

**BEFORE THE UTTARAKHAND PUBLIC SERVICES TRIBUNAL
AT NAINITAL**

Present: Hon'ble Mr. Justice J.C.S. Rawat

----- Chairman

Hon'ble Mr. U.D.Chaube

-----Member (A)

Claim Petition No. 21/N.B./D.B./2013

(District :- Nainital)

Narendra Kumar Singh, aged 41 years,
S/o Late Sri Gopal Singh,
R/o Mariya Dham Bhimtal, District Nainital

.....Petitioner

Versus

1. State of Uttarakhand through Secretary, Ministry of Rural Engineering Service Dehradun, Uttarakhand, Dehradun.
2. Chief Engineer Managing, Rural Engineering Service Raipur, Dehradun, Uttarakhand, Dehradun.
3. Executive Engineer Rural Engineering Service, Bhimtal, District Nainital, Uttarakhand.

.....Respondents

Present: Sri A. D. Tripathi, Advocate for the petitioner.
Sri V.P. Devrani, Ld. A.P.O. for the respondents.

JUDGMENT

DATED: 07th July, 2015

(Delivered by Hon'ble Mr. Justice J.C.S. Rawat, Chairman)

1. This petition has been filed for seeking following relief:-

“In view of the facts, mentioned in the aforesaid paragraph the applicant prays that the Hon'ble Tribunal may graciously be pleased to direct the opposite parties:-

(i) *Issue a direction/order to respondent not to count the grading given to the petitioner in the year 2000-2001 and 2001-2002 where the no entry was available/given to him and more so it was given by one person alone therefore it does not fulfill the condition precedent provided in the Government order, 2002.*

(ii) *To issue direction/ order to the respondent to review the case of petitioner in the light of Government order No. 1450/dated 30.9.2010 in which it is clearly stated that the “Entry given previous years of promotion as “satisfactory” be treated as “Good” so the interest of the employee shall not be defeated, and give promotion to him from the very date of promotion 26.4.2011, otherwise the petitioner shall suffer loss and injury.*

(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.”*

2. It is admitted case of the parties that the petitioner was initially appointed as Junior Engineer (Civil) in the R.E.S. Department in the year 1997. There were 174 posts of Additional Assistant Engineers, in which 134 posts were for General Category employees and 33% were reserved for the Reserved Categories and the Junior Engineers were also entitled to be promoted on the said post. The Government framed rules

उत्तराखण्ड राज्याधीन सेवाओं के अन्तर्गत अपर सहायक अभियंता पद पर पदोन्नति हेतु भर्ती की प्रक्रिया अल्पकालिक नियमावली 2011 (hereinafter referred to as Niymawali 2011) for promotion of Additional Assistant Engineers in the said department for one time promotion in the year 2011. The petitioner being eligible for the promotion under these rules, his name was considered for promotion from the post of Junior Engineer to the post of Additional Assistant Engineers in the R.E.S. Department. Criteria for promotion was seniority-cum-merit subject to rejection of unfit. Petitioner did not qualify the benchmark as prescribed in The Uttarakhand Procedure of Selection for Promotion in the State Services (Outside the Purview of the Public Service Commission) On the Basis of 'Seniority' and 'Merit', Subject to the Rejection of Unfit(Procedure) Rules, 2009 (hereinafter referred to as Niymawali 2009). Hence the petitioner was not found eligible to be promoted. He made a representation for his supersession to the post of Additional Assistant Engineer on the ground that the Government has not considered the Notification dated 30.09.2010. The petitioner had earned entries in the year 2002-03 and 2003-04 as a 'Good Officer' but rest of his entries were 'Satisfactory' and 'good'. According to the benchmark he should have at least earned 5 or more entries in his character roll specified as 'Good' or higher category but the petitioner had not obtained the required benchmark according to the D.P.C. The petitioner has alleged that Notification dated 30.9.2010 specifically provides that the entries which have been given in the character roll as 'Satisfactory Officer', will be considered equivalent to 'Good' at the time of the consideration of promotion. It is further alleged that he had sufficient number of 'Good' entries to fulfill the Benchmark. Thereafter, Secretary of Diploma Engineers preferred a representation which has not been decided so far.

Feeling aggrieved by the said omission, the petitioner has filed this claim petition.

