

BEFORE THE UTTARAKHAND PUBLIC SERVICES TRIBUNAL
BENCH AT NAINITAL

Present: Hon'ble Mr. Ram Singh

----- Vice Chairman (J)

Hon'ble Mr. A.S.Nayal

-----Member (A)

CLAIM PETITION NO. 11/NB/DB/2016

1. Hridesh Kumar Sharma, aged 52 years S/o Devkinandan Sharma, R/o Moradabad, presently working as Ganna Supervisor, District Udham Singh Nagar, Uttarakhand, Sl. No. 34.
2. Murlidhar Upadhyaya, aged 51 years S/o Ramnuj Upadhyaya, Sl. No. 38, R/o presently working as Ganna Supervisor, District Udham Singh Nagar, Uttarakhand.
3. Vijendra Giri, aged 55 years, S/o Bishambhar Singh Singh Giri, Sl. No. 32 R/o presently working as Ganna Supervisor, District Haridwar, Uttarakhand.
4. Ram Samujha Maurya, aged 57 years, S/o Ram Sewak Maurya, Sl. No. 68, R/o presently working as Ganna Supervisor, District Udham Singh Nagar, Uttarakhand.
5. Dharma Nath Singh, aged 53 years, S/o Ram Narayan Sigh, Sl. No. 69, R/o presently working as Ganna Supervisor District Udham Singh Nagar, Uttarakhand.
6. Rajesh Kumar, aged 46 years, S/o Kewal Ram, Sl. No. 93, R/o presently working as Ganna Supervisor District Haridwar, Uttarakhand.
7. Hrishankar Gangwar, aged 52 years, S/o Kewal Ram, Sl. No. 65, R/o presently working as Ganna Supervisor, District Udham Singh Nagar, Uttarakhand.
8. Ram Singh Bishnoi, aged 59 years, S/o Ram Chandra Singh, Sl. No. 64, R/o presently working as Ganna Supervisor, District Udham Singh Nagar, Uttarakhand.

.....Petitioners

VERSUS

1. The State of Uttarakhand through Secretary, Cane/Ganna, Uttarakhand Government, Dehradun.
2. The Cane Commissioner, Uttarakhand, Head Office, Kashipur, District Udham Singh Nagar.
3. The Joint Cane & Sugar Commissioner, Uttarakhand, Kashipur, District Udham Singh Nagar.
4. The Assistant Cane Commissioner, Uttarakhand, Rudrapur, District Udham Singh Nagar.
5. The Chairman, Uttarakhand State Public Service Commission, through its Secretary, Roorkee at Haridwar, District Haridwar. (Person promoted on the post of Ganna Vikas Nirikshak)
6. Mohammad Yunus, aged 58 years, S/o Mohammad Yashin, Sl. No. 49, R/o presently working as Ganna Supervisor, Kichhha, District Udham Singh Nagar, Uttarakhand. (Now promoted on Ganna Vikash Nirikshak).
7. Mohan Singh, aged 59 years, S/o Ram Chandra Singh, Sl. No. 50, R/o presently working as Ganna Supervisor, Bajpur, District Udham Singh Nagar, Uttarakhand (Now promoted on Ganna Vikash Nirikshak).
8. Het Ram, aged 59 years, S/o Nanki Ram Sl. No. 48, R/o presently working as Ganna Supervisor, Kashipur, District Udham Singh Nagar, Uttarakhand. (Now promoted on Ganna Vikash Nirikshak).
9. Mitan Singh, aged 59 years, S/o Dungar Singh, Sl. No. 56, R/o presently working as Ganna Supervisor, Bajpur, District Udham Singh Nagar, Uttarakhand (Now promoted on Ganna Vikash Nirikshak).
10. Sher Singh Yadav, aged 59 years, S/o Gumani Singh, Sl. No. 57, R/o presently working as Ganna Supervisor, Nadehi, District Udham Singh Nagar, Uttarakhand (Now promoted on Ganna Vikash Nirikshak)
11. Shripal Singh, aged 51 years S/o Mahavir Singh, Sl. No. 72, R/o presently working as Ganna Supervisor, Doiwala (Now promoted on Ganna Vikash Nirikshak)
12. Jai Singh, aged 55 years, S/o Punna Singh, Sl. No. 78, R/o presently working as Ganna Supervisor, Iqbalpur, Haridwar, Uttarakhand (Now promoted on Ganna Vikash Nirikshak)
13. Sompal Singh, aged 58 years S/o Bool Chand, Sl. No. 79, R/o presently working as Ganna Supervisor, Iqbalpur, Haridwar, Uttarakhand (Now promoted on Ganna Vikash Nirikshak)
14. Tej Pal Singh, aged 51 years, S/o Ghashita Singh, Sl. No. 35, R/o presently working as Ganna Supervisor, Kashipur, District Udham Singh Nagar, Uttarakhand (Now promoted on Ganna Vikash Nirikshak)

