



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.11374 OF 2019**

Smt. Shweta w/o Shivaji Takalgavankar,
Age: 57 years, Occu. Service (as Superintendent,
Family Court, Aurangabad),
R/o: Row House No. D-23, Disha Nabhangan,
N-2, Cidco, Sant Tukoba Nagar,
Mukundwadi, Aurangabad.

..Petitioner

Versus

1. The State of Maharashtra
Through the Principal Secretary,
Law & Judiciary Department,
Mantralaya, Mumbai – 32.
2. The Registrar General,
High Court of Judicature at Bombay,
Fort, Mumbai.
3. The Registrar [Administration],
High Court of Judicature at Bombay,
Bench at Aurangabad, Aurangabad.
4. The Principal Judge,
Family Court, Adalat Road,
Aurangabad.
5. Smt. Asha w/o Bhaskarrao Bagul,
Registrar, Family Court,
Adalat Road, Aurangabad.

..Respondents

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Mr. A. S. Deshmukh, Advocate for the Petitioner.
Mrs. P. R. Bharaswadkar, AGP for Respondent No.1.
Mr. C. K. Shinde, Advocate for Respondent Nos.2 to 4.
Mr. A. P. Ghule Patil, Advocate for Respondent No.5.

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**CORAM : SMT. VIBHA KANKANWADI AND
S. G. CHAPALGAONKAR, JJ.**

Reserved on : 15th OCTOBER, 2024.
Pronounced On : 24th OCTOBER, 2024.

JUDGMENT (Per S. G. Chapalgaonkar, J):-

1. Rule. Rule made returnable forthwith. With the consent of parties, matter is taken up for final hearing at the stage of admission.

2. The petitioner has approached this Court under Article 226 of the Constitution of India impugning promotion order dated 26.07.2019 issued by the Judge, Family Court, Aurangabad thereby promoting respondent no.5 on the post of Registrar, Family Court, Aurangabad and seeks issuance of Writ of Mandamus directing to promote petitioner as Registrar of Family Court at Aurangabad and further grant of consequential service benefits to the petitioner to which she would become entitle in view of her promotion on the post of Registrar of Family Court at Aurangabad w.e.f. 26.07.2019.

3. The petitioner contends that on 30.09.1985 she entered into service on the post of Junior Clerk on the establishment of District Court, Aurangabad. On 10.02.1993, she was absorbed on establishment of Family Court, Aurangabad. On 12.07.2017 she earned promotion on the post of Superintendent with retrospective effected from 17.01.2017. The respondent no.5 was promoted on the post of Superintendent on 07.09.2018. As such, she is junior to the petitioner in the cadre of Superintendent.

4. On 05.07.2019, the meeting of the Advisory Committee was held for recommending suitable candidate for promotion on the post of Registrar of Family Court at Aurangabad. The petitioner, respondent no.5 and Smt. S. R. Dani were in the zone of consideration. The Advisory Committee concluded that petitioner, respondent no.5 and Smt. S. R. Dani are eligible for recommendation in chronological order of “most eligible candidate”, ignoring the seniority of the petitioner and mandate of Rule 3(a) of the Registrar of the Family Courts (Recruitment) Rules, 1995 (for short ‘Rules of 1995’). Consequently, name of respondent no.5 is considered for promotion in supersession of petitioner’s claim.

5. The contentions in Writ Petition have been refuted by affidavit-in-reply filed on behalf of respondent nos.2 to 4, thereby justifying promotion of respondent no.5 on the post of Registrar, particularly giving reference to service record, efficiency and merit of the candidate *inter se*. Admittedly, relaxation in eligibility criteria of three year service in feeder cadre was granted by High Court vide letter dated 26.06.2019 to all the three candidates including petitioner and respondent no.5. It is contended that seniority is not sole criteria. The suitability of the candidate has to be assessed as per fitness i.e. overall performance and the sincerity in discharge of the duties on the basis of the service record. The reference is made to paragraph 580 of the Civil Manual that provides for consideration of service record, confidential reports, leave and punctuality record, special reports and the abilities of the employees within the consideration zone. The Advisory Board has considered aforesaid factors and recommended name of respondent no.5 for promotion to the post of Registrar. It is also brought on record that petitioner as well as respondent no.5 stood retired voluntarily during pendency of this petition. As such, petition become infructuous.