3. The respondents have filed written statement alleging therein that the petitioner did not qualify the benchmark as has been given in Rule-3 of the 2009 Niymawali. The Government order of 30.9.2010 is not applicable in the case of the petitioner. The said notification is only applicable in the case of the promotion of the employees who are covered by the principle of promotion of seniority-cum-merit and the said Government order is not applicable in the case of the persons whose promotion has to be considered on the basis of seniority-cum-merit subject to the rejection of unfit. Rule-3 specifically deals with the said category of the petitioner and Rule 4 deals with the promotion which had been made on the basis of merit-seniority. The respondents have denied all the averment and grounds of attack made in the petition and at last requested to dismiss the claim petition.
4. Ld. Counsel for the petitioner has contended that the case of the petitioner has not been considered properly in the light of the Government order dated 30.09.2010 which was enforceable prior to the D.P.C proceedings were started and the said Government order was ignored by the authorities concerned deliberately to provide undue benefit to others. It clearly shows that the selection committee was fully biased. Ld. Counsel for the petitioner further contended that during the period 2007-08, 3 officers were In- charge and they have given entries on the assessment of work done by the petitioner and during the said period, the Executive Engineers, who were In-charge for two periods of year for different times, they have recorded 'Good' entries in his character roll whereas the third officer, who spent short period of not more than 3 months, has given entry as 'Satisfactory' including a period of year for which no above Executive Engineers were In-charge of his

work, which could not be taken into account according to the Government order. This entry should have been considered as a Good entry.

5. Ld. A.P.O. refuted the contention and contended that the petitioner had to earn 5 Good entries during the period of 10 years. The Entry during the period 2000-2001 and 2001-2002 were not available, as such this entry could not have been taken into account and two of the entries thereafter were 'Good' in his character roll and rest six entries thereafter he earned in his character roll were of 'Satisfactory' nature. He further contended even if his entry for the year 2007-08 be also counted Good, even then he does not fulfill the benchmark. The D.P.C. has correctly assessed the entry of the year 2007-08 as 'Satisfactory' because it was the subjective satisfaction of the committee and it cannot be disputed before the Tribunal or Court. It was further contended that the contention of the petitioner that the petitioner was posted as Junior Engineer and there were only two levels of finalization of annual entry according to the G.O., is not sustainable, because the petitioner was posted in block level and there are three level for finalization of annual entry. He also placed the G.O. No. 73/38-9-89M/85 dated 18.01.1989. The respondents have further contended that the Government order of 30.9.2010 is not applicable in the case of the petitioner because that government order is only applicable to the case where the promotion is simply on the basis of seniority-cum-merit but in this case the principle of seniority-cum-merit subject to rejection of unfit has to be applied. He further contended that the bias cannot be alleged against the D.P.C. and the contention of the Ld. Counsel for the petitioner is totally baseless.
6. Ld. Counsel for the petitioner at the outset contended that the members of the D.P.C. were prejudiced to the petitioner as such they

have not nominated the petitioner as suitable candidate. Ld. A.P.O. refuted the contention. Whereas the bias and malafide act has been alleged against the members of the DPC by the petitioner, the said contention is also not tenable because the petitioner has alleged that inference should be drawn by ignoring the Government order by the members of the D.P.C., so they were biased. It is necessary where bias/prejudice is alleged against any of the members of the DPC; it should specifically be pleaded and proved by evidence. The DPC always consists of two or three officers and it cannot be said that all the persons sitting in the committee would be biased against the petitioner. We will discuss the applicability of the Government order dated 30.09.2010 later on. If the said Government is not applicable in the case of the petitioner, then the basis of the bias is rooted out. The DPC has opined and given the finding, 'as to why the petitioner cannot be promoted.' The said finding has been recorded in para 22 of Annexure-1 of the proceedings of the DPC which is as under:-

“ श्री नरेन्द्र कुमार सिंह कनिष्ठ, अभियन्ता की विगत 10 वर्षों के सेवाभिलेखों प्रविष्टियों का समिति द्वारा जांच परीक्षण किया गया तथा जांच एवं परीक्षणोंपरान्त इनकी 5 अच्छा, 04 उत्तम , एवं 01 वर्ष की सत्यनिष्ठा प्रमाणित है । इस प्रकार इनकी विगत 10 वर्षों की प्रविष्टियां में 5 अथवा अधिक वर्षों की चरित्र प्रविष्टियां उत्तम/उच्चतर श्रेणी में वर्गीकृत न होने के कारण ये पदोन्नति के निर्धारित मापदण्ड पूर्ण नहीं करते हैं जिसके फलस्वरूप समिति द्वारा इन्हें सर्व सम्मति से अपर सहायक अभियन्ता पद पर पदोन्नति हेतु अनुपयुक्त घोषित किये जाने का निर्णय लिया गया है।”