15. Yash Pal Singh, aged 59 years, S/o Jugnandan Singh, Sl. No. 42, R/o presently working as Ganna Supervisor, Bajpur, District Udham Singh Nagar, Uttarakhand (Now promoted on Ganna Vikash Nirikshak)
16. Bharat Singh, aged 59 years, S/o Aman Singh, Sl. No. 46, R/o presently working as Ganna Supervisor, Sitarganj, District Udham Singh Nagar, Uttarakhand.(Now promoted on Ganna Vikash Nirikshak)
17. Rakesh Kumar, aged 47 years, S/o Phul Nath Singh, Sl. No. 91, R/o presently working as Ganna Supervisor, Kichchha, District Udham Singh Nagar, Uttarakhand (Now promoted on Ganna Vikash Nirikshak)
18. Udal Singh, aged 47 years, S/o Mangal Singh, Sl. No. 92, R/o presently working as Ganna Supervisor, Sitarganj, District Udham Singh Nagar, Uttarakhand (Now promoted on Ganna Vikash Nirikshak)
19. Surendra Singh, aged 48 years, S/o Vijai Pal Singh, Sl. No. 94, R/o presently working as Ganna Supervisor, Kichchha, District Udham Singh Nagar, Uttarakhand (Now promoted on Ganna Vikash Nirikshak)
20. Gandhi Ram, aged 50 years, S/o Ram Diya, Sl. No. 96, R/o presently working as Ganna Supervisor, Luxur, District Haridwar, Uttarakhand (Now promoted on Ganna Vikash Nirikshak)
21. Samay Singh, aged 48 years, S/o Harphool Singh, Sl. No. 99, R/o presently working as Ganna Supervisor, Libbarheri, District Haridwar, Uttarakhand (Now promoted on Ganna Vikash Nirikshak)
22. Surajbhan Singh, aged 48 years, S/o Bhopal Singh, Sl. No.100, R/o presently working as Ganna Supervisor, Luxur, District Haridwar, Uttarakhand (Now promoted on Ganna Vikash Nirikshak)

.....**Respondents**

Present: Sri A.D.Tripathi, Ld. Counsel
for the petitioners.
Sri V.P. Devrani, Ld. A.P.O.
for the Respondents No. 1 to 4

JUDGMENT

DATED: NOVEMBER 13, 2018

HON'BLE MR. RAM SINGH, VICE CHAIRMAN (J)

1. The petitioners have filed this petition for the following reliefs:-

*“(i) To set aside promotion order dated 16 March 2016
by which the juniors have been promoted ignoring the senior*

most employee of the same cadre having common seniority list in the light of statutory service rules 2013.

(ii) To issue direction/order to the respondent to give promotion to the senior most employees from the very date of promotion i.e. 16.03.2016 given to the juniors to them.

(iii) To pass any other or further order which this Hon'ble Court may deem fit and proper in facts and circumstances of the case.

(vi) Cost of the petition may be awarded in favour of the petitioner."

2. According to the petitioners, the respondents passed the impugned order of promotion of their juniors from the post of Cane Supervisor to Cane Development Inspector, applying the wrong criteria of promotion. Under the rules, the criteria for promotion is 'seniority subject to rejection of unfit' but respondents applied the criteria of 'seniority-cum-merit' and thus, the provisions of the concerned Rules, applicable on the petitioners, have been violated. Hence, it has been challenged that the order of promotion is an arbitrary, illegal and against rules and Article 14 and 16 of the Constitution of India.

3. The petition was opposed by the respondents on the ground that following the due process of law and the relevant service rules, the impugned order was passed, which is correct, perfect and legal in the eyes of law and requires for no interference. According to the respondents, the concerned Uttarakhand Subordinate Ganna (Group-I and Group-II General) Service Rules, 2013 (hereinafter referred to as Service Rules of 2013) were followed and selection process was conducted on the basis of the procedure laid down in the Uttarakhand (inside the purview of the Public Service Commission posts) procedure Rules, 2010 (hereinafter referred to as Procedure Rules, 2010) and Public Service Commission Procedural Rules, 2003,

and on that basis, the petitioners were not found fit for promotion, hence, impugned order was passed.

4. The petitioners in their Rejoinder Affidavit have reiterated that the wrong criteria were applied by the respondents and juniors were promoted ignoring the claim of petitioners.

