



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

**LPA No. 650 of 2011 alongwith
connected matters.**

Judgment reserved on : 26.09.2023

Date of decision : 09.10.2023

1. LPA No. 650 of 2011

H.P. Public Service Commission

..Appellant

Versus

Roop Lal and others

..Respondents

Mr. Vikrant Thakur, Advocate, for the appellant.

Mr. Anup Rattan, Advocate General, with Mr. Rakesh Dhaulta, Additional Advocate General, for the respondents-State.

2. LPA No. 708 of 2011

The State of H.P. and another

..Appellant

Versus

Roop Lal and others

..Respondents

Mr. Anup Rattan, Advocate General, with Mr. Rakesh Dhaulta, Additional Advocate General, for the appellant-State.

None for respondent No. 1.

Mr. Vikrant Thakur, Advocate, for respondent No. 2.

Mr. Ramesh Kaundal, Advocate, for respondent No. 3.

3. LPA No. 709 of 2011

The State of H.P. and another

..Appellant

Versus

Roop Lal and others

..Respondents

Mr. Anup Rattan, Advocate General, with Mr. Rakesh Dhaulta, Additional Advocate General, for the appellant-State.

None for respondent No. 1.

Mr. Vikrant Thakur, Advocate, for respondent No. 2.

Mr. Ramesh Kaundal, Advocate, for respondent No. 3.

4. LPA No. 74 of 2013

Satinder Singh Thakur

..Appellant

Versus

Roop Lal and others

..Respondents

Mr. Ramesh Kaundal, Advocate, for the appellant.

None for respondent No.1.

Mr. Anup Rattan, Advocate General, with Mr. Rakesh Dhaulta, Additional Advocate General, for respondents No. 2 & 3/State.

Mr. Vikrant Thakur, Advocate, for respondent No. 4.

Coram :-

The Hon'ble Mr. Justice M. S. Ramachandra Rao, Chief Justice

The Hon'ble Ms. Justice Jyotsna Rewal Dua, Judge

Whether approved for reporting ?¹ Yes

Jyotsna Rewal Dua, Judge

Learned Single Judge on 26.08.2011 allowed the writ petition filed by one Roop Lal assailing the promotion of one Satinder Singh Thakur made on 09.10.2007 to the post of Block Development Officer (BDO). Promotion of Satinder Singh Thakur was quashed and set aside. State/official respondents were directed to initiate fresh process for making promotion to the post of BDO. Aggrieved against this decision, four Letters Patent Appeals i.e. (i) LPA No. 650 of 2011 by the Himachal

¹ Whether reporters of print and electronic media may be allowed to see the order? Yes.

Pradesh Public Service Commission (original respondent No. 3) ; (ii) LPA Nos. 708 & 709 of 2011 by State of Himachal Pradesh (original respondents No. 1 and 2 in the writ petitions) and (iii) LPA No. 74 of 2013 by Satinder Singh Thakur (original respondent No.4) have been filed.

Arising out of common judgment, all these appeals are being taken up together for decision. For convenience, status of parties is being referred to hereinafter as it was before the learned writ Court.

2. Relevant facts may be encapsulated :-

2(i) Roop Lal-the writ petitioner joined the respondent-department on 15.01.1988 as an Agriculture Inspector. Six days later, i.e. on 21.01.1988, Satinder Singh Thakur-respondent No. 4 joined the respondent-department as Agriculture Inspector. The petitioner as well as respondent No. 4 were confirmed as Agriculture Inspectors on 12.12.1994. The petitioner was senior in age to respondent No.4. In the final seniority list of the officers of Himachal Pradesh Agriculture Services Class-I (Gazetted), as it stood on 01.01.2006 circulated under Office Memorandum dated 23.08.2006, the respondent No. 4 was shown senior to the petitioner. Name of respondent No. 4 figured at Sr. No. 199, whereas that of the petitioner was reflected at Sr. No. 200. One Khem Chand Sharma figured at Sr. No. 203.

2(ii) The Department prepared a list of eligible officers to be considered for promotion to the post of Block Development Officer (BDO). Under the Recruitment & Promotion Rules (R&P Rules), the

promotional post of BDO (Gazetted) Class-I was described as 'selection' post.

For making promotion, meeting of Departmental Promotion Committee (DPC) was convened by the Himachal Pradesh Public Service Commission (HPPSC) on 14.08.2007. The DPC considered the names of respondent No. 4, petitioner and Khem Chand Sharma for promotion to the post of BDO against the quota available to the feeder category of ADO/EO (AGR).