7. In Union of India & others Vs. S.P. Nayyar(supra) bias was pleaded against the members of the D.P.C., and the Hon'ble Apex Court in Para 14 and 15 has held as under:-

“14. The bias and malafide acts can be adjudged only on the basis of evidence. The assessment of Character Roll by one or the other officer, giving a general grade such as 'Good' cannot be the sole ground to hold that the officer was biased against the person whose Character Roll is assessed. In

the instant case, there is nothing on record to suggest that the appellant no. 3 - E.N. Ram Mohan was biased against the respondent. Merely because he assessed the ACR of the respondent as 'Good' as against assessment of 'Very Good' made by I.O. it cannot be said that he was biased against the respondent.

15. The Departmental Promotion Committee consists of a Chairman and the members. Even if bias is alleged against the Chair-person, it cannot be presumed that all the members of the Committee were biased. No ground has been made out by the respondent to show as to why the assessment made by the DPC is not to be accepted. The High Court failed to notice the aforesaid fact and wrongly discarded the assessment made by the D.P.C.

8. It is admitted case of the parties that the petitioner was eligible to be considered for promotion from the post of Junior Engineer to Additional Assistant Engineer in the department of Rural Engineering Services. The Government promulgated the rules regarding promotion from the post of Junior Engineer to Additional Assistant Engineer only for one time. Rule-5 provides how the vacancies of Additional Assistant Engineer would be filled amongst eligible Junior Engineers. Rule-5 of the said Rules provides that the committee constituted under the Rules for the promotion would consider the promotion of the Junior Engineers on the basis of the rejection of unfit on the basis of seniority-cum-merit. Rule 5(2) is quoted below:-

“5—(1).....

(2) अपर सहायक अभियंता के पद पर भर्ती अनुपयुक्त को अस्वीकार करते हुए ज्येष्ठता के आधार पर निम्नवत गठित चयन समिति के माध्यम से की जायेगी:—

- | | | |
|-----|---|---------|
| (क) | विभागाध्यक्ष | अध्यक्ष |
| (ख) | विभागाध्यक्ष द्वारा नाम निर्दिष्ट अधिकारी जो कि अधीक्षण अभियंता से न्यून न हो | सदस्य |
| (ग) | विभागाध्यक्ष कार्यालय में कार्यरत स्टाफ आफिसर अथवा समकक्ष अधिकारी | सदस्य |

नोट:— उक्त चयन समिति में अध्यक्ष सदस्यों में से यदि कोई भी अनुसूचित जाति /जनजाति श्रेणी का अधिकारी न हो तो उक्त श्रेणी के किसी अधिकारी को अध्यक्ष द्वारा चयन समिति में नामित किया जायेगा।”

9. Thus, this Niymawali does not provide any further procedure to promote the officers amongst the Junior Engineers, then the rules for the promotion on the basis of rejection of unfit on the basis of seniority is applicable in the case of the petitioner. It is also admitted that this Niymawali is applicable in the case of the petitioner. The said Niymawali provides the detailed procedure and about the benchmark for the promotion of the candidates. The relevant benchmark for the purpose of this matter has been given in Para 2, 3 & 4 of the said rules which has been quoted as **below:-**

“(2) इस प्रक्रिया हेतु सम्बन्धित अधिकारियों की प्रोन्नति के ठीक नीचे के पद पर कार्य करने की अवधि की अद्यतन 10 वर्ष की उपलब्ध प्रविष्टियां देखी जायेंगी और यदि 10 वर्षों से कम की प्रविष्टियां ही उपलब्ध हों तो उपलब्ध सभी प्रविष्टियां देखी जायेंगी।

