

**SIKKIM PUBLIC SERVICE  
COMMISSION**



**IN THE HIGH COURT OF SIKKIM**  
**CIVIL WRIT PETITION NO.45 OF 1995**  
**D.D. 2.9.1996**

**THE HON'BLE MR.JUSTICE MALAY SENGUPTA, JUDGE**

**S.D.Karthak Lepcha** ... **Petitioner**

Vs.

**Saran Kumar Thapa & Others** ... **Respondents**

**Promotion to non-selection post:**

**RULE 6 OF SIKKIM GOVERNMENT ESTABLISHMENT RULES 1974:**

The principle that promotion should be on the basis of seniority but subject to fitness and any other conditions laid down by the Government - Clause 1.7 of the notification dated 28.1.1980 which was recast in June 1987 gives priority to quality over seniority - Though the petitioner was senior to 1<sup>st</sup> respondent amongst the Food Inspectors the 1<sup>st</sup> respondent was promoted to the post of District Civil Supply Officer on the basis of Clause 1.7 ignoring seniority of the petitioner – The High Court allowed the writ petition in part and held that the departmental instruction at Clause 1.7 is invalid so far as promotion to non selection post is concerned and set aside the Government order dated 2.11.1995 and the promotion of the 1<sup>st</sup> respondent on the recommendation of the Departmental Promotion Committee made on the basis of Annual Confidential Reports only.

**Held:**

It is the settled principle with regard to the subordinate legislations that when a Rule is not in conformity with the Act, the provisions of the Act would prevail. Similarly, if any departmental instruction is in contradiction with the provisions of Rule, the latter would prevail.

**Further held:**

at in the case of a non selection post the seniority should be the prevailing factor and that quality and merit might prevail over seniority when it is a question of appointment in any selection post.

**Cases referred:**

1. AIR 1970 Rajasthan 173 – Goman Singh v. State of Rajasthan
2. (1973) 2 SCC 836 – Unon of India v. M.L. Capoor
3. 1983 (2) SLR 183 – T.N.Sankara Sundaram v. Director of S & P
4. 1989 (1) SCC 175 - Union of India v. Soma Sundaram Vishwanath

**JUDGMENT**

This case arises out of a petition filed under Article 226 of the Constitution of India.

2. The fact of the case relevant for our purpose is that the petitioner was initially appointed as a graduate clerk in a Government Department of Sikkim. On 12.2.77 he was promoted to the post of Inspector and became attached to the Food & Civil Supplies Department. He was selected for and underwent training on various subjects necessary in the Food & Civil Supplies Department. Exactly eight months after the appointment of the petitioner as Inspector, three more persons were appointed so. Those three included the respondent No.1 who was a matriculate and held the post of Sub Inspector in the Food Department before his promotion as aforesaid. The only scope for promotion available to the Inspectors of the Food Department was the post of Town Rationing Officer which was subsequently redesignated as District Civil Supplies Officer.

3. Some time in 1988 respondent No.1 was picked up from amongst the Inspectors and he was appointed as District Civil Supplies Officer on officiating basis. The respondent No.1 was junior to the petitioner and other inspectors and was under qualified. Sometime in 1990 the Government sent a requisition for the post of the Town Rationing Officer to the Public Service Commission and requested the Commission to arrange selection of one of the Inspectors to the said post on

promotion basis through Departmental Promotion Committee. The Departmental Promotion Committee as formed under Notification dated 23.6.87 took the decision on its meeting dated 6.4.90 and sent recommendation to the Government in favour of respondent No.1 by its letter dated 9.4.90. The petitioner raised objection to such selection and sent representation to the Government. In consideration of the representation of the petitioner, the Government decided not to approve the said recommendation and sent a fresh proposal to the Public Service Commission for making recommendation afresh. That proposal reached the Public Service Commission in mid 1995. The P.S.C. intimated the Government that while making the recommendation in 1990 they took into consideration the seniority of the petitioner as Food Inspector and found the respondent No.1 to be most suitable for the job. The P.S.C. therefore refused to review its recommendation made in 1990. On receipt of this letter from the P.S.C., the Government issued appointment letter in favour of respondent No.1 on 2.11.95 appointing him as District Civil Supply Officer with retrospective effect from 9.4.90.