The DPC recommended name of respondent No. 4 for promotion as BDO against the quota of ADO (AGR). Consequent upon the recommendation, respondent No. 4 was promoted as BDO vide Notification dated 09.10.2007.

2(iii) Petitioner preferred O.A. No. 3223 of 2007 before the erstwhile H.P. State Administrative Tribunal assailing the promotion of respondent No.4.

2(iii)(a) Petitioner's challenge to respondent No. 4's promotion was primarily on the ground that post in question was a selection post, hence, criteria required to be adopted was 'merit-cum-seniority' ; In the ACRs considered by the DPC for preceding five years, the petitioner had one 'good' and four 'very good' final entries, whereas respondent No. 4 had three 'very good' and two 'good' final entries. Therefore, the DPC could not have ignored the better claim and higher merit of the petitioner for promotion to the post of BDO. Prayer was made for quashing the promotion of respondent No. 4 to the post of BDO.

2(iii)(b) Respondent No.1/Secretary (Agriculture) to the Government of Himachal Pradesh in its reply defended the promotion of respondent No.4.

It was put forth that respondent No. 4 was senior to the petitioner and there being only one post of BDO to be filled in from amongst the eligible persons in the feeder channel of Agriculture Development Officers, the recommendation made by the DPC for promotion of respondent no. 4 to the post of BDO was in order.

2(iii)(c) Respondent No.2-Secretary (Rural Development) to the Government of Himachal Pradesh in its reply asserted that the DPC had adopted the procedure as prescribed under the rules. That the committee had considered the ACRs for five years i.e. from 2001 to 2006 of all the three officers falling in the zone of consideration i.e. petitioner, respondent No. 4 and one Khem Chand Sharma for promotion to the post of BDO by following the procedure laid down under the rules and recommended the name of respondent No. 4 for promotion to the post of BDO.

2(iii)(d) The H.P. Public Service Commission-respondent No. 3 pleaded that the DPC in its meeting held on 14.08.2007 had considered not only the final seniority list of the eligible officers supplied by the department for making promotion to the post of BDO against the unreserved vacancy available in the year 2007, but had assessed the officers on the basis of their ACRs of five years i.e. from 2001-2002 to 2005-2006 in order of seniority as under :-

“

| Sr. No. | Name of official S/Sh. | Seniority No. | Final Assessment |
|---------|---|---------------|------------------------------------|
| 1. | Satinder Singh Thakur (Respondent No.4) | 199 | Found fit and assessed "Very Good" |
| 2. | Roop Lal Chauhan (S.C.) (Petitioner) | 200 | Found fit and assessed "Very Good" |
| 3. | Khem Chand Sharma | 203 | Found fit and assessed "Very Good" |

”

It was the contention of H.P. Public Service Commission that all the three officers falling in the zone of consideration were assessed as 'very good'. Since all the officers were assessed as 'very good', therefore, the DPC recommended for promoting respondent No. 4 as BDO in view of his higher seniority placement.

2(iii)(e) On considering respective cases of the parties, learned Single Judge in the judgment dated 26.08.2011 held that post in question was 'selection' post. Criteria for filling up the post by way of promotion was 'merit-cum-seniority'. The DPC had ignored this criteria in recommending the name of respondent No. 4 for promoting him to the post of BDO. The DPC had just looked into the final grading in the ACRs of the concerned officials. It had not made any independent assessment of its own on the basis of different entries made in the ACR. It had not considered the entire service record of the concerned officers. It had not even verified whether the officers were visited with any penalty or not. The promotion of respondent No. 4 was quashed and set aside. Respondents No. 1 to 3 were directed to initiate fresh process for making promotion to the post of BDO. The operative direction in the judgment runs as under :-

“19. Accordingly, in view of the observations and discussions made hereinabove, the petition is allowed. Annexure A-1 dated 9.10.2007 is quashed and set aside. Respondents No.1 to 3 are directed to initiate fresh process for making promotion to the post of Block Development Officer in view of the observations made hereinabove within a period of three months from the date of production of certified copy of this judgment by the petitioner.

20. Before parting with the judgment, it is expected that respondent No.3 will now adopt latest guidelines issued for Departmental Promotion Committee as contained in Chapter-III of Swamy's Compilation on Seniority and Promotion in Central Government Service (Fourteenth Edition-2011) to make the process of selection very objective, fair and transparent. No costs.”

2(iv) Feeling aggrieved against the decision dated 26.08.2011, the State, the H.P. Public Service Commission and respondent N. 4 have filed these Letters Patent Appeals.