(3) यदि पात्रता क्षेत्र में शामिल अभ्यर्थी की विगत 10 वर्षों की चरित्र प्रविष्टियों में पांच या अधिक चरित्र प्रविष्टियों को ‘उत्तम’ या ‘उच्चतर’ श्रेणी में वर्गीकृत किया गया हो तथा विचारण के ठीक 2 वर्ष की प्रविष्टियां प्रतिकूल न हों, तो, ऐसे अभ्यर्थी को विभागीय पदोन्नति समिति द्वारा पदोन्नति हेतु “उपयुक्त” घोषित किया जायेगा।

(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।”

According to these provisions, the candidate's 10 years' entries would be considered at the time of the promotion. If less than 10 years' entries of the candidate were only available, then DPC would consider all those available entries for the promotion of the candidate. It is also provided that the candidate should have obtained 5 or more entries as good / very good/ outstanding and also he should not have obtained adverse entries for two preceding years immediately before the date of DPC and it is also provided if the candidate has received a special adverse entry and his integrity has been found doubtful in any of these years, then the DPC will not consider his case, because he is not eligible to be promoted

for five years after such entry. Now the said benchmarks have been prescribed under the aforesaid rules and we have to see whether the petitioner fulfills all these benchmarks or not. The petitioner's case was considered on 26.4.2011 and he was not found fit on the ground that he did not fulfill the benchmark as has been indicated in the aforesaid rules.

10. The factual matrix of the petitioner's case is that the petitioner earned the confidential entries as follows for the last 10 years which were to be considered by the D.P.C.:-

Financial Year	Details	Further Details	Grading accepted by D.P.C.
(1)	(2)	(3)	(4)
2000-2001	1.4.2000 to 31.3.2001 Integrity certified		Integrity certified
2001-2002	Direct from EE/AE/BDO Not received		Satisfactory
2002-2003	1.4.2002 to 16.9.2002 BDO/AE Good EE Satisfactory	17.9.2002 to 31.3.2003 BDO/AE Good EE Good	Good
2003-2004	1.4.2003 to 31.03.2004 AE Good EE Good		Good
2004-2005	5.10.2004 to 31.03.2005 AE Good EE Satisfactory SE Satisfactory		Satisfactory
2005-2006	01.04.2005 to 31.03.2006 AE Satisfactory EE Satisfactory SE Satisfactory		Satisfactory
2006-2007	01.04.2006 to 31.03.2007 AE Satisfactory EE Satisfactory SE Satisfactory		Satisfactory
2007-2008	01.04.2007 to 19.08.2007 AE Good EE Satisfactory SE Satisfactory	20.8.2007 to 18.1.2008 AE Good EE Satisfactory SE Satisfactory 23.6.2007 to 31.3.2008	Satisfactory

		19.1.2008 to 31.3.2008 AE No grading EE Satisfactory SE Satisfactory	
2008-2009	01.04.2008 to 31.03.2009 AE Good EE Good/Accepted SE Good		Good
2009-2010	01.04.2009 to 31.07.2009 AE Very Good EE Accepted	1.8.2009 to 31.3.2010 EE Good SE Good	Good

11. The aforesaid rules of 2009 did not provide how the entries have to be given to the eligible candidates by the department. For the said matter we have to travel with different government orders which have been filed along with claim petition. G.O. dated 26th July, 2002, Annexure 3 to the claim petition clearly lays down the procedure of awarding entries and there would be five type of categories, which has been enumerated in the said government order. Para 8 of the government order is extracted as below:-

“(8) प्रविष्टिकर्ता अधिकारी प्रविष्टि समाप्त होने के पश्चात् उसका वर्गीकरण भी निम्न श्रेणियों में से किसी एक में करेगा:-

1. उत्कृष्ट (Outstanding)
2. अति उत्तम (Very good)
- 3 उत्तम (Good)
4. सन्तोषजनक (Satisfactory)
5. खराब/असन्तोषजनक (Bad/Unsatisfactory)

प्रविष्टियों के अंत में सत्यनिष्ठा प्रमाण-पत्र निम्न प्रकार से अंकित किया जाना चाहिए:-

“प्रमाणित किया जाता है कि मेरी जानकारी में कोई भी ऐसा तथ्य नहीं आया जो श्रीकी सत्यनिष्ठा में विपरीत प्रभाव डालता हो, ईमानदारी के लिए इनकी सामान्य ख्याति अच्छी है और मैं इनकी सत्यनिष्ठा प्रमाणित करता/करती हूँ।