4. Being aggrieved over the situation the petitioner has filed this writ petition mainly challenging the order of promotion of respondent No.1.

5. The writ petition is being contested by three sets of respondents separately. The submission of the Government (respondent No.2) is that there was no nepotism, favouritism or irregularity at any stage of the proceeding which culminated in the selection and appointment of respondent No.1 in the post of District Civil Supply Officer. Respondent No.1 might have been slightly below the petitioner in the seniority list but the P.S.C. took the seniority and merit of each of the candidates and made the recommendation. The government in consideration of the representation made by the petitioner to the Government referred the matter to the P.S.C. once again with request to review its decision. But the P.S.C. held that there was no reason to deviate from its earlier decision in the matter of recommendation.

6. The P.S.C. (respondent No.3) contends that they have made their recommendation fairly in

consideration of the A.C.Rs. and also in strict compliance with the rules and government instructions in this respect.

7. The contention of respondent No.1 is that his appointment as District Civil Supply Officer was made in consideration of his merit and that as he was continuing to officiate in the said post from before and since his name was recommended in April, 1990, he was given appointment with retrospective effect from the date on which he ought to have been appointed on the basis of the recommendation made by the Public Service Commission.

8. There is no dispute over the fact that the post of District Civil Supply Officer was to be filled up by promotion from amongst the Food Inspectors. Both the petitioner and the respondent No.1 were Inspectors and that besides them three more names of Inspectors were considered by the P.S.C. while making the recommendation. Rule 6 of the Sikkim Government Establishment Rules deals with the matter of promotion. It has been laid there that the promotions should be on the basis of seniority but subject to fitness and any other conditions laid down by the Government from time to time. The Government of Sikkim took certain decisions and issued Notifications from time to time in amplification of or for giving proper effect to the provision of Rules. By a Notification dated 28.1.80 several Departmental Promotion Committee were formed. Since the promotion to the post of District Civil Supply Officer is an entry into the lowest gazetted post, a Committee was formed as per Clause 1.1A of the above noted instruction. It was recasted in June, 1987, possibly consequent upon the formation of Public Service Commission in the State. Clause 1.4 of the Notification prescribes that five eligible persons are to be brought with the consideration zone when the vacancy is only one. Clause 1.5 of the Notification indicates that the Annual Confidential Reports for the past five years excluding the year in which the matter is being considered shall be taken into account by the Committee. Clause 1.7 gives a vivid illustration as to how the remarks in the A.C.Rs. are to be utilised for the purpose of selection of the candidates for promotion.

9. At the very outset it has been alleged by the petitioner that the respondent No.1 was treated in

a manner different from the rest of the Inspectors as he happens to be the nephew of the Joint Secretary of the Food & Civil Supplies Department. It has been stated that though the minimum qualification for the Inspector was graduation, the respondent No.1 though a matriculate was appointed as Inspector. He was No.5 in the seniority list and ultimately became No.4 on account of death of Inspector D.P.Sharma. The position of the petitioner is at Sl.No.2. It has further been alleged that the promotion should have been on the basis of seniority and if the senior man is found to be unfit for any reason whatsoever, the case of the next senior man should be considered for promotion. But that has not been done in this case of promotion. The P.S.C. might have relied on Clause 1.7 of the Government Notification/Instruction and ignored the seniority of the concerned officers. The petitioner urged that the instruction under Clause 1.7 is bad in law as it hits the basic structure of Rule 6.