3. We have heard learned counsel for the parties and considered the case record. For convenience, the submissions made by learned counsel and discussion made thereupon is being assimilated hereinafter.

4. Observations

4(i) For making promotion to one unreserved vacancy of BDO available in the year 2007, the DPC had considered three eligible officers belonging to the feeder channel of Agriculture Development Officer/ Extension Officer (Agriculture). The three officers were :- petitioner (Roop Lal), respondent No. 4 (Satinder Singh Thakur) and Khem Chand Sharma. The petitioner was appointed as Agriculture Inspector on 15.01.1988 i.e prior in time to respondent No. 4, who joined the respondent department as Agriculture Inspector on 21.01.1988. Both of them were confirmed in service on 12.12.1994. The factual assertion of the petitioner made in the writ petition of his being older in age to

respondent No. 4 has not been rebutted. Be that as it may. Respondent no. 4 figured at Sr. No. 199, whereas names of the petitioner and Khem Chand Sharma were at Sr. No. 200 & 203, respectively in the final seniority list of officers of H.P. Agriculture Service (Class-I (Gazetted)) as it stood on 01.01.2006, circulated on 23.08.2006.

4(ii) In terms of the applicable R&P Rules, the post of BDO being filled up on the basis of recommendation of DPC was a 'selection' post. It is an admitted case of the parties that this being a 'selection' post, was to be filled up on the principle of 'merit-cum-seniority'. In view of the controversy involved, it will be appropriate at this stage to discuss the concept of making promotion to the 'selection' post :-

4(ii)(a) Where promotion is on the basis of seniority alone, merit will not play any part.

A 'selection' post can be filled in by promotion either on the basis of principle of 'merit-cum-seniority' or 'seniority-cum-merit'.

4(ii)(b) 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 for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of

service record and interview and prescribing minimum marks which would entitle a person to be promoted on the basis of 'seniority-cum-merit'.(re: AIR 1998 SC 2565 B.V. Sivaiah and others etc., v. K. Addanki Babu and others etc.)

4(ii)(c) Where the promotion is based on 'merit-cum-seniority', the seniority is not the determinative factor. The emphasis is on the 'merit' of the officer. The comparative assessment of merit of officers being considered for promotion on the basis of their seniority, assumes utmost significance. A junior officer with higher merit than his senior, can steal march over the latter, depending upon fulfillment of other prescribed parameters.

4(ii)(d) Difference between the concepts of 'seniority-cum-merit' & 'merit-cum-seniority'

Promotion to the selection post is not automatic on the basis of ranking in the seniority list. The question of merit enters in making promotion to the selection post. The difference between the two concepts of 'seniority-cum-merit' & 'merit-cum-seniority' is as under :-

While filling in the post on the principle of 'seniority-cum-merit', the promotion cannot be claimed by the officer as a matter of right by virtue of his seniority alone. If the senior officer is found unfit to discharge duties of higher post, he would be passed over and a junior to him may be promoted. In this principle 'merit' has a role, but that is not predominant. All eligible candidates in the feeder cadre are subjected to a process of assessment of a specified level of minimum necessary merit

and those who possess the requisite merit get promoted strictly in order of their seniority. In this regard (2013) 11 SCC 746 (**Balbir Singh Bedi versus State of Punjab and others**) holds as under :-

17. *In Rajendra Kumar Srivastava & Ors. v. Samyut Kshetriya Gramin Bank & Ors.*, AIR 2010 SC 699, while considering the aforementioned issue, this Court held that when a promotion is to be made on the principle of "seniority-cum-merit", then the said promotion must be made only after assessing the minimum necessary merit for such promotion. This must be done on the basis of seniority among the candidates possessing such minimum necessary merit, additionally, it must be ensured that the benchmark fixed is bonafide and reasonable. Fixing the benchmark cannot be challenged as being opposed to the principle of "seniority-cum-merit" and further, cannot be held to be violative of the concept of promotion by "seniority-cum-merit" considering the nature of duties and functions to be performed on the promotional post. The criteria for selection is not subject to challenge generally as it falls within the area of policy making. Therefore, the criteria for adjudging claims on the basis of the principle of "seniority-cum-merit", depends upon various factors which the employer may determine depending upon the class, category and nature of posts in the hierarchy of administration, and the requirements of efficiency for the posts.