Perusal of this gradation clearly reveals that the employee can be given the entry graded to be as Satisfactory. Thereafter the Government had taken a decision on 18.12.2003 by which the controlling officer could not award an entry that the officer/official is graded as “Satisfactory”, as this category was deleted from the gradation of the entry. However, in the year 2010 vide government order No. 1450/XXX(2)/2010 dated 30.9.2010 the aforesaid government order was amended and the categories were again redefined in para 4 of the said Government order. Para 2,3,4 & 6 are relevant which are extracted as under:-

“2— उक्त शासनादेश के प्रस्तर-9 में वार्षिक प्रविष्टियों में ग्रेडिंग के सम्बन्ध में यह व्यवस्था की गयी है कि वार्षिक प्रविष्टि के अन्त में प्रतिवेदक अधिकारी द्वारा सम्बन्धित कार्मिक के सम्पूर्ण कार्य एवं आचरण के परिप्रेक्ष्य में उसकी ग्रेडिंग की जायेगी यह ग्रेडिंग निम्नवर्गीकरण के अन्तर्गत होगी:-

- | | |
|--------------------|----------------------|
| 1. उत्कृष्ट | (Outstanding) |
| 2. अति उत्तम | (Very good) |
| 3. उत्तम | (Good) |
| 4. अच्छा/ संतोषजनक | (Satisfactory) |
| 5. खराब/असन्तोषजनक | (Bad/Unsatisfactory) |

(3) शासन के संज्ञान में यह तथ्य आये है कि वार्षिक प्रविष्टियां अंकित करने वाले अधिकारियों द्वारा उक्त शासनादेश में दिये गये निर्देशों का अनुपालन भली-भांति नहीं किया जा रहा है तथा सरसरी तौर पर सम्बन्धित कार्मिकों के कार्य एवं आचरण का मूल्यांकन करते हुए श्रेणी अंकित की जा रही है। इसके परिणामस्वरूप जिन कार्मिकों को अच्छा/ संतोषजनक श्रेणी में वर्गीकृत किया जाता है, उनके सम्बन्ध में सम्पूर्ण तथ्यों का संज्ञान नहीं लिया जाता है। ऐसी दशा में उच्चतर पदों पर पदोन्नति के समय अच्छा/ संतोषजनक श्रेणी में वर्गीकृत अधिकारियों को श्रेष्ठता के चयन में कोई भी अंक प्राप्त नहीं होते हैं तथा वे पदोन्नति से वंचित हो जाते हैं।

(4) इस संबंध में शासन द्वारा सम्यक विचारोपरान्त यह निर्णय लिया गया है कि उपरोक्त संदर्भित शासनादेश दिनांक 18 दिसम्बर, 2003 में वर्गीकृत श्रेणियों को संशोधित करते हुए अब वार्षिक गोपनीय प्रविष्टि अंकित हेतु निम्न श्रेणियों को रखा जायेगा:—

- | | |
|--------------------|----------------------|
| 1. उत्कृष्ट | (Outstanding) |
| 2. अति उत्तम | (Very good) |
| 3. उत्तम | (Good) |
| 4. खराब/असन्तोषजनक | (Bad/Unsatisfactory) |

(6). उपरोक्त के अतिरिक्त पूर्व में प्रदत्त "अच्छा/संतोषजनक" श्रेणी को श्रेष्ठता के आधार पर चयन के मामले में मूल्यांकन हेतु 'उत्तम' के समतुल्य माना जायेगा ताकि ऐसे कार्मिक को मूल्यांकन / Marking को लेकर क्षति न हो।

कृपया उपरोक्त निर्देशों का कड़ाई से अनुपालन सुनिश्चित करने का कष्ट करें।"

12.Ld. Counsel for the petitioner has specifically taken a case that Rule 2011 clearly provides the method of selection is seniority-cum-merit rejection of unfit. Rules 2009 are also applicable in the case of the petitioner. Respondents have also taken a specific case that the said Government order is not applicable in this case because the petitioner's selection has not been made on the basis of seniority-cum-merit Rules. The word "श्रेष्ठता के चयन" used in para 3 is very relevant, so the petitioner's case is not covered by the said Government order. In this place it is also necessary to mention that Government has issued a subsequent Government order dated 15.3.2012 which is as under:-