10. The petitioner submits further that the respondent No.1 was allowed to officiate in the post of Town Rationing Officer or District Civil Supply Officer ignoring the claim of other Inspector senior to the respondent No.1. The allegation of the petitioner is that the Joint Secretary, uncle of respondent No.1, managed not only the entry of the respondent No.1 in the service as Inspector defying the Rules, not only his officiating promotion out of turn but also giving superlative remarks in the A.C.Rs. which resulted in befooling the Departmental Promotion Committee.

11. To appreciate the situation, we would require to deal with a few correspondence between the Government and the P.S.C. But even before entering into the matter we must once again note that the case is of promotion to the lowest gazetted post in terms of Rule 6 of the Sikkim Government Establishment Rules, 1974 and that such a matter is to be dealt with by a Departmental Promotion Committee as per Clause 1.1A of the Establishment Department Notification No.286/GEN/EST dated 28.1.1980 read with Notification No.89/GEN/EST dated 12.6.87. Whatever has been contemplated in these rules is that the promotion shall be on the basis of seniority subject to fitness which is to be assessed by the Departmental Promotion Committee. Incidentally in the latest formation of the Committee, the Chairman and the Member of the Sikkim Public

Service Commission have been included in the Committee. Hence it cannot be said that the matter of promotion to the lowest gazetted post is to be dealt with by P.S.C. It might be that P.S.C. was made the Nodal Office for such purpose. Unfortunately, the correspondence between the Government and P.S.C. over the issue gives an impression as if the matter of promotion is being dealt with by the P.S.C. itself. Even in their affidavits the respondents described the position in such a manner that everything was done by the P.S.C. The D.P.C. virtually finds no place in the pleadings.

12. On 28.2.90 the first requisition was sent from the Government to the P.S.C. for selection of Town Rationing Officer on promotion from the Inspectors. The D.P.C. held its meeting on 6.4.90 and considered the A.C.Rs. and service records of five senior most Inspectors and on the basis of overall relative assessment made on the A.C.Rs. found the respondent No.1 suitably for promotion to the post of Town Rationing Officer. The P.S.C. sent their recommendation accordingly on 9.4.90. After more than four years the Government informed the P.S.C. on 26.7.94 that 'on the basis of recent decision of the Government' the vacant post of District Civil Supply Officer was to be filled up by promotion from amongst the serving Inspectors. In this letter it was indicated that respondent No.1 was holding the said post on officiating capacity. It may be noted incidentally that the post of Town Rationing Officer was designated as District Civil Supply Officer in the meantime. On 1.4.95 the P.S.C. informed the Government that since the post of District Civil Supply Officer is the same as that of Town Rationing Officer and since the D.P.C. already made a recommendation on 6.4.90, there was no further action to be taken. After sometime the P.S.C. again wrote to the Government on 26.5.95 asking for the reason for not accepting the recommendation dated 6.4.90. The Government in its turn sent a letter to the P.S.C. on 20.6.95 stating that the recommendation of the S.P.S.C. for promoting respondent No.1 was not approved by the Government on 14.5.90 on account of representation submitted by the petitioner who claimed to be senior to the respondent No.1. P.S.C. replied to this letter on 5.7.95 to the effect that the petitioner's seniority over respondent No.1 was taken into consideration by the Selection Committee on 6.4.90 and found the respondent No.1 most suitable for promotion. The