18. *In Rupa Rani Rakshit & Ors. v. Jharkhand Gramin Bank & Ors.*, AIR 2010 SC 787, this Court while considering the earlier judgments of this Court, held that where promotion is made on the principle of "seniority-cum-merit", such promotion cannot be made on the basis of seniority alone. Merit also plays some role. The standard method adopted by the principle of "seniority-cum-merit", is to subject all eligible candidates in the feeder cadre to a process of assessment of a specified level of minimum necessary merit, and then to promote candidates, who are found to possess the minimum necessary merit, strictly in order of seniority. The minimum merit necessary for promotion to the said post may be assessed either by subjecting candidates to a written examination, or an interview, or by assessment of their work performance during the previous years, or by a combination of either of the above, or of all the aforesaid methods. There cannot be any hard and fast rule with respect to how minimum merit should be ascertained. For the purpose of assessing the merit of employees, the employer may proceed with reference to four criteria (Period of service, educational qualifications, performance during last three years and interview) allocating separate maximum marks as regards each of the aforesaid counts.

19. *In Haryana State Warehousing Corporation & Ors. v. Jagat Ram & Anr.*, (2011) 3 SCC 422, this Court considered a similar issue and reiterated a similar view. The Court

also observed that, for the purpose of according promotion on the principle of "seniority-cum-merit", a comparative assessment of all eligible candidates is not permissible. Once a person has secured minimum marks with respect to merit, his seniority would play a significant role. Thus, in the event that an employee is found to possess minimum requisite merit, he is entitled to be considered for promotion on the basis of his seniority.

20. In view of the above, the law as regards this point can be summarised to the effect that, where a promotion is to be given on the principle of "seniority-cum-merit", such promotion will not automatically be granted on the basis of seniority alone. Efficiency of administration cannot be compromised with at any cost. Thus, in order to meet said requirements, all eligible candidates in the feeder cadre must be subject to a process of assessment to determine whether or not an individual in fact possesses the specified minimum necessary merit, and in the event that he does possess the same, his case must be considered giving due weightage to his seniority. Furthermore, the statutory authority must adopt a bonafide and reasonable method to determine the minimum necessary merit, as is required to be possessed by the eligible candidate. It must also take into account his period of service, educational qualifications, his performance during his past service for a particular period, his written test, interview, etc. The authority must further be competent to allocate separate maximum marks on each of the aforesaid counts. Fixing such criteria, or providing for minimum necessary merit, falls within the exclusive domain of policy making. Thus, it cannot be interfered with by courts in the exercise of their judicial powers, unless the same is found to be off the mark, unreasonable, or malafide.

21. The relevant portions of the executive instructions dated 29.12.2000 read as under:

"(iii) In the case of promotion to posts with pay scales less than Rs.12000-16350, the benchmark will be 'Good'. This benchmark will determine the fitness of the officer and person graded 'Very Good' or 'Outstanding' will not supersede persons graded 'Good'.

iv) Henceforth each Annual Confidential Report will be evaluated as under:-

Outstanding : +A - 4 Marks
 Very Good : A - 3 Marks
 Good : +B - 2 Marks
 Average : B - 1 Mark

ACRs for 5 years are taken into consideration for promotion. Out of a total of 20 marks, officers earning 0 to 14 marks will be graded overall 'Good' and those earning 15 to 17 marks will be graded overall 'Very Good'. Those earning 18 to 20 marks will be graded as 'Outstanding'. Departmental which are 'Outstanding' must have been out of

the ordinary and reasons for giving grading must be cogent and well spelt out, to be accepted and outstanding. If the ACR does not fulfill the above criteria, the entry of the 'Outstanding' should be read as 'Very Good' only. An officer will not be fit for promotion if he is rated 'below average' in any of the 5 years."

22. Similarly, the executive instructions dated 6.9.2001 so far as applicable in the instant case, read as under:

"3. In the case of promotion to posts falling in Group 'B' the minimum benchmark will be 'Good' and there would be no supersession i.e. promotions would be made strictly on seniority- cum-merit.

4. For making promotion in all the categories there should not be any adverse remarks in the ACRs under consideration."

23. *If, the instant case is examined in light of the aforesaid settled legal propositions, it becomes evident that even in the absence of the executive instructions, the State/employer has the right to adopt any reasonable and bonafide criteria to assess the merit, for the purpose of promotion on the principle of "seniority-cum- merit". The aforesaid executive instructions are nothing but codification of directions issued by this Court in the cases referred to hereinabove. Therefore, a challenge made to the executive instructions on the ground that they were issued at a date subsequent to the date on which the vacancy arose, is meaningless. The present case is not the one where, Respondent No. 5 was found to be more meritorious, in fact, the same is admittedly a case, where the appellant was unable to achieve the benchmark set, as it is evident from the record that his ACRs were average, and the benchmark fixed by the State was "Good".*

(2009) 7 SCC 311 (Haryana State Electronics Development Corporation Limited and others Vs. Seema Sharma and others) holds that principle of merit-cum-seniority puts greater emphasis on merit & 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 amongst 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 cannot be denied unless the person concerned is found totally unfit on merit to discharge duties of higher post.