5. We have heard both the sides and perused the record.

6. This fact is admitted to both the sides that the relevant service rules applicable in the matter is Uttarakhand Subordinate Ganna (Group-I and Group-II General) Service Rules, 2013, issued on 24.09.2013. Rule 5 of the same prescribed the source of recruitment of Cane Development Inspector, which is quoted below:-

“5(1) (क).....

(ख) समूह दो- सामान्य पद- गन्ना विकास निरीक्षक,

(एक) पच्चास प्रतिशत आयोग के माध्यम से सीधी भर्ती द्वारा।

(दो) पच्चास प्रतिशत समूह तीन के स्थायी गन्ना पर्यवेक्षकों में से, जिन्होंने भर्ती के वर्ष में, जिससे रिक्तियों का संबंध हो, प्रथम दिनांक को उस रूप में कम से कम पांच वर्ष की सेवा पूर्ण कर ली हो, अनुपयुक्त को अस्वीकार करते हुए ज्येष्ठता के आधार पर, आयोग के माध्यम से पदोन्नति द्वारा।”

Hence, as per Rules 50% posts of Cane Development Inspectors are to be filled up by promotion from the Cane Supervisors. The petitioners as well as private respondents, all were working on the post of Cane Supervisor and were having experience of more than 5 years, as required by the law.

Rule 16 of the Service Rules of 2013 prescribed the procedure of recruitment by promotion, which quoted below:-

“16. पदोन्नति द्वारा भर्ती समय-समय पर यथासंशोधित उत्तराखण्ड लोक सेवा आयोग सपरामर्श चयनोन्नति (प्रक्रिया) नियमावली, 2003 के अनुसार अनुपयुक्त को अस्वीकार करते हुये ज्येष्ठता के आधार पर की जायेगी।”

7. The respondents have submitted that while considering the petitioners for promotion, the उत्तराखण्ड लोक सेवा आयोग सपरामर्श चयनोन्नति (प्रक्रिया) नियमावली, 2003 (hereinafter referred to as Rules of 2003) was to be followed. Respondent department submitted a list of eligible candidates before the Commission. Admittedly, in this list, the petitioners were senior but while considering them for promotion, Rules of 2003 was to be followed. Part-3 of the Rules of 2003, prescribed the procedure for selection on the basis of merit and Part-4 prescribed for procedure selection on the basis of seniority, which are quoted below:-

“भाग-3

योग्यता के मानदण्ड से पदोन्नति की प्रक्रिया

7. इस भाग का लागू होना-

यदि नियम 5 के उपबन्धों के आधार पर योग्यता के मानदण्ड से पदोन्नति करना हो तो इस भाग में निर्धारित प्रक्रिया का अनुसरण किया जायेगा।

8. पात्रता सूची जैयार करना-

नियुक्ति प्राधिकारी, प्रत्येक श्रेणी अर्थात् सामान्य, अनुसूचित जाति और जनजाति के अभ्यर्थियों की अलग-अलग तीन सूचियाँ उक्त श्रेणी के लिए उपलब्ध रिक्तियों को दृष्टि में रखते हुए, तैयार करेगा जो ज्येष्ठतम पात्र अभ्यर्थियों की पात्रता सूची कही जायेगी, जिनमें यथासम्भव रिक्तियों की संख्या के तीन गुना किन्तु कम से कम आठ नाम रखे जायेंगे:

प्रतिबन्ध यह है कि यदि भर्ती ऐसी रिक्तियों के लिए, जो भर्ती के एक वर्ष से अधिक अवधि के दौरान हुई हो, की जानी हो तो प्रत्येक ऐसे वर्ष के सम्बन्ध में पृथक पात्रता सूचियाँ तैयार की जायेंगी और उस दशा में भर्ती के द्वितीय और अनुवर्ती वर्षों के लिए पात्रता सूचियाँ तैयार करते समय, पात्रता सूचियों में सम्मिलित किये जाने वाले अभ्यर्थियों की संख्या निम्नलिखित होगी:-

(क) द्वितीय वर्ष के निमित्त- उक्त अनुपात के अनुसार संख्या और प्रथम वर्ष के निमित्त रिक्तियों की संख्या का योग,

(ख) तृतीय वर्ष के निमित्त- उक्त अनुपात के अनुसार संख्या और प्रथम तथा द्वितीय वर्ष के निमित्त रिक्तियों की संख्याओं का योग,

और इसी प्रकार आगे भी:

अग्रेत्तर प्रतिबन्ध यह है कि जिन अभ्यर्थियों को, प्रथम दृष्टया, पदोन्नति के लिए उपयुक्त न समझा जाय, उनकी गणना उक्त अनुपात के निमित्त नहीं की जायेगी और

उनके नाम के सामने उनके सम्बन्ध में इस प्रकार विचार न किये जाने के आशय की एक टिप्पणी लिख दी जायेगी।

स्पष्टीकरण 1—

इस नियम में “रिक्तियों की संख्या” का तात्पर्य ऐसी मौलिक, अस्थयी या स्थानापन्न रिक्तियों की कुल संख्या से है जो भर्ती के वर्ष में हुई हों

स्पष्टीकरण 2—

सभी प्रकार की रिक्तियों को समाविष्ट करने के लिए पात्रता की एक एकल सूची तैयार की जायेगी।

9. आयोग को सूचियाँ भेजना—

नियुक्ति प्राधिकारी पात्रता की सीमा में आने वाले समस्त व्यक्तियों की पदक्रम सूची तथा पात्रता की सूची या सूचियाँ और उनमें या उनमें सम्मिलित अभ्यर्थियों की चरित्र आयोग की प्रेषित करेगा और भर्ती के प्रत्येक वर्ष की, जिसके लिए चयन प्रस्तावित है, रिक्तियों की संख्या भी आयोग को सूचित करेगा।

10. पात्रता की सूची का पुनरीक्षण—

यदि किसी मामले में आयोग को यह प्रतीत हो कि नियम 9 के अधीन उसे प्राप्त सूची या सूचियों में सम्मिलित नामों में से अपेक्षित संख्या में उपयुक्त अभ्यर्थी प्राप्त न हो सकेंगे तो यह नियुक्ति प्राधिकारी से उतनी अधिक संख्या में ज्येष्ठतम, अथवा सभी पात्र अभ्यर्थियों के नाम और चरित्र पंजियाँ उसमें सम्मिलित करने के लिए कह सकता है जिन्हें वह उचित समझे और नियुक्ति प्राधिकारी तदनुसार नियम 8 में दी गई किसी बात के होते हुए भी, उक्त सूची या सूचियों को पुनरीक्षित करेगा।

11. चयन समिति—

नियुक्ति प्राधिकारी द्वारा एक चयन समिति संघटित की जायेगी जिसमें निम्नलिखित होंगे:—

(1) आयोग का प्रतिनिधित्व करने वाला उसका अध्यक्ष या सदस्य समिति का अध्यक्ष होगा,

(2) नियुक्ति प्राधिकारी, तथा

(3) उसी विभाग या किसी अन्य विभाग का सरकार द्वारा नाम निर्दिष्ट कोई ज्येष्ठ अधिकारी, किन्तु प्रतिबन्ध यह है कि यदि राज्यपाल नियुक्ति प्राधिकारी हों तो सामान्यतया उक्त विभाग का विभागाध्यक्ष इस खण्ड के अधीन नाम निर्दिष्ट किया जायेगा।

12. चयन के लिये दिनांक निश्चित करना—

(1) नियुक्ति प्राधिकारी आयोग के परामर्श से चयन के लिए कोई दिनांक निश्चित करेगा:

प्रतिबन्ध यह है कि चयन कार्य एक या उससे अधिक दिनों तक किया जा सकता है।

(2) यदि आयोग या नियुक्ति प्राधिकारी यह आवश्यक समझे कि पात्रता की सूची या सूचियों में समाविष्ट समस्त या किसी भी अभ्यर्थी का साक्षात्कार चयन समिति द्वारा किया जाना चाहिए तो नियुक्ति प्राधिकारी, यथास्थिति, ऐसे अभ्यर्थियों या अभ्यर्थी को उक्त प्रयोजन के लिए उपयुक्त दिनांक या दिनों पर बुलायेगा।

(3) चयन समिति प्रत्येक मामले में अभ्यर्थियों की चरित्र पंजियों पर विचार करेगी और किसी अन्य बात पर भी विचार कर सकती है जो उसकी राय में संगत हो।

13. चयन सूची-

चयन समिति योग्यता के अनुसार एक सूची अर्थात् चयन सूची तैयार करेगी जिसमें नियम 9 के अधीन आयोग को सूचित की गयी रिक्तियों के प्रति मौलिक रूप से नियुक्त किये जाने के लिये सिफारिश किये गये अभ्यर्थियों के नाम होंगे:

प्रतिबन्ध यह है कि यदि भर्ती ऐसी रिक्तियों के लिये, जो भर्ती के एक वर्ष से अधिक अवधि के दौरान हुई हो, की जाय तो प्रत्येक ऐसे वर्ष के सम्बन्ध में चयन उस वर्ष के लिए तैयार की गयी पात्रता सूची से किया जायेगा। ऐसी दशा में किसी वर्ष की रिक्तियों के प्रति चुने गये अभ्यर्थियों के नाम यथास्थिति उससे बाद के वर्ष या वर्षों की पात्रता सूची या सूचियों में से, द्वितीय और अनुवर्ती वर्षों की पात्रता सूचियों से चयन करने के पूर्व निकाल दिये जायेंगे।

14. आयोग का अनुमोदन-

आयोग, चयन समिति की सिफारिशों पर विचार करेगा और तत्पश्चात् यथा अनुमोदित चयन सूची नियुक्ति प्राधिकारी को भेजेगा।

15. ज्येष्ठताक्रम में चयन सूची का फिर से क्रमबद्ध किया जाना-

नियुक्ति प्राधिकारी ज्येष्ठताक्रम में चयन सूची को फिर से क्रमबद्ध करेगा।

16. चयन सूची से नियुक्ति-

चयन सूची में सम्मिलित अभ्यर्थियों को नियम 9 के अधीन आयोग को यथा अधिसूचित रिक्तियों के प्रति उस क्रम में नियम 15 के अधीन फिर से क्रमबद्ध की गयी सूची में उनके नाम आये हों, नियुक्त किया जायेगा:

प्रतिबन्ध यह है कि यदि परीक्षा के दौरान किसी भी समय नियुक्ति प्राधिकारी को यह प्रतीत हो कि मौलिक रूप से नियुक्त सरकारी सेवक संतोष प्रदान करने में विफल रहा है तो वह उसे कोई कारण बताये बिना उस पद पर जिससे पदोन्नत किया गया है, प्रत्यावर्तित कर सकता है:

अग्रेतर प्रतिबन्ध यह है कि भर्ती के किसी वर्ष की चयन सूची का उपयोग भर्ती के उसी वर्ष की रिक्तियों के लिये किया जायेगा।

भाग-4

पदोन्नति की प्रक्रिया

यदि अनुपयुक्त को अस्वीकृत करते हुए ज्येष्ठता मानदण्ड हो:

17. इस भाग का लागू होना-

यदि नियम 5 के उपबन्धों के आधार पर, अनुपयुक्त व्यक्तियों को अस्वीकार करते हुए ज्येष्ठता के मानदण्ड से पदोन्नति की जानी हो, तो इस भाग में निर्धारित प्रक्रिया का अनुसरण किया जायेगा।

18. पात्रता सूची तैयार करना—

(1) नियम 19 में अन्यथा उपबन्धित के सिवाय, नियुक्ति प्राधिकारी, प्रत्येक अनुभाग से अर्थात् सामान्य, अनुसूचित जाति और अनुसूचित जनजाति के अभ्यर्थियों की अलग-अलग तीन सूचियाँ जिसे ज्येष्ठतम पात्र अधिकारियों की पात्रता सूचियाँ कहा जायेगा, तैयार करेगा। जिसमें उक्त प्रत्येक अनुभाग के लिये उपलब्ध रिक्तियों को दृष्टि में रखते हुए यथासम्भव निम्नलिखित अनुपात में नाम दिये जायेंगे:—

1 से 5 तक रिक्तियों के लिए—रिक्तियों की संख्या का दुगुना किन्तु कम से कम 5।

5 से अधिक रिक्तियों के लिये—रिक्तियों की संख्या का डेढ़ गुना किन्तु कम से कम 10।

नियम 8 का प्रथम प्रतिबन्धात्मक खण्ड और स्पष्टीकरण यथावश्यक परिवर्तन सहित इस नियम पर लागू होंगे।

(2) भाग तीन में नियत शेष प्रक्रिया यथा आवश्यक परिवर्तनों सहित इस भाग के अधीन की गयी पदोन्नति पर लागू होगी सिवाय इसके कि भाग तीन में अभिदिष्ट चयन सूची, चयन समिति द्वारा अनुपयुक्त को अस्वीकार करते हुए, ज्येष्ठताक्रम में तैयार की जायेगी।

19. कुल मामलों में चयन समिति संघटित न करने का अधिकार—

नियम 18 में किसी बात के होते हुए भी यदि किसी दशा में भरी जाने वाली रिक्तियों की संख्या कम हो और नियुक्ति प्राधिकारी का यह विचार हो कि ज्येष्ठतम अभ्यर्थी या अभ्यर्थीगण पदोन्नति के लिए पूर्णतः योग्य है और तदनुसार कोई अतिक्रमण नहीं होता है, तो आयोग यदि वह नियुक्ति प्राधिकारी के विचार से सहमत हो, प्रस्ताव का सीधे अनुमोदन कर सकता है। उस दशा में कोई भी चयन समिति संघटित करने की आवश्यकता नहीं है और इस प्रकार अनुमोदित अभ्यर्थी या अभ्यर्थीगण पदोन्नति के लिए यथाविधि चयन किये गये समझे जायेंगे।”

Accordingly, Rule 18 of the Rules of 2003 specifically mentioned that procedure for conducting the proceedings will be followed with necessary amendments and subject to the condition that the list of promotion will be prepared by the DPC according to the ‘seniority subject to the rejection of unfit.’