"प्रेषक,
उत्पल कुमार सिंह
प्रमुख सचिव
उत्तराखण्ड शासन।

सेवा में,
1— अपर मुख्य सचिव
वित्त विभाग, उत्तराखण्ड शासन।

- 2- समस्त प्रमुख सचिव/ सचिव
उत्तराखण्ड शासन।
- 3- समस्त विभागाध्यक्ष /कार्यालयाध्यक्ष
उत्तराखण्ड।
- 4- मण्डलायुक्त
गढ़वाल /कुमाऊं।
- 5- समस्त जिलाधिकारी
उत्तराखण्ड।

कार्मिक अनुभाग-2

देहरादून दिनांक 15 मार्च,2012

विषय:- चरित्र पंजिकाओं में वार्षिक प्रविष्टियां,सत्यनिष्ठा प्रमाण-पत्र ,प्रतिकूल प्रविष्टि संसूचित करना, उसके विरुद्ध प्रत्यावेदन और प्रत्योवदन निस्तारण की प्रक्रिया।

महोदय,

उर्पयुक्त विषयक शासनादेश सं0 1450/XXX(2)/2010 दिनांक 30 सितम्बर 2010 के प्रस्तर -6 में आंशिक संशोधन करते हुए मुझे यह कहने का निदेश हुआ है कि उक्त शासनादेश के प्रस्तर -6 के वर्तमान प्राविधान के स्थान पर उसके सम्मुख प्रतिस्थापित प्राविधान को निम्नवत पढ़ा जाय-

वर्तमान प्राविधान	प्रतिस्थापित प्राविधान
6- पूर्व में प्रदत्त 'अच्छा/सन्तोषजनक' श्रेणी को 'श्रेष्ठता' के आधार पर चयन के मामले में मूल्यांकन हेतु 'उत्तम' के समतुल्य माना जायेगा ताकि ऐसे कार्मिक को मूल्यांकन /Marking को लेकर क्षति न हो।	पूर्व में प्रदत्त 'अच्छा/सन्तोषजनक' श्रेणी को 'श्रेष्ठता ' तथा 'अनुपयुक्त को अस्वीकार करते हुए 'ज्येष्ठता' के आधार पर चयन के मामलो में 'उत्तम के समतुल्य माना जायेगा ताकि ऐसे कार्मिकों को मूल्यांकन /Marking को लेकर क्षति न हो।

2- कृपया उपरोक्त सन्दर्भित शासनादेश दिनांक 30 सितम्बर 2010 को उक्त सीमा तक संशोधित समझा जाय।

भवदीय,

(उत्पल कुमार सिंह)
प्रमुख सचिव।

13. This government order clearly indicates that the Government order of 2010 was not applicable in the case of all the persons whose criteria for promotion was seniority-cum-merit rejection of unfit. In case the said Government order of 2010 is not applicable in the case of the petitioner, he is not entitled to get the promotion and his 'Satisfactory' gradation cannot be considered as Good. Now we have to see as to whether the said Government order dated 15.3.2012 is prospective or retrospective. The government order clearly reflects that the amendment has been incorporated on 15.3.2012 and there is no averment in the body of the Government order that it will apply retrospectively. It is also settled principle of law if any statute or Government order is made applicable from the retrospective date, it should be clearly mentioned on the said statute or Government Order. However, it is also settled that the Government order, Rules and Regulations cannot divest the right which has already accrued to the parties. There is no need to travel beyond the scope of this Government order. Thus, the Government order is prospective. Perusal of the Government order dated 15.03.2012 clearly reveals that the satisfactory entry would be read as Good w.e.f. the date 15.03.2012 in case promotion is to be done on the basis of seniority-cum-merit rejection of unfit. Prior to 15.03.2012 no such criteria would be available in the case of promotion in seniority –cum-merit rejection of unfit case. At this place it would also be very relevant that the petitioner had not challenged the entries which have been awarded to him. There is no relief claimed by the petitioner to quash the said entries. If there is no relief to quash these entries, the entries have attained finality and it cannot be reopened at the subsequent stage. If the petitioner was not satisfied with the entries, he could have preferred the appeal against said entries and could have prayed for up-gradation of the entries from

the competent appellate authority. In view of this, finality has been attained by the entries, so it cannot be challenged in the ancillary proceedings for the same.