4(iii) In the instant case, it is an admitted position that it is the principle of 'merit-cum-seniority' and not 'seniority-cum-merit', which is applicable. That being so, the seniority would play a much lesser role. Its significance would lay only in ascertaining the officers falling in zone of consideration for considering their cases for promotion to the post of BDO. Once that is determined, it is their inter-se merit which will hold the key for their promotion. The merit has to be determined by the DPC. Based on the seniority positions, three officers viz. respondent No. 4, petitioner and one Khem Chand Sharma were in the zone of consideration for promotion to the post of BDO. Their ACRs for the years 2001-02, 2002-03, 2003-04, 2004-05 and 2005-06 were considered by the DPC.

Petitioner and Khem Chand Sharma had equal number of 'very good' & 'good' final gradings in the ACRs of these five years. Both had one 'good' and four 'very good' final gradings in their ACRs for the years 2001-02 to 2005-06, whereas respondent No. 4 had three 'very good' final gradings in his ACRs for the years 2002-03 & 2004-06. For the years 2001-02 & 2003-04, his final grade was 'good'. Learned Single Judge after seeing the record of the DPC, observed that the DPC had assessed all the three officers as fit and 'very good' ; On that basis, respondent No. 4 on the basis of his seniority was recommended for promotion to the post of BDO ; The recommendation found its way in issuance of notification on 09.10.2007 promoting respondent No. 4 as BDO. That the DPC had

merely looked into the final grading in the ACRs of the officers and gave weightage to their seniority positions. That the DPC was required to independently assess and classify different ACRs of the concerned officers as 'outstanding', 'very good' & 'good' etc. ; The officer with higher assessment, even if junior was to supersede the senior officer with lower assessment depending upon fulfillment of other parameters ; The DPC had not resorted to any independent assessment of the ACRs of the concerned officers. It merely took into consideration the final gradings already assigned in their ACRs ; The service record of the officers was also not looked into.

These findings recorded in the judgment have not been disputed before us. That being the position, we fail to understand how the DPC graded all the three officers as 'very good' when even their final grading in the ACRs differed.

4(iv) Learned Advocate General while defending the promotion of respondent No. 4 submitted that the assessment made by the DPC would be saved by the procedure prescribed in the instructions issued by the Department of Personnel Himachal Pradesh, dated 3/4th November, 1981.

The relevant portion of the instructions reads as under :-

"The procedure for assessing the over-all classification shall be as under :-

- i) *The Departmental Promotion Committee will assess the confidential reports of the eligible officers for five years and classify them separately for each year, as "Outstanding", "Very Good", "Good" and "Fair". The assessment of classification will be made by the Departmental Promotion Committee after considering the whole of a particular confidential report.*
- ii) *Each type of assessment shall carry marks as under :*

| | |
|--------------------|----------------|
| <i>Outstanding</i> | <i>5 marks</i> |
|--------------------|----------------|

| | |
|------------------|----------------|
| <i>Very Good</i> | <i>4 marks</i> |
| <i>Good</i> | <i>3 marks</i> |
| <i>Fair</i> | <i>2 marks</i> |

The classification for each year shall be evaluated in the form of marks in the above manner and the total marks shall be worked out for five years.

iii) After total evaluation is made as above, average marks shall be worked out by dividing the total marks by the same No. as. The No. of years for which confidential reports have been considered. Thus an officer who gets average marks of 4.5 or above in this manner shall be considered to be of exceptional merit. One getting average marks of 3.5 or above but below 4.5 shall be classified as "Very Good, and one getting an average of 2.5 or above but below 3.5 marks shall be classified as "Good". Officers who earn less than 2.5 average marks shall be classified as unfit for promotion. Those categorized as unfit will be excluded from the eligibility for promotion.

While grading officers as "Outstanding", "Very Good" and "Good", one should not mechanically follow the grading given by the Reporting Officers. They should also take into account the nature of the job against which an individual is posted as well as its responsibilities. For reports on difficult or higher assignments, the categorization may be stepped up by one category in comparison to similar reports on officers working on junior assignments. For proper and just assessment, the Senior Officer or an officer doing a difficult job needs to be assessed very carefully for comparison with a junior officer or an officer doing a relatively simple job."

