

A HARYANA STATE ELECTRONICS DEVELOPMENT
CORPORATION LTD. AND ORS.

V.

SEEMA SHARMA AND ORS.
Civil Appeal No. 3240 of 2009

B MAY 05, 2009

[DR. ARIJIT PASAYAT AND ASOK KUMAR
GANGULY, JJ.]

C *Service Law: Promotion – Suit challenging promotion of
junior colleagues, decreed – Plea of employer that its
promotion policy was based on principle of merit-cum-seniority
– Such plea was taken in written statement but no issue framed
on this question nor finding given by the Court – Said question
was also not considered by High Court – On appeal, held:*
D *Such question was vitally important to entire controversy –
Matter remitted to High Court for deciding said question and
based on that, the claim of the plaintiff.*

E The respondent no.1 was aggrieved with the decision
of appellant-Corporation in promoting her two junior
colleagues. She filed suit for declaration, which was
decreed. The case of appellant-Corporation before the trial
Court was that in view of its promotion policy, such
promotion was based on the principle of Merit-cum-
Seniority. Such plea was also taken in written statement.
F However, no issue was framed on that question and no
finding on that was reached. This question was also not
considered by the High Court in second appeal. Hence
the present appeal.

G Disposing of the appeal, the Court

HELD: 1. The principle of Merit-cum-Seniority and
that of Seniority-cum-Merit are two totally different
principles. The principle of Merit-cum-Seniority puts

greater emphasis on merit and ability and where A
promotion is governed by this principle seniority plays a
less significant role. However, seniority is to be given
weightage when merit and ability more or less are equal
among the candidates who are to be promoted. On the
other hand, insofar as the principle of seniority-cum-merit B
is concerned it gives greater importance to seniority and
promotion to a senior person cannot be denied unless the
person concerned is found totally unfit on merit to discharge
the duties of the higher post. The totality of the service of
the employee has to be considered for promotion on the C
basis of seniority-cum-merit. [Para 8] [665-D-G]

2. The question as to whether promotion claim of
respondent no.1 only on the basis of seniority is
sustainable when as per the departmental promotion rules
the promotion was based on Merit-cum-Seniority was not D
dealt with by the courts below and even by the High Court.
This question was vitally important to the entire
controversy. Under Section 103 of the CPC, the High
Court in second appeal can decide this issue since it is
necessary for disposal of the appeal and was not decided E
by the courts below. Relevant materials on this issue are
also on record. After deciding that question the High Court
would decide whether respondent claim for promotion
was wrongfully denied. [Paras 10, 11] [666-C-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3240 F
of 2009

From the Judgement and Order dated 15.02.2005 of the
High Court of Punjab & Haryana at Chandigarh in R.S. A. No.
4858 of 2004

Alok Sangwan, Sushil Balwada, for the Appellant(s). G

The Judgement of the Court was delivered by

ASOK KUMAR GANGULY, J.

1. Leave granted. H

A 2. This appeal is directed against the judgment and order
dated 15.2.2005 passed by the High Court of Punjab and
Haryana in R.S.A. No. 4858 of 2004, whereby the High Court
has been pleased to dismiss the second appeal filed by the
appellant at the stage of admission. There is a delay of one day
B in filing of the appeal before the High Court. The High Court did
not pass any order on the same since the appeal was dismissed
on merit at the stage of admission.

3. A suit for declaration was filed by the Respondent No.1
against the appellant-Haryana State Electronics Development
C Corporation Limited (hereinafter referred to as "the appellant-
corporation") and two of her colleagues, who according to
Respondent No.1 were promoted by the appellant-corporation
even though they were junior to her. The suit was filed claiming
a declaration that Respondent No.1 is senior to two of her
D colleagues and also praying for a declaration that the
promotional order dated 10.9.1991, by which the junior
colleagues of the Respondent No.1 were promoted, was illegal
and invalid.

E 4. The Addl. Civil Judge (Sr. Divn.), Ambala Cantt. by
judgment and order dated 5.2.2002 *inter alia* held that
Respondent No.1 is senior to her colleagues, the defendant nos.
4 and 5 in the suit and that the order of promotion dated
10.9.1991 passed by the respondent-corporation purporting to
F promote the said defendants on the post of Senior Receptionist-
cum-PBX Operator is illegal and void.