14. The benchmark as provided in Niymawali 2009, as extracted above in para 10, clearly reveals that the last 10 years' entries would be counted and out of these 10 years, at least 5 'good' entries should have been earned by the officer/official in case of seniority-cum-merit rejection of unfit. It is also provided in the said Rule that he will not earn bad entry for two years immediately before the consideration of the promotion.
15. Perusal of the factual scenario of the petition as enumerated in Para 11 that the petitioner has earned only 4 good entries, thus, there is a shortfall of one good entry in his count. Ld. Counsel for the petitioner has contended that his 5th entry, which has been considered as 'satisfactory' for the year 2007-08, be considered as good. In this case, if the said entry of 2007-08 is adjudged to be good in favour of the petitioner, then the petitioner will qualify the benchmark as provided in the 2009 Niymawali. There is no adverse remark against the petitioner immediately before the promotion. Ld. A.P.O. contended that the Court cannot sit in appeal to re-appreciate the assessment made by the initiating officer, reviewing officer and of the accepting officer. It is admitted that the petitioner had been working under the Block Development Officer and the Government order which has been referred above, clearly reveals that there are three stages for entry in the said department. The entry for the year 2007-08 as extracted above and as well as the copy of the said entry filed by the petitioner as Annexure-6, it is revealed that for a period from 01.04.2007 to 19.08.07 the Initiating Officer (Assistant Engineer) has reported the petitioner to be a 'Good Officer' and the Reviewing Officer (Executive Engineer) had adjudged him to be a 'Satisfactory Officer' and at the end of the entry it

is indicated by the Accepting Officer (Superintending Officer) for a period commencing from 23.06.2007 to 31.03.2008, he is agreeable to the remark of the Reviewing Officer and he also graded him to be a 'Satisfactory Officer'. Perusal of the entry sheet clearly reveals that the Superintending Engineer had not given any remark for a part of period i.e. 01.04.2007 to 22.06.2007. Thus, that portion was left without any remark by the Accepting Officer. So, the petitioner will be treated as 'Satisfactory Officer' on the basis of the remark awarded by the Executive Engineer. Then again, petitioner's entry for a period commencing from 20.08.2007 to 18.01.2008 was recorded separately in which the Assistant Engineer has graded him to be a 'Good Officer' and the Executive Engineer was also agreeable to the opinion of the Assistant Engineer and as such the petitioner would be treated as a 'Good Officer' by the Executive Engineer too. At the last again the Superintending Engineer had recorded accepting entry for a period commencing from 23.06.2007 to 31.03.2008 that he is agreeable to the comments of the Executive Engineer though his gradation was downgraded to a 'Satisfactory Officer'. Thus, the total period commencing from 01.04.2007 to 22.06.2007, the petitioner has been awarded a 'Satisfactory' entry and the Superintending Engineer has not recorded any entry for the said period. For the remaining period the Superintending has recorded him to be a 'Satisfactory Officer'. Thus, the above scenario reveals that the petitioner had not been adjudged to be a 'Good Officer'. In view of the above factual matrix the Departmental Promotion Committee considered the said entry and adjudged it to be a satisfactory entry and after adjudging it as 'Satisfactory' entry, the shortfall of one benchmark came to the count of the petitioner and he was not found suitable for promotion. Ld. Counsel for the petitioner contended that the Tribunal should assess the said entry as a 'Good'

entry because for the longer period he had earned a 'Good' entry. Ld. A.P.O. refuted the contention.

16. It is the well settled principle of law that the Tribunal or the Hon'ble High Court cannot sit in appeal over the assessment made by the D.P.C. If the assessment made by the D.P.C. is perverse or is not based on record or proper record has not been considered by the D.P.C., it is always open to the Court or the Tribunal to remit the matter back to the D.P.C. for consideration. But the High Court cannot assess the matter on its own on perusal of the service record of one or the other employee. In this case the entire record was available before the D.P.C. and it was made available before us also. The D.P.C. has come to the conclusion that the entry shall be adjudged to be 'Satisfactory' and not to be 'Good'. Now the question arises can the Tribunal re-appreciate the said recorded satisfaction of the D.P.C. The power of the judicial review of the Hon'ble High Court is constituted under Article 226 of the Constitution of India or of the Tribunal is under Article 323 A or under any enactment of the State is not akin to a Court of appeal. It is settled law that the Tribunal has only power of judicial review of the administrative action of the authority in service matters relating to service conditions of the employee and matters relating to service; it is the exclusive domain of the authority to consider the record and the evidence therein and to record his satisfaction and the findings whether the petitioner's claim had any substance or to record the finding whether the allegation made by the petitioner has been substantiated by the record. The competent authority has to consider the material on record in judicial review. It is also settled law that Court or Tribunal has no power to trench on the jurisdiction to appreciate the evidence and to arrive at its own conclusion. Judicial review is not an appeal from a decision but on the review of a matter in which the decision is made, it

