesachandran for the relevant period (3 years)

01.01.2001 to 31.12.2001 : Good

01.01.2002 to 02.05.2002 : Good

31.05.2002 to 31.12.2002 : Very efficient

01.01.2003 to 31.08.2003 : Very Good

01.09.2003 to 31.12.2003 : Good

01.01.2004 to 31.12.2004 : Very Good

4) S. Sainudheen was promoted as Super-time Scale District Judge with effect from 09.09.2002.

Confidential Report of Sri. S. Sainudeen for the relevant period (3 years)

01.01.1999 to 31.12.1999 : Good

01.01.2000 to 23.11.2000 : Good

24.11.2000 to 19.02.2001 : Average

(should

show more

application)

20.02.2001 to 31.12.2001 : Good

01.01.2002 to 31.10.2002 : Good

Confidential Report of Sri. S. Sainudeen for the subsequent period (not relevant)

01.01.2003 to 31.12.2003 : Adverse

entry

26.03.2004 : Adverse entry

communicated

27.04.2004 : Representation

to expunge the

adverse entry

01.01.2004 to 14.05.2004 : Not satisfactory

17.05.2004 : Adverse Entry

communicated

02.06.2004 : Representation

to expunge the

adverse entry

05.07.2005 : Adverse

remarks for the

period from

01.01.2003

to 31.12.2003

were expunged

as per order

dated 5.7.2005.

5) M.L. Joseph Francis was promoted as Super-time Scale District Judge with effect from 19.09.2004.

Confidential Reports of Sri. M.L. Joseph Francis for the relevant period (3 years)

01.01.2001 to 31.12.2001 : Satisfactory

02.04.2002 : Entry communicated

01.01.2002 to 31.12.2002 : Satisfactory

01.01.2003 to 11.04.2003 : Just satisfactory

12.04.2003 to 31.08.2003 : Good

01.09.2003 to 31.12.2003 : Not satisfactory

(adverse entry)

24.06.2004 : Adverse entry

communicated

02.07.2004 : Representation

to expunge

Adverse entry

03.08.2004 : Representation

to expunge

adverse entry

rejected by

order dated

3.8.2004

20.08.2004 : Rejection order

communicated

01.01.2004 to 11.05.2004 : Not satisfactory

(adverse entry)

04.12.2004 : Adverse entry

communicated

19.05.2005 : Representation to

expunge adverse

entry

01.06.2005 : Adverse remarks for

the period from

01.01.2004 to

11.05.2004

were expunged as per

order dt.1.6.2005.

The confidential reports in many cases are not written for a particular year. One year is split into more than one part. The date of effect of

promotion of the third respondent is 01.05.2003. So, his confidential reports for the period from 01.05.2000 to 30.04.2003 can be reckoned, as

the claim for promotion was considered long after the above period was over. Going by the confidential reports, the ratings for the above period

disclosed are in the following manner:

01.05.2000 to 23.11.2000 - about 7 months : Good

24.11.2000 to 19.02.2001 - 3 months : Average

20.02.2001 to 31.10.2002 - 19 months : Good

01.11.2002 to 31.12.2002 - 2 months : No comments by the

Controlling Judge

01.01.2003 to 31.05.2003 - 5 months : Adverse entry

later deleted

Out of the total period of 36 months, the third respondent has thus, good rating for a period of 26 months. Out of the balance 10 months, the rating

for three months is average. For two months, there is no rating. The period for which the adverse entry is deleted, cannot be treated as a period

with good rating. Whether it should be treated as a period with nil rating or some other rating, is a matter for the Administrative Committee, to

decide.