8. Learned counsel for the parties have also mentioned that another procedural Niyamawali was issued by the Public Service Commission on 10.02.2011, which is known as उत्तराखण्ड (लोक सेवा आयोग क्षेत्रान्तर्गत) राज्याधीन सेवाओं में “अनुपयुक्त को अस्वीकार करते हुए ज्येष्ठता” एवं

“श्रेष्ठता” के आधार पर पदोन्नति द्वारा किये जाने वाले चयनों में अपनयी जाने वाली प्रक्रिया विनियमावली, 2010 (hereinafter referred to as Regulations of 2010).

9. These Regulations of 2010 prescribed the procedure for the matters of promotions, on the basis of the ‘seniority-cum-merit’ as well as ‘seniority subject to rejection of unfit’ and purely on ‘merit’. Regulation-3 jointly prescribes for procedure for ‘seniority-cum-merit’ and ‘seniority subject to rejection of unfit’. Whereas, the Regulation-4 prescribes for selection on the basis of merit and in this matter, the relevant Regulation is Regulation-3.

10. Admittedly, there are three criteria for promotion i.e. (i) Seniority subject to rejection of unfit (ii) Seniority-cum-merit and (iii) Merit. It is an admitted fact that the criteria for promotion is always mentioned in the relevant service Rules and the Agency, conducting the DPC may it be the Public Service Commission, cannot apply a different criteria for promotion.

11. The relevant service rules, in this matter are the Rules of 2013. Rule 5 (1) (Kha)-Part-2 prescribes that 50% promotions for the post of Cane Development Inspector, will be made from those Cane Supervisors, who have completed at least 5 years of service and they will be promoted on the basis of ‘seniority subject to rejection of unfit’. Similarly, Rule 16 also prescribes the criteria for promotion, which specifically mentions as ‘अनुपयुक्त को अस्वीकार करते हुये ज्येष्ठता’. Learned counsel for the petitioners has raised the point that neither the Public Service Commission nor any other body can change the criteria mentioned in the concerned Service Rules.

12. In support of their contention, the petitioners have referred to certain law laid down by the Hon’ble Apex Court. In **Durga Charan Mishra vs. State of Orissa and others (1987)4 SCC 646**, it was held that the Public Service Commission had no power to prescribe such

minimum standard for determining the suitability of candidates for appointment, if it is not prescribed in the concerned Service Rules and in para 15 of the judgment, following observation was made by the Hon'ble Apex Court which reads as under:-

“15.....The Commission which has been constituted under the Rules must, therefore faithfully follow the Rules. It must select candidates in accordance with the Rules. It cannot prescribe additional requirements for selection either as to eligibility or as to suitability. The decision of the Commission to prescribe the minimum marks to be secured at the viva voce test would, therefore, be illegal and without authority.”

13. In **Balbir Singh Bedi vs. State of Punjab and others (2013)11 SCC, 746**, it was also held by the Hon'ble Apex Court that the eligibility criteria of promotion “seniority-cum-merit” and “merit-cum-seniority” are totally different. In case of ‘seniority-cum-merit’ greater emphasis is on seniority even though it is not the deciding factor, while in case of ‘merit-cum-seniority’ merit is the deciding factor.

14. However, in the present case, the merit was not to be considered and only criteria for promotion is ‘seniority subject to rejection of unfit’.

15. The Hon'ble Apex Court in the case of **Sher Singh & others vs. Surinder Kumar & others, 1998(4) SLR, 357**, further held that while making selection, the authority should follow the criteria for making promotion from one post to other and it was “seniority-cum-merit” and if promotion were made on the basis of ‘merit-cum-seniority’, then it vitiates the whole selection process.

16. Learned counsel for the petitioners has argued that although in the case of ‘merit-cum-seniority’ and ‘seniority-cum-merit’, the merit has to be seen but in the case of ‘seniority-cum-merit’, merit cannot supersede the seniority, as settled by the Hon'ble Apex Court. We agree with this argument.