6. Mr. Deshmukh, learned Advocate appearing for the petitioner submits that although petitioner and respondent no.5 retired from the service, the prayer clause (C) in petition for grant of deemed date of promotion and consequential benefits to the petitioner would survive in case impugned order is quashed and set aside holding entitlement of the petitioner. He would urge that Registrar of the Family Courts (Recruitment) Rules, 1995 framed under Article 309 of the Constitution of India regulates recruitment to the post of Registrar “Group B” in the Family Courts within State of Maharashtra. The Rule 3 of the Rules of 1995 deals with appointment to the post of Registrar in the Family

Court. Sub-clause (a) of Rule 3 of the Rules of 1995 prescribes for promotion of the suitable person on the basis of “seniority subject to fitness” from amongst the persons holding the posts of Deputy Registrars and Superintendents on the establishment of the Family Courts. Mr. Deshmukh would submit that the language of Sub-clause (a) of Rule 3 would depict that seniority is dominant consideration for promotion. However, respondent no.5 has been appointed in supersession of the petitioner on erroneous interpretation of Rules. In support of his contentions, he relies upon observations of the Supreme Court of India in case of ***Haryana State Warehousing Corporation Vs. Jagat Ram and Another***¹.

7. Per contra, Mr. Shinde, learned Advocate appearing for respondent nos.2 to 4 relying upon the contents of the affidavit-in-reply submits that service record of the petitioner was not comparable with respondent no.5. The general assessment in her confidential report for last five years shows that she was mostly rated “Average” and for the year 2015-2016 she was rated “Below Average”. On the other hand, respondent no.5 was rated “Good” or “Very Good”. Further leave record of the petitioner was also not satisfactory. Mr. Shinde would place his reliance on the judgments of the Division Bench of this Court in cases of ***Prakash Jagannath Mane Vs. Honble Registrar General High Court of Judicature at Bombay Appellate Side***² and ***Shrirang Atmaram Nikam Vs. District and Sessions Judge, Thane and Ors.***³.

8. Admittedly, recruitment/appointment on the post of Registrar of Family Court is governed by Rules of 1995 framed in exercise of powers conferred by Proviso to Article 309 of the

¹ 2011 (3) SCC 422.

² 2013 (3) All.M.R. 366.

³ 2005 (3) ALL MR 573.

Constitution of India by the Governor of Maharashtra with consultation of the High Court of Judicature at Bombay. The Rule 3(a) of the Rules of 1995 would be relevant for deciding controversy involved in the present matter.

9. **Rule 3(a) of the Rules of 1995 reads thus:**

“3. Appointment to the post of Registrar in the Family Court shall be made by the committee either;

*a) by promotion of a **suitable** person on the basis of **seniority subject to fitness** from amongst the persons holding the posts of Deputy Registrar and Superintendent on the establishment of the Family courts, having not less the three years regular service in their respective cadres.”*

10. Careful reading of the Rule depict that promotion on the post of Registrar shall be on the basis of “seniority” subject to “fitness”. The minutes of meeting of the Advisory Committee dated 05.07.2019 depicts that petitioner, respondent no.5 and Smt. S. R. Dani were employees under zone of consideration for promotion. All the three candidates were given relaxation as regards to the qualifying criteria of three years service in the feeder cadre in pursuance of the communication dated 26.06.2019 issued by Registrar (Inspection-I), High Court, (Appellate Side), Bombay. The communication further prescribes that names of all three employees found eligible, suitable and fulfill the required qualification as per the Family Court (Recruitment) Rules, 1995 be intimated to office of Registrar.