is meant to ensure that the claimant receives fair treatment and not to ensure that the conclusion which the authority reaches, is necessarily correct for the Court or Tribunal. When conclusion reached by the authority is based on the record, the Tribunal is devoid of power to re-appreciate the evidence and to come to its own conclusion setting aside the conclusion of the authority. The only consideration of the Court or the Tribunal has in its judicial review, is to consider, whether the conclusion is based on record and supports the findings or whether the conclusion is based on without any record. This is the consistent view of the Hon'ble Apex Court in the plethora of judgments. It is also necessary in the case of departmental proceedings, if the factual aspects of the record is to be assessed, it is a subjective satisfaction of the members of the committee. If the decision is based on record, hence the said decision cannot be re-appreciated by this Tribunal. The Hon'ble Apex Court in the case of **Union of India and others Vs. S.P.Nayyar 2015(3) SLR 1 SC** has elaborately discussed the above proposition. In this case the petitioner was superseded for the post of Additional D.I.G. According to the guidelines for the Departmental Promotion Committee issued by the Government of India, empowered the D.P.C. to devise their own method and procedure for objective assessment of the suitability of the candidates who are to be considered. Sub and substance of the instructions issued by the Government of India is that the D.P.C. would grade an officer as 'Very Good' if at least for 3 of 5 A.C.Rs. are Very Good and remaining A.C.Rs under consideration for performance are generally good and there is no adverse entry in any of the 5 A.C.Rs. under consideration of the D.P.C. In S.P. Nayyar (supra) the candidate was found unsuitable; he was graded very good for the year 1994-95 and 1995-96 by the initiating officer and reviewing officer as well as accepting officer. In the A.C.R. 1996-97 he was graded 'Very Good' by

the initiating officer as well as by the reviewing officer but he was downgraded by the accepting officer as 'Good' without recording any reason. Thereafter the Director General of B.S.F. undoing the damage graded the officer as 'Very Good'. Later on the same accepting officer, who downgraded from 'Very Good' to 'Good' , took over the charge of Director General , B.S.F. and requisitioned the said record and he downgraded the A.C.Rs. of the officer for the year 1997-98 and 1998-99 to 'Good' contrary to the grade given by two authorities and that too without assigning any reason and these entries were never communicated to the petitioner. The officer preferred a writ petition before the Hon'ble Delhi High Court and the Hon'ble High Court, after re-appreciating and taking into consideration the situation and the facts, allowed the writ petition and he was directly promoted to the post of Additional Director General. However, Hon'ble Supreme Court reversing the order allowed the appeal of the department held in Para 12 & 13 as under :-

“ It is settled that High Court under Article 226 of the Constitution of India cannot sit in appeal over the assessment made by the DPC. If the assessment made by the DPC is perverse or is not based on record or proper record has not been considered by the DPC, it is always open to the High Court under Article 226 of the Constitution to remit the matter back to the DPC for recommendation, but the High Court cannot assess the merit on its own, on perusal of the service record of one or the other employee.

13. The selection to the post of Addl. DIG is based on merit-cum-suitability which is to be adjudged on the basis of ACRs of different candidates. The merit position can be adjudged by the Selection Committee on appreciation of their Character Roll. In absence of the Character roll of other candidates, who were also in the zone of promotion, it is not open to the High Court to assess the merit of one individual who moves before the High Court, to give a finding whether he comes within the zone of promotion or fit for promotion.”

17. Thus, the decision taken by the competent authority was found to be correct. In view of the above legal proposition, in the present case the

Superintending Engineer had down graded the petitioner, it cannot be subject matter of the judicial review.

18. In view of the above discussion we do not find any force in the claim petition and the claim petition is liable to be dismissed and dismissed accordingly. The parties shall bear their own cost.

Sd/-

(U.D.CHAUBE)
MEMBER (A)

Sd/-

(JUSTICE J.C.S.RAWAT)
CHAIRMAN

DATE: 07th July, 2015
NAINITAL