5. The following issues were framed by the trial court:-

- I. Whether the plaintiff is senior to defendant Nos. 4
and 5? OPP
- G II. Whether the impugned orders dated 10.9.1991,
passed by defendant Nos. 1 and 2 promoting the
defendant nos.4 and 5 to the post of Sr. Receptionist-
cum-PBX Operator, are illegal, null and void, if so, its
effect? OPP
- H

III. Whether the suit is time barred? OPD A

IV. Whether the suit is not maintainable in the present
form? OPD

V. Relief

6. The case which was sought to have been made out before the trial court by the appellant-corporation is that in view of its promotion policy such promotion is based on the principle of Merit-cum-Seniority. This appears from paragraph 4 of the judgment of the trial court as the stand taken by the appellant-corporation. B C

7. Unfortunately no issue was framed on that question and obviously no finding on that was reached. However, in the written statement which was filed by the appellant-corporation before the trial court, it appears that the said plea was taken that the promotion in the appellant-corporation was based on Merit-cum-Seniority and not on the basis of seniority alone. D

8. The Court is of the opinion that the principle of Merit-cum-Seniority and that of Seniority-cum-Merit are two totally different principles. The principle of Merit-cum-Seniority puts greater emphasis on merit and ability and where promotion is governed by this principle seniority plays a less significant role. However, seniority is to be given weightage when merit and ability more or less are equal among the candidates who are to be promoted. On the other hand, insofar as the principle of seniority-cum-merit is concerned it gives greater importance to seniority and promotion to a senior person cannot be denied unless the person concerned is found totally unfit on merit to discharge the duties of the higher post. The totality of the service of the employee has to be considered for promotion on the basis of Seniority-cum-Merit (see AIR 1996 SC 273). E F G

9. Even though in the written statement of the appellant-corporation the point is specifically taken that promotion has to be given on the basis of Merit-cum-Seniority, on that aspect no issue has been framed by the trial court. This question does not H

A appear to have been considered by the High Court also. The grounds of appeal filed before the High Court is not before us. But a ground to that effect has been taken before the First Appellate Court as ground no.4. The said ground is as follows:-

B “4. That the learned lower court has totally ignored the fact that the promotion is based on merit-cum-seniority and on account of the punishment imposed and various acts of misconduct of the respondent no.1, she had no merit to claim promotion.”

C 10. But on that ground also no finding has been reached by the First Appellate Court. Before us one of the questions of law raised by the appellant-corporation is as follows:-

D “Whether the promotion claim of respondent no.1 only on the basis of seniority is sustainable, whereas as per the departmental promotion rules the promotion is based on Merit-cum-Seniority?”

E 11. The aforesaid question has not been dealt with by the courts below and even by the High Court. Since the said question is vitally important to the entire controversy in this case, this Court remands the matter to the High Court and direct the High Court to re-hear the second appeal and decide the aforesaid question, namely, whether in the matters of granting promotion to Respondent No.1, the appellant-corporation has to follow the principle of Merit-cum-Seniority, as contended by them. The fate of Respondent No.1’s claim for promotion depends on an answer to this question. Under Section 103 of the Civil Procedure Code, the High Court in second appeal can decide this issue since it is necessary for disposal of the appeal and has not been decided by the courts below. Relevant materials on this issue are also on record. After deciding that question the High Court will decide whether respondent(s) claim for promotion has been wrongfully denied.

H 12. As this matter is pending in courts for a long time, we request the High Court to dispose of the matter as early as

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possible, preferably within a period of four months from the date of production of this order before the Hon'ble High Court. We give liberty to the parties to mention before the Hon'ble the Chief Justice of the High Court and the Hon'ble Chief Justice may explore the possibilities of assigning this matter to any appropriate bench for decision, preferably within the time mentioned above. A B

13. We do not express any opinion on the merits of this case of either of the parties. The appeal is thus disposed of. No costs.

D.G.

Appeal disposed of.