11. The minutes of meeting further depicts that on the basis of service record of the candidates, the Committee has recommended names of the three candidates in chronological order starting from “most eligible candidate”. The name of respondent no.5 stands at serial no.1, whereas name of the petitioner stands at serial no.3. There is no dispute that amongst three candidates before the

Committee, the petitioner was senior most. However, while recommending names, the chronology was fixed on the basis of eligibility, particularly in reference to the past performance in service. It is not the case that the petitioner was ineligible or unfit for promotion. If language of Rule 3(a) of the Rules of 1995 is considered predominantly, seniority is the Rule, however, same is subject to fitness. It is not discernible from the minutes of the meeting of Advisory Committee that petitioner was found unfit for promotion. The Committee appears to have embark upon comparative assessment of service record of all three candidates, who were in the zone of consideration and fixed chronology of recommendation starting from most eligible candidate. Apparently, the criteria adopted by the Committee was inconsistent with the Rules of 1995. When the petitioner was senior most amongst three candidates, unless she is held to be unfit, she could not have been superseded on the basis of eligibility criteria adopted by Advisory Committee. It is possible to contend that respondent no.5 had overall better performance amongst three candidates, albeit, criteria for promotion under Rules of 1995 mandates consideration of seniority subject to fitness. The minutes of meeting of Advisory Committee nowhere suggests that petitioner was unfit for promotion.

12. Reliance of Mr. Deshmukh on observations of Supreme Court of India in case of ***Haryana State Warehousing Corporation Vs. Jagat Ram and Another*** (supra) appears to be most appropriate. In that case, while interpreting language of Regulation 8 of the Haryana Warehousing Corporation (Officers & Staff) Regulations, 1994, the Supreme Court observed in paragraph no.22 as under:

“22. Thus it is the settled position that the criterion of seniority-cum-merit is different from the criterion of merit and

also the criterion of merit-cum-seniority. 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. Seniority-cum-merit means that, given the minimum necessary merit required for efficiency of administration, the senior, though less meritorious, shall have priority in the matter of promotion and there is no question of a further comparative assessment of the merit of those who were found to have the minimum necessary merit required for efficiency of administration. 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 employees. 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 considered for promotion on the basis of seniority-cum-merit. The concept of "seniority-cum-merit" postulates the requirement of certain minimum merit or satisfying a benchmark previously fixed and, subject to fulfilling the said requirement, promotion is based on seniority. There is no further assessment of the comparative merits of those who fulfil such requirement of minimum merit or satisfy the benchmark previously fixed. On the other hand, the principle of "merit-cum-seniority" puts greater emphasis on merit and ability and seniority plays a less significant role. Seniority is given weightage only when merit and ability are more or less equal among the candidates considered for promotion."

13. Similarly, in paragraph no.23, last placitum states thus:

"Therefore, it is clear that even according to the Corporation, both Jagat Ram and Ram Kumar fulfilled the requirement of minimum merit and were suitable for promotion but Ram Kumar, though junior, was preferred as he was found to be more meritorious. This was obviously in violation of the principle of seniority-cum-merit. Since both Jagat Ram and Ram Kumar fulfilled the requirement of minimum merit and were found suitable for promotion and since Jagat Ram was senior to Ram Kumar, Jagat Ram was entitled to be promoted on the basis of seniority-cum-merit. Consequently, the promotion of Ram Kumar was liable to be set aside as was rightly done by the Division Bench of the High Court."

14. The aforesaid observation of the Supreme Court would clearly depict that when promotion is based on seniority-cum-merit, the minimum necessary merit is required and seniority would be given priority and there is no question of further comparative assessment of those who have minimum necessary merit. If we apply aforesaid principles of law in the present case, in light of language of Rule 3(a) of Rules of 1995, it is discernible that promotion is on the basis of seniority subject to fitness. Therefore, once candidate is found to be fit, seniority would be Rule for promotion. It is discernible from the Rule that assessment of comparative merit of the candidates need not be gone into while granting promotion on the post of Registrar.