16. The date of effect of promotion of the appellant is 31.08.2004. So, the confidential reports for the period from 01.09.2001 to 31.08.2004

have to be taken into account. The ratings disclosed by the annual confidential reports, going by the statement filed by the High Court, are given

below:

01.09.2001 to 31.12.2002 16 months : Satisfactory

01.01.2003 to 11.04.2003 About 3 months : Just

satisfactory

12.04.2003 to 31.08.2003 5 months : Good

01.09.2003 to 31.12.2003 4 months : Not

satisfactory

01.01.2004 to 11.05.2004 4 months : Adverse, but

deleted

12.05.2004 to 31.08.2004 4 months : Good

Out of the 36 months, the appellant has got good rating only for about 9 months. 19 months" rating is only "satisfactory". For 4 months, it is

adverse and for another 4 months, the adverse entry is deleted. Whether that period should be treated as favourable period or adverse period, is a

matter to be decided by the Administrative Committee. Going by the state of affairs revealed by the annual confidential reports and also in

principle, the view taken by the learned Single Judge that on removal of the adverse entries, the incumbents will not become meritorious

candidates, has to be upheld. The Administrative Committee, it appears, has proceeded on the footing that once the adverse remarks are

removed, they are entitled to get promotion automatically with effect from the date their turn arose. With respect, we would point out that the

Committee should have independently evaluated the merits of the appellant and the third respondent vis-a-vis the other claimants, in the light of the

principles governing promotion, based on merit-cum-seniority. The Apex Court in B.V. Sivaiah and Others etc. Vs. K. Addankl Babu and Others

etc., , has explained the said concept in the following words.

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 (UOI) Vs. Mohan Lal Capoor and Others, has said: (SCC p.856 para 37).

For inclusion in the list, merit and suitability in all respects should be 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."

The Apex Court has also held in Chandra Gupta, I.F.S. Vs. The Secretary, Govt. of India, Ministry of Environment and Forests and others, that

on expunging the adverse remarks, restoration of promotion is not automatic. The relevant portion of the said decision reads as follows:

No doubt, a special review is provided for under Clause III(vi) of the Government's order dated 31.01.1985. That reads as follows:

"Special review may be done in cases where the adverse remarks in the officers' annual confidential reports are expunged subsequently as a result

of their representations."

On this score, we are unable to hold that on the expunction of adverse remarks and consequential promotion, the appellant would date back to the

date when it was due. First of all, the method of selection is:

Selection should be made on merit with due regard to seniority in terms of Rule 3(3) of the Indian Forest Service (Pay) Rules, 1968.

That Rule reads as follows:

3. Time scale of pay - (1) \* \* \*

(2) \* \* \*

(3) Appointment to the Selection Grade and to posts carrying pay above the time scale of pay in the Indian Forest Service shall be made by

selection on merit with due regard to seniority.

Therefore, what is essential is merit and not mere seniority. This Court in Sant Ram Sharma Vs. State of Rajasthan and Another, has stated as

follows: (SCR p.118)

...it is a well-established rule that promotion to selection grades or selection posts is to be based primarily on merit and not on seniority alone. The

principle is that when the claims of officers to selection posts are under consideration, seniority should not be regarded except where the merit of the

officers is judged to be equal and no other criterion is therefore available.

Again, this Court in State of Mysore and Another Vs. Syed Mahmood and Others, held thus:

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.

Therefore, even assuming the best in favour of the appellant as a consequence of expunction of adverse remarks, the appellant's case was liable to

be reviewed by the Departmental Promotion Committee for the post of Chief Conservator of Forests as on the date when Respondents 3 to 5

were promoted it could be done, provided the appellant was found suitable for promotion on the basis of record. Our attention has not been

drawn to any record from which conclusion could be arrived at that after the expunction of adverse remarks, the record of service of the appellant

was more meritorious than that of Respondents 3 to 5.

The learned Counsel for the appellant strongly relies on Lakhi Ram Vs. State of Haryana and Others, . This Court at pages 126-127 held thus

(SCC para 2).

There is no dispute that during the pendency of this appeal, the appellant's representation against the adverse entries has been allowed and these

entries have been expunged from his service record. Since the adverse entries were expunged, the State Government by its order dated

24.01.1991 granted Selection Grade to the appellant with effect from the date he takes over charge. We fail to appreciate the view taken by the

State Government. Once the adverse entries awarded to the appellant were expunged, the appellant is entitled to Selection Grade with effect from

1.1.1986 the date on which he was eligible for grant of Selection Grade. We, accordingly, allow the appeal, set aside the order of the Central

Administrative Tribunal and modify the order of the State Government dated 24.01.1991 and direct that the appellant shall be treated in Selection

Grade with effect from 1.1.1986 and he will be entitled to all other consequential benefits with effect from that date. As regards appellant's further

promotion, he will be considered for promotion in accordance with Rules.