Learned Advocate General submitted that in terms of above instructions, the three officers would have scored following marks on the basis of their final gradings in the ACRs under consideration :-

| Sr. No. | Name of official & Seniority No. | Date of appointment | 2001-02 | 2002-03 | 2003-04 | 2004-05 | 2005-06 | Final assessment/Average Marks |
|---------|----------------------------------|---------------------|---------------|---------------|---------------|---------------|---------------|--------------------------------|
| 1. | Sh. Satinder Singh Thakur (199) | 21.01.88 | Good (3) | Very Good (4) | Good (3) | Very Good (4) | Very Good (4) | Very Good (18/5 = 3.6) |
| 2. | Sh. Roop Lal Chauhan (SC) (200) | 15.01.88 | Very Good (4) | Very Good (4) | Very Good (4) | Very Good (4) | Good (3) | Very Good (19/5 = 3.8) |
| 3. | Sh. Khem Chand Sharma (203) | 23.01.88 | Very Good (4) | Very Good (4) | Very Good (4) | Very Good (4) | Good (3) | Very Good (19/5 = 3.8) |

Petitioner, Khem Chand Sharma and respondent No. 4 though had different final gradings in their ACRs of different years, but their average marks in terms of above instructions would have been 19, 19 and

18, respectively. These marks divided by 5 (number of years) would have further resulted into 3.8, 3.8 & 3.6 average marks, respectively. In terms of above quoted instructions of the year 1981, the persons getting 3.5 average marks, but below 4.5 are categorized as 'very good'. The petitioner with $19/5 = 3.8$, Khem Chand Sharma with $19/5 = 3.8$ and respondent No. 4 with $18/5 = 3.6$, all got average marks between 3.5 and 4.5 and it was for that reason that they were categorized as 'very good'. The contention put forth by the learned Advocate General as adopted by learned counsel for other appellants is that in view of the petitioner, Khem Chand Sharma and respondent No. 4 being assessed as 'very good' by the DPC on the basis of the instructions of 1981, there was no other way out, but to fall back upon the seniority of officers considered for promotion to the post of BDO.

4(v) We are afraid, the reliance upon guidelines/instructions issued by the Department of Personnel Himachal Pradesh, dated 3/4th November, 1981 is misplaced. **Firstly**, it is not the case of the respondents that the DPC had actually assessed the officers on the basis of these guidelines/instructions. In absence of any contemporary material available on record, learned Single Judge was correct in observing that it cannot be assumed that the DPC had relied upon these instructions for assessing the officers as 'very good'. **Secondly**, these instructions in the given facts of the case could not have been acted upon. Applying these instructions for assessing the officers on the applicable principle of 'merit-cum-seniority' would virtually amount to tinkering the principle and replacing it with

‘seniority-cum-merit’. Respondent No. 4, who got ‘very good’ final grading in ACRs of 3 years would steal a march by virtue of his seniority over petitioner and Khem Chand Sharma who had got ‘very good’ final gradings in their 4 ACRs. This is when the DPC had not even considered the entire service record of these officers. It is well settled that the DPC should not be guided merely by the overall grading recorded in the ACR, but should make its own objective assessment on the basis of entries in the ACR & service record of the officers. In the present case, the DPC merely considered final grades in the ACRs of the officers and graded them at par with each other though even their final grades were different.

In the given facts, we are of the view that the official respondents have not adhered to the principle of ‘merit-cum-seniority’ while making the promotion. Rather, it appears that they have applied the concept of ‘seniority-cum-merit’. The latter principle was admittedly not applicable in the case. Tendency of mixing two different principles having two different connotations i.e. ‘seniority-cum-merit’ and ‘merit-cum-seniority’ in a case where recommendations are to be made only on the basis of ‘merit-cum-seniority’ has been disapproved and deprecated by the Hon’ble Supreme Court in **AIR 2023 SC 2328 (Ravikumar Dhansukhlal Maheta and another Vs. High Court of Gujarat and others)**. The said case pertained to promotion to the cadre of District Judges from amongst Senior Civil Judges on the basis of ‘merit-cum-seniority’ and passing a suitability test. The High Court considered the merit only for the purpose of achieving benchmark and thereafter

switched to 'seniority-cum-merit' and made promotions on the basis of seniority. The Apex Court held that promotions were to be made solely on the basis of merit and it is only then, it can be said to be following the principle of 'merit-cum-seniority'. Merely because a wrong method is being adopted for making promotion cannot be a ground to perpetuate the same. Relevant paras from the judgment are extracted hereinafter :-