15. Mr. Shinde, learned Advocate appearing for respondent nos.2 to 4 places his reliance on the judgment of this Court in case of ***Prakash Jagannath Mane*** (supra). The said case pertains to the promotion on the post of Registrar of District Court, which is governed by the provisions contained in paragraph 580 of the Civil Manual and Government Resolution dated 26.12.1957 as amended on 22.02.1971. This Court found that paragraph 580 of the Civil Manual alongwith Rule 3 of Appendix 'A' entitles administration of District Court to exercise discretion to fix criteria for adjudicating claim on seniority-cum-merit while giving primacy to merit as well. Evidently, observations are made in wake of fact that there is no statutory Rule operating. In present case field is governed by mandate of Rules framed under Article 309 of the Constitution of India. Mr. Shinde has further relied upon judgment of this Court in case of ***Shrirang Atmaram Nikam*** (supra), wherein the petitioner working as Bailiff was seeking time bound promotion on the basis of scheme under Government Resolution dated 28.07.2001. This Court after taking into account criteria for grant of promotional pay scale, directed ACP benefit to the petitioner

observing that only those employees, who are not entitled for regular promotion on account of not possessing qualification, experience or having a bad service record namely adverse entries would not be eligible to get the benefits of the scheme. In the case of promotion whether by selection or based on seniority-cum-fitness what is always considered is the number of posts and the zone of consideration.

16. At this stage, we deem it proper to refer certain observations of the Supreme Court of India, which deals with selection for promotion based on different criteria. The Constitutional Bench of Supreme Court of India in case of *Union of India and Others Vs. Lt. Gen. Rajendra Singh Kadyan and Another*⁴ explained criteria for selection for promotion. It is observed that selection for promotion is based on different criteria depending upon the nature of the post and requirements of the service. Such criteria fall into three categories, namely,

1. Seniority cum fitness,
2. Seniority cum merit,
3. Merit cum suitability with due regard to seniority.

Wherever fitness is stipulated as the basis of selection, it is regarded as a non-selection post to be filled on the basis of seniority subject to rejection of the unfit. Fitness means fitness in all respects. "Seniority cum merit" postulates the requirement of certain minimum merit or satisfying a benchmark previously fixed. Subject to fulfilling this requirement the promotion is based on seniority. There is no requirement of assessment of comparative merit both in the case of seniority cum fitness and seniority cum merit. Merit cum suitability with due regard to seniority as prescribed in the case of promotion to All India Services necessarily

⁴ (2000) 6 Supreme Court Cases 698.

involves assessment of comparative merit of all eligible candidates, and selecting the best out of them.

17. While interpreting expression “fit, which has different shades of meanings, also means “a person to be appointed shall be legally eligible” and eligible mean “fit to be chosen””. The Division Bench of this Court in case of ***Ramsewak Sonwanshi Vs. Oil & Natural Gas Corporation Limited (Writ Petition No.1359/2010)*** dated **22.09.2017** while interpreting provisions of Rule 7(4) and 7(5) of the Regulations observed in paragraph nos.114 and 115 as under:

“114. The criteria for merit based promotion is set out in Regulation 7(4), whereas, the criteria for promotion of "seniority-cum-fitness" is set out in Regulation 7(5).

115. The DPC only can recommend to the Appointing Authority the candidates, who it considers fit in the order of merit when the merit is the criteria and in the order of seniority when the seniority-cum-fitness is the criteria.”

18. The Full Bench of Kerala High Court in case of ***Suresh Vs. Manager, S.N.M. College***⁵ considered similar question framed as under:

“Does a provision providing for promotion to the post of Principal of a College “on the basis of seniority-cum-fitness” permit a comparative assessment?.”

This question was framed in the context of the interpretation of Section 59(3) of the Mahatma Gandhi University Act, 1985. The following observations are relevant for the controversy involved in the present matters:

“23. These observations clearly indicate that a senior person can be denied promotion when he is found to be unfit Not otherwise. Not on the basis of comparative assessment.

24. As already observed, it is true that the post of Principal is of utmost importance in an institution. The appointment

of a proper person is imperative. But even in case of appointment to very senior posts in the country, it is not unknown that the law permits promotion of the senior-most In the case of private institutions, the affairs are managed by persons, who may not be trained in administration. It is not difficult to imagine that the Manager of an institution may be illiterate. The members of the governing body may have their own predilections. Aware of the factual position, the Legislature appears to have chosen to restrict the management's discretion. It has placed an embargo on its power. It has consciously prescribed that the Management shall promote the senior-most person subject to his being found fit. Otherwise, a private management may act arbitrarily. Under the garb of selecting the best or at least a more suitable person, it may act unfairly. In an educational institution, there is a need to keep the environment congenial. If the junior persons are arbitrarily allowed to supersede the seniors, there can be a lot of avoidable heartburn. It can cause frustration. It can pollute the environment of the institution. To check this, the Legislature has given a limited discretion to the management. It can reject a senior person only if he is found to be unfit.”