17. However, in the present case before this Court, both the criteria cannot be applied and only criteria of 'seniority subject to rejection of unfit', was to be applied.

18. Learned counsel for the petitioners also argued that the Hon'ble Apex Court in the case of **Durga Charan Mishra (Supra)** has also laid down that the Public Service Commission cannot prescribe additional requirements for selection either as to eligibility or as to suitability over those which are prescribed in the service rules. Where the Rules do not prescribe for viva voce, the Commission cannot prescribe the minimum marks to be secured at the viva voce test.

19. Learned counsel for the petitioners has argued that in the cases, when 'seniority-cum-merit' was the criteria (although in the present case, the criteria is different) it does not violative assessment of comparative merit as held in **B.V. Sivaiah vs. K. Addanki Babu, AIR 1998 Supreme Court, 2565**. The Hon'ble Apex Court in para-18 has held as under:-

"18. We thus arrive at the conclusion that the criterion of 'seniority-cum-merit' in the matter of promotion postulates that given the minimum necessary merit, requisite for efficiency of administration, the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. 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 employee who is eligible for consideration formance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit".

20. This court agree with learned counsel for the petitioners that even in the case of 'seniority-cum-merit', the seniority cannot be ignored. However, in the case in hand, the criteria was neither 'merit-cum-seniority' nor 'seniority-cum-merit', rather it was purely 'seniority

subject to rejection of unfit.' This court agree with the argument that while applying the criteria of 'seniority subject to rejection of unfit', the comparative assessment of 'merit' cannot be made by the Commission. We hold that the concerned Service Rules of 2013 were made under Article 309 and the criteria of promotion mentioned in these rules, cannot be changed by the Agency (Public Service Commission), applying their procedural Regulations.

21. Learned counsel for the petitioners also referred to the judgment of the Hon'ble Apex Court, passed in **State of Punjab vs. Manjit Singh (2003)11 Supreme Court Cases 559**, wherein it was held that the Public Service Commission could not resort to screening test to shortlist the candidates for recruitment and fixing the cut-off marks for such purpose, was held improper. In our view, although, the facts of that case were different, but the ratio of the judgment of the Hon'ble Apex Court has been that, if the Rules do not prescribe for the minimum standard or any new type of test, that cannot be applied by the Commission, prescribing their own criteria.

22. Referring to another judgment of the Hon'ble Apex Court, passed in **Syed Mohammad Vs. Union of India and others, 2017 SCC OnLine SC 1170**. Learned counsel for the petitioners has also argued that if the rule does not prescribe the minimum qualifying marks for the interview or other test, for the purpose of selection, whether a candidate participates in the interview or not, is of no relevance, since, assuming, he had been granted zero marks in case he had otherwise obtained better marks in the written examination and the performance appraisal, he is eligible to be promoted since the selection is based on seniority-cum-merit and since there is also no provision for disqualifying an incumbent then that criteria cannot be applied.

23. Although the facts of that case to some extent are different but in the case of 'seniority-cum-merit', all the judgments of the Hon'ble Apex Court also laid down that even less meritorious candidate, if senior, would also be considered.

24. Hence, there is a difference between 'seniority subject to rejection of unfit' and 'seniority-cum-merit' and we hold that in the former, only 'seniority' was to be seen with the proviso that a person having an adverse remarks, will not be entitled for promotion, whereas in the later, the promotion will be made according to the seniority, but his merit will also to be seen so as to pass a minimum standard. In the present case, the criteria for promotion, mentioned in the Rules was 'seniority subject to rejection of unfit', which means that if a person is senior and is not having any adverse entry for a certain period, he will be given promotion and cannot be superseded by his junior.

25. Learned counsel for the petitioners has argued that while taking the promotional exercise, the DPC has applied the wrong criteria of 'seniority-cum-merit' in this case, and they have given weightage to the merit of the candidates, after taking into consideration their 10 years entries and fixing a minimum criteria for that, seniority was ignored. We agree with this argument.

26. Learned counsel for the respondents replied this point with the argument that following the due procedure, set by the Regulations of 2010, the promotional exercise was completed. Those procedural Regulations were made by the Commission and in our view, it cannot supersede the Service Rules of 2013, framed under Article 309. Learned counsel for the respondents has also argued that to judge the suitability for promotion, the Procedural Rules, 2010 were followed, whereas, in the opinion of the court, this Viniyamawali cannot supersede the Service Rules.