“8.3 In the present case and as per the case on behalf of the High Court, so stated in the counter, the High Court has considered the merit only for the purpose of achieving the benchmark and thereafter has switched to the seniority-cum-merit and has given the promotion on the basis of seniority only amongst those, who have achieved the benchmark of 50 percent. Thus, after conducting the written test, which is one of the components to assess the suitability, the High Court has considered the merits only for the purpose of achieving benchmark and thereafter has switched to the principle of seniority-cum-merit and thereby has given a go-by to the principle of merit-cum-seniority. The method adopted by the High Court is just contrary to the observations made by this Court in paragraph 27 in the case of All India Judges’ Association and Ors. (supra) and also contrary to the Gujarat State Judicial Service Rules, 2005 and the Recruitment Notice.

8.4 We do not find anything in the Recruitment Rules, 2005 and/or even the Recruitment Notice to consider the merit only for the purpose of achieving benchmark of 50 percent. The correct method would be to prepare the merit list on the basis of the four components as mentioned in paragraph 2 of the Recruitment Notice, from amongst those Senior Civil Judges (including ad-hoc Additional District Judges) having not less than two years of qualifying service in that cadre and thereafter to prepare the merit list on the basis of the aggregate marks obtained under different components and thereby to give the promotion solely on the basis of merit, then and then only, it can be said to be following the principle of merit-cum-seniority. Therefore, in the present case, while giving the promotion in the cadre of District Judge, the High Court has given a go-by to the principle of merit-cum-seniority, which this Court has emphasised in the case of All India Judges’ Association and Ors. (supra). Therefore, the High Court has adopted the wrong method.

8.5 Now, insofar as the submission on behalf of the contesting respondents – promotees and the High Court that this procedure is being followed since 2011 and even the same is being followed in other High Courts and therefore, this Court may not interfere with such a method is concerned, the aforesaid cannot be accepted. Merely because, a wrong method is

being adopted cannot be a ground to perpetuate the same, if it is found to be illegal and/or contrary to the directions issued by this Court, more particularly, in the case of *All India Judges' Association and Ors. (supra)*.

8.8 Now, insofar as the reliance placed upon the decision of this Court in the case of *V.K. Srivastava and Ors. (supra)* relied upon on behalf of the promotees is concerned, at the outset, it is required to be noted that in the said decision, of this Court is not observing that the principle of merit-cum-seniority is to be given a go-by. Before this Court, it was submitted on behalf of the petitioners that prior to the amendment of the Rules, promotion to the cadre of District Judge was based on the principle of "seniority-cum-merit" and now, as per the amended Rules, pursuant to the directions issued by this Court, the principle has been changed to "merit-cum-seniority" and the same has seriously affected the rights of the Civil Judges (Senior Division). However, the amended Rules are applicable retrospectively and to that, this Court noted the contention on behalf of the State that in the process of promotion, merit alone was not being given importance. There was no direct controversy before this Court on the principle of "merit-cum-seniority" and/or what can be said to be the "merit-cum-seniority". The law on the principle of "merit-cum-seniority" is by now, settled by this Court in a catena of decisions. As observed, while applying the principle of "merit-cum-seniority", greater emphasis is given on merit and ability and seniority plays a less significant role. As observed, while applying the principle of "merit-cum-seniority", the seniority is to be given weight only when merit and ability are approximately equal (See *B.V. Sivaiah and Ors. (supra)*; *Rajendra Kumar Srivastava and Ors. Vs. Samyut Kshetriya Gramin Bank and Ors., (2010) 1 SCC 335*).

8.9 It is required to be noted that in the present case and as per the merit list produced before the High Court, the candidates, who have secured much more marks are denied promotion and the candidates / Civil Judge (Senior Division), who are having less marks / less meritorious are promoted. In the present case, the petitioner No. 1 secured 135.50 out of 200 marks and the petitioner No. 2 secured 148.50 marks out of 200 against which a candidate having secured 101 marks have got the promotion, which is affecting the principle of "merit-cum-seniority".