The Court further observed in paragraph nos.28 to 31 as under:

“28. It appears that it is to check such arbitrariness that the Legislature had deliberately restricted the discretion of the Management. It had only permitted it to reject a senior candidate if he was unfit. Not otherwise. In any case, it is clear that for the purpose of promotion, the senior teacher cannot be arbitrarily denied appointment by devising such a method of selection.

29. It is possible to imagine that a candidate may be a good teacher. However, he may be totally lacking in the capacity to administer. In such a situation, it should be permissible and possible for the management to declare a candidate as unfit. However, there should be a reason for such a conclusion. It can't be done arbitrarily. It is true that the post of Principal of a College is pivotal. A bad teacher may not be able to administer an institution. However, the management has been given the discretion to supersede a senior person, if he is found unfit. This discretion can be exercised by the management on the basis

of good reasons. Since the Act provides for the remedy of appeal before an Appellate Tribunal against an order of supersession, it would be incumbent on the management to give reasons for the supersession of a senior person. The reasons cannot be fanciful or imaginary. These must have a nexus with the fitness of the candidate for the post and should be founded on tangible material. In the present case, the selection committee had not rejected the senior persons on the ground of unfitness. It had in fact made the selection on a comparative assessment. The action was not in conformity with the provision contained in S. 59(3) of the Mahatma Gandhi University Act.

19. The legal position as espoused in aforesaid judgment makes out abundantly clear that when the basis for promotion is seniority-cum-fitness, the candidate has to cross over minimum fitness/eligibility to bring him within the zone of promotion. Once such hurdle is passed, the seniority would be the ultimate Rule. Once minimum eligibility requirement or fitness is complied and employee is taken in the zone of consideration, further comparative assessment on the basis of his service record would be redundant. Pertinently, in the present case, field is guarded by Rules of 1995 framed under Article 309 of the Constitution of India. The Rules nowhere stipulates the comparative assessment of the candidate, once he is considered fit for promotion based on eligibility criteria. Therefore, when petitioner was considered for promotion alongwith other two eligible/fit candidates, no discretion was left with Authorities to grant promotion to respondent no.5 ignoring seniority of the petitioner.

20. It is argued on behalf of respondent no.5 that the post of Registrar in the Family Court is top most in administration of the Family Court and the person must be fit in all respect, apart from his seniority, therefore, selection of the suitable and meritorious candidate after considering seniority and comparative assessment of the service was proper. We cannot countenance such

submissions for the reason that when the filed is occupied by Statutory provisions, the authorities has no discretion to adopt any method inconsistent with Rules. It is to be noted here that if Rule making authority found it necessary to confine discretion of the authority in the matter of grant of promotion, the authority cannot be permitted to deny promotion by devising different method of selection. In case candidate was found unfit, it would be permissible and possible for authority to declare candidate to be unfit for promotion. However, once he cross over minimum requirement of fitness/eligibility, the authority has no discretion to deny him promotion by making comparative assessment amongst candidates within the zone of consideration. In light of aforesaid discussion, we find that impugned order granting promotion to respondent no.5 in supersession of the petitioner's claim based on seniority, cannot be countenanced.

21. Hence, Writ Petition deserves to be allowed to the extent of prayer Clause (C), which reads as under:

“C. This Hon'ble Court be pleased to issue a writ of mandamus or any other writ, direction or order in the of nature of writ of mandamus directing the Respondents to extend all consequential service benefits to the petitioner to which she would become entitled in view of her promotion on the post of Registrar of Family Court at Aurangabad w.e.f. 26/07/2019.”

22. Writ Petition is disposed of.

23. Rule is made absolute in above terms.

(S. G. CHAPALGAONKAR)
JUDGE

(SMT. VIBHA KANKANWADI)
JUDGE