already noted the implication of Clause 1.7. It is in complete defiance of the provision prescribed in the Rule. It is the settled principle with regard to the subordinate legislations that when a Rule is not in conformity with the Act the provision of the Act would prevail. Similarly if any departmental instruction is in contradiction with the provisions of Rule, the latter would Prevail. Decision reported in AIR 1970 Rajasthan 173 (Goman Singh versus State of Rajasthan) and 1989(1) SCC 175 (Union of India versus Soma Sundaram Vishwanath) would confirm the above proposition. Rule 6 indicates priority on the seniority over fitness. But Clause 1.7 suggests that quality would make the seniority insignificant. This Court in its decision dated 8.6.92 in Writ Petition No.4 of 92 confirmed the position that Rule 6 contemplates seniority as the principal basis of promotion. Learned Advocate General referred to a decision dated 27.6.95 in Civil Writ Petition No.19 of 92 by the same Judge to show that a contrary view was taken. A reading of the two judgments would not lead us to the conclusion that the view taken in these two decisions are contradictory. Again we have before us the decisions reported in 1983 (2) SLR 183 (T.N. Sankara Sundaram Versus Director of S & P) and (1973) 2 SCC 836 (union of India versus M.L.Capoor) which indicate that in case of promotion, the seniority should be the prevailing factor. We should further note that quality and merit might prevail over seniority when it is a question of appointment in any selection post. Besides the above two decisions we may refer to the decision reported in AIR 1967 S.C. 1910 (Sant Ram versus State of Rajasthan) in this context. The State is also conscious about the legal position and for the said reason in its affidavit dated 8.4.96 it categorically stated “the present post being a selectional post and not a promotional post respondent No.1 was promoted on merit-cum-seniority”. But ultimately the respondents conceded that the instant case was not a case of promotion to a selection post.

15. It has been pleaded by the petitioner that as Clause 1.7 of the Departmental Instruction is contrary to the specific provision in Rule 6 this particular clause should be held to be invalid. It is true that Clause 1.7 of the Departmental Instruction is contrary to Rule 6 of the Establishment Rules. But this Clause 1.7 cannot be held to invalid outright. Clause 1.7 holds quite good so far as promotion to a selection post is concerned but it is bad and inapplicable in cases of promotion

simpliciter.

16. We have already pointed out that the Departmental Promotion Committee made the recommendation on the basis of Annual Confidential Reports only. That means invoking Clause 1.7 of the Departmental Instructions. Since it is not a case of promotion to selection post, the Committee palpably worked under misconception. Therefore, the decision of the Selection Committee on 6.4.90 suffers from material irregularity and illegality.

17. In cases of promotion in non-selection posts, seniority should receive prime consideration. Fitness should obviously be examined. But not in the manner as illustrated under Clause 1.7. Grammatically fitness means suitability. It can be judged from various aspects beside entries in the A.C.Rs. Academic qualification must be one of the elements in assessing the suitability. In Sikkim, academic qualification receives priority in many respects. Rule 10(a) of the Establishment Rules is a glaring example.

18. Since the D.P.C. while considering the candidature on 6.4.90 was guided under a wrong application of the provision of law and since the D.P.C. had no occasion to apply its mind on the proposal of the Government to make the recommendation fresh, we cannot endorse the step taken by the Government in issuance of the retrospective order of promotion on 2.11.95. At the same time we cannot impose any decision on the Departmental Promotion Committee. It has neither been pleaded nor prayed by the petitioner nor is permissible under the law to replace respondent No.1 by the petitioner. Decision of the Supreme Court in *State Bank of India versus Md. Mynuddin* reported in AIR 1987 S.C. 1889 may be referred to in this context. It should also be noted that such a prayer could also not have been made by the petitioner as he does not hold position at Sl.No.1 in the seniority list of Inspectors.

19. We should also keep in our mind that the petitioner has been officiating in the promotional post since 1988 though the initial officiating promotion was made in defiance of all the norms

and rules. It is needless to mention that even in adhoc and officiating appointments, norms and rules are to be followed strictly. However, it would not be just and prudent to make any mandatory order to pull the respondent No.1 down from the post where he has been working so long, even on illogical and illegal manner.

20. From the above discussions it is,

**ORDERED**

That the writ petition be and the same is allowed in part on contest but without any costs. Departmental instruction at Clause 1.7 is held invalid so far as promotion to non-selection post is concerned. The order of the Government dated 2.11.95 is set aside. The Departmental Promotion Committee would reconsider the requisition of the Government for recommendation for appointment in the post of District Civil Supply Officer on promotion in due consideration of the candidature in the light of the observation made in this judgment. The respondent No.1 would, however, continue to officiate in the post till final appointment is made by the Government on the recommendation of the Departmental Promotion Committee.

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