9. Thus, we are more than satisfied that the impugned Select List dated 10.03.2023 issued by the High Court and the subsequent Notification dated 18.04.2023 issued by the State Government granting promotion to the cadre of District Judge are illegal and contrary to the relevant Rules and Regulations and even to the decision of this Court in the case of *All India Judges' Association and Ors. (supra)*. Therefore, we are more than prima facie satisfied that the same as such are not sustainable. Though, we were inclined to dispose of the writ petition finally, however, as Shri Dushyant Dave, learned Senior Advocate appearing on behalf of some of the respondents – promotees has prayed not to dispose of the writ petition finally and, therefore, may consider the question of interim relief, we are

not disposing of the writ petition finally. Taking into consideration the fact that the State Government has issued the impugned Notification dated 18.04.2023 during the pendency of the present writ petition and after the receipt of the notice issued by this Court in the present proceedings and, thus, despite in knowledge of the present proceedings, however, subject to the ultimate outcome of the present writ petition and as observed hereinabove, the State Government could have waited till the next date of hearing by this Court, which was on 28.04.2023 and at present the respective promotees have not assumed their posting on the promotional post and as such are sent for training, we stay the further implementation and operation of the Select List dated 10.03.2023 issued by the High Court of Gujarat and the subsequent Notification dated 18.04.2023 issued by the State Government. Meaning thereby, the respective promotees be sent to their original posts which they were holding prior to their promotion vide Select List dated 10.03.2023 and Notification dated 18.04.2023. However, it is clarified that the present stay order shall be confined with respect to those promotees whose names do not figure within the first 68 candidates in the Merit List on the basis of the merits, the copy of which is produced by the High Court along with the counter. Meaning thereby, the promotion of those promotees, whose names otherwise do figure in the first 68 candidates in the Merit List shall be continued as even otherwise and even if the writ petition is allowed, in that case also, they will get the promotion on merits.”

5. Conclusions

5(i) Promotion to the ‘selection’ post of BDO was to be made on the basis of ‘merit-cum-seniority’.

5(ii) Three officers in terms of their seniority, under the concept of ‘merit-cum-seniority’ were considered by the DPC for making its recommendations. The officers were respondent No.4, petitioner and one Sh. Khem Chand Sharma.

5(iii) For determining the inter-se merit of the three officers, the DPC did not make its independent & objective assessment of the merit of the officers. The DPC only looked into the final gradings of the ACRs of these officers for the years 2001-02, 2002-03, 2003-04, 2004-05 & 2005-06. The DPC did not consider any other record of these officers. The DPC

adjudged all the three officers as 'fit and very good'. Considering the fact that even in the final gradings of the ACRs under consideration, the petitioner and Khem Chand Sharma had 4 'very good' and 1 'good' entries as compared to 3 'very good' and 2 'good' entries of respondent No.4. If so, we are unable to understand how the DPC assessed respondent No. 4 as 'very good' besides giving same assessment to the petitioner and Khem Chand Sharma.

Contention of learned Advocate General that the three officers' assessment as 'very good' is as per the H.P. Government Department of Personnel O.M. dated 3/4.11.1981 is not tenable. As **firstly**, this is only an assumption drawn by the appellant. After perusing the record of the DPC meeting, learned Single Judge concluded that the DPC had not relied upon any such instructions. This factual position is not even disputed for the appellants. **Secondly**, the 1981 instructions cannot be applied to the case of making promotion to the selection post on the concept of 'merit-cum-seniority'. Application of these instructions would virtually result in making a lesser meritorious senior person coming at par with a more meritorious junior person and thereby on the strength of former's seniority, he would steal march in matter of promotion. Such a position cannot be countenanced. Principle of 'Merit-cum-Seniority' cannot be inter-mingled with or allowed to be tinkered by the principle of 'seniority-cum-merit'. Both concepts have different connotations and separate areas of operation.

5(iv) Consequent assessment of respondent No. 4 as 'very good' and his promotion to the post of BDO is not in consonance with the principle of 'merit-cum-seniority'.

6. The Result

Promotion of respondent No. 4 to the post of Block Development Officer made on 19.07.2006 on the basis of faulty recommendations of the Departmental Promotion Committee, cannot be sustained. Learned Single Judge was justified in quashing and setting aside such promotion. Official respondents No. 1 to 3 are directed to convene the DPC afresh for considering the cases of respondent No. 4, petitioner and Khem Chand Sharma for promotion to the post of BDO in light of findings recorded in this judgment. The review DPC shall be convened and necessary follow up action shall be taken within a period of three weeks from today.

7. The appeals are dismissed in terms of above directions.

(M. S. Ramachandra Rao)
Chief Justice

9th October, 2023 (K)

(Jyotsna Rewal Dua)
Judge