What requires to be carefully noted is eligibility for promotion is one thing while actual promotion is a different thing. Even in this ruling, promotion

in accordance with the rules alone was what was directed. Even assuming on the strength of this ruling, the appellant is entitled to promotion on the

date when he became eligible for promotion, but for these adverse entries, a factual finding requires to be rendered on the following aspects:

1. Whether the adverse entries for 1980-81 and 1981-82 were actually communicated ?

2. After expunction of adverse remarks, whether there was a comparative estimate of the merits by the Departmental Promotion Committee ?

Neither the records produced nor the averments in the counter affidavit would show that there was a comparative evaluation of the merits of the

candidates with reference to the date of occurrence of the vacancy. So, the decision to promote the appellant and the third respondent with

retrospective effect is vitiated by omission to take into account, relevant facts. There is manifest failure in addressing relevant matters. So, the



decision is unreasonable in the ""Wednesbury"" sense and therefore, ultra vires and unauthorised.

17. We feel that the various other decisions cited by both sides are not strictly relevant to the facts of this case. So, we are not referring to them in

detail. But, we feel that the decisions cited by the learned Counsel for the third respondent to contend that once the adverse entries are removed,

promotion is automatic, have to be mentioned. The decision in R.K. Singh v. State of UP , is a short order, which says that if a person is denied

selection grade, as a result of the adverse entries in his confidential reports, he is entitled to get retrospective promotion on expunging them. The

said decision, apparently, does not deal with a promotion governed by merit- cum-seniority. Therefore, that decision cannot have any application

to the facts of this case. The third respondent also relied on a decision of the learned Single Judge of this Court in Radha v. State of Kerala 2005

(4) KLT SN 17 (Case No. 20). The said decision also says, the promotion to the selection grade is automatic on expunging the adverse remarks.

But, what are the Rules governing that promotion, are not evident from the decision. As held by the Apex Court in Chandra Gupta, I.F.S. Vs. The

Secretary, Govt. of India, Ministry of Environment and Forests and others, , where the promotion is to be ordered on the basis of merit, the

incumbent cannot get automatic promotion on expunging the adverse remarks. In the result, the Judgment of the learned Single Judge, quashing the

retrospectivity given to the promotion of the appellant and the third respondent herein is upheld. But, the direction given by the learned Single

Judge to the High Court to issue fresh proceedings in the place of Ext.P6, granting promotion to the appellant and the 3rd respondent as Super-

time Scale District Judges, prospectively from 09.11.2005 is vacated and the High Court is given liberty to re-evaluate the merits of the appellant

and the third respondent, comparing the same with the merit of others in the field of choice and pass fresh orders as to with effect from which date,

they can be given promotion. Needless to say, the promotion of the writ petitioners have become final long ago. The only modification permissible

is the date of effect of their promotion and that too, for giving retrospective effect to the promotion of the appellant and the third respondent, if they

are found eligible for promotion with retrospective effect, on evaluation of their confidential reports and comparing the same with that of the writ

petitioners and others in the field of choice. Until such exercise is completed, the writ petitioners shall be treated as seniors to the appellant and the

third respondent herein in the super time scale post.

18. The learned Counsel for the High Court pointed out that the learned Single Judge issued certain directions as to how the selection to the

Super- time Scale should be made. They are unwarranted, it is submitted. The suggestions made by the learned Single Judge are well meaning

suggestions, meant to improve the process of selection to the Super-time Scale. They need not be taken as binding directions to be implemented,

when next time the question of placement in the Super-time Scale is taken up for consideration. If the Administrative Committee proposes to

modify the method of selection, the suggestions made by the learned Single Judge deserve consideration. In other words, they need not be treated

as directions to be implemented mandatorily.

The Writ Appeals are disposed of as above.