27. However, even if applying this Viniyamawali, we are of the view that the contention of the respondents cannot be accepted because of the reasons that Rule 3 of this Viniyamawali prescribed the procedure combinedly for both the criteria of 'seniority subject to rejection of unfit' and 'seniority-cum-merit' and we are of the view that the principle of 'seniority-cum-merit' cannot be applied for the criteria 'seniority subject to rejection of unfit'.

28. Rule 3 sub rule (1) specifically prescribes that the names mentioned in the eligibility list will be considered according to the seniority and after considering the senior person and deciding him fit or unfit, the next person will be considered. Sub-rule (2) & (3) are, however, applicable in the case of 'seniority-cum-merit' and after following the Sub-Rule (2) & (3), the merit of a person will be declared fit. This court is of the view that Sub-Rule (2) & (3) are for the criteria of 'seniority-cum-merit' because this Rule, nowhere prescribed how 'unfit' person will be declared. So, Rule 3- sub-rule (2) & (3) cannot be applied for the criteria of 'seniority subject to rejection of unfit' because it nowhere prescribed about the candidate who is unfit.

29. However, Sub-rule (4) of Rule 3 to some extent prescribes the procedure for 'seniority subject to rejection of unfit' and it reads as under:-

“(4) यदि किसी वर्ष में वार्षिक गोपनीय प्रविष्टि में अथवा विशेष प्रतिकूल प्रविष्टि के रूप में किसी अभ्यर्थी की सत्यनिष्ठा संदिग्ध अंकित होती है तो जिस वर्ष ऐसी प्रविष्टि अंकित की गयी है उस वर्ष से 05 वर्ष तक ऐसे अभ्यर्थी को पदोन्नति हेतु अर्ह नहीं समझा जायेगा।”

Hence, if in the annual or special adverse entry, the integrity of a person is doubtful, then he will be deemed to be unfit for promotion for next five years of such entry. So this sub-rule (4) clarifies the position that if a person's annual entries or special entries are adverse, he will not be fit for promotion for next five years. In other words, a

person who is having any adverse entry in last five years, he will be unfit for promotion. This Court is of the view that this is the only criteria to declare the candidate unfit for promotion in case of 'seniority subject to rejection of unfit' while doing their promotional exercise.

30. The only thing to be seen for promotion was whether any senior person was having an adverse entry in last five years or not and if it was so, he is unfit, otherwise, he should have been granted promotion on the basis of 'seniority subject to rejection of unfit'. Sub-rule (2) & (3) of Procedural Niyamawali of 2010 should be followed only to assess the merit for the criteria of 'seniority-cum-merit', and cannot be applied in this case because of the reasons that the Service Rules of 2013 nowhere prescribes the criteria of promotion as 'seniority-cum-merit' rather it was specifically mentioned as 'seniority subject to rejection of unfit' and this court is of the clear view that even if applying the Procedural Niyamawali of 2010, the petitioners could not be denied the promotion because their entries for last 5 years were not adverse. Hence, whole promotional exercise was vitiated and needs to be set aside.

31. We are of the view that to apply the criteria of 'seniority subject to rejection of unfit' no comparative chart of 10 years entries was required to be made and only the seniority of the candidates were to be seen subject to the fact that any senior candidate having any adverse entry since last five years, was to be superseded and only criteria of being unfit in this case, is to see that a senior candidate is not entitled for promotion for five years from the date of having any adverse entries in his service record.

32. Learned A.P.O. on behalf of the respondents has contended that they have applied the right criteria and followed the right procedure. This court does not agree with this contention and is of the

view that the criteria, as prescribed in the Rules, was misinterpreted and some persons, junior to the petitioners were granted promotion while as per the Rules and law laid down by the Hon'ble Apex Court, the petitioners being senior were entitled to be promoted before their juniors.

33. The petitioners have sought the relief to set aside the promotion order dated 16.03.2016 by which juniors were promoted, ignoring the senior most employee and they have also sought direction to give promotion to the senior most employees from the date of promotion of their juniors. This court is of the view that the relief sought by the petitioners needs to be granted and petitioners having no adverse remark, are entitled for promotion before their juniors. As the wrong criteria of promotion was applied, hence the whole promotional exercise is vitiated, which needs to be set aside and it should be completed afresh. Petition deserves to be allowed and following order is hereby passed.

ORDER

The claim petition is allowed. The impugned promotion order dated 16.3.2016 passed by the respondents is hereby set aside. Respondents are directed to initiate promotional exercise afresh, in accordance with the rules and as per the observation made in the body of the judgment, within a period of three months from today. No order as to costs.

(A.S.NAYAL)
MEMBER (A)

(RAM SINGH)
VICE CHAIRMAN (J)

DATE: NOVEMBER 13, 2018
NAINITAL

KNP