

A

PREMLATA JOSHI

v.

CHIEF SECRETARY STATE OF UTTARAKHAND & ORS.
(Civil Appeal No.10236 of 2013 etc.)

B

NOVEMBER 12, 2013

[K.S. RADHAKRISHNAN AND A.K. SIKRI, JJ.]

Service Law:

C

Appointment by promotion - Appointment to post of Director, Medical Health - Held: In the instant case, promotion is on the basis of merit alone, where seniority should play the role only if two candidates are of equal merit and not otherwise - Government Order laid down the criteria of judging the merit and specified the categories as 'excellent', 'good' and 'unsuitable' - DPC committed the mistake by grading the officers in 'very good', 'good' and 'unfit' categories --By eliminating 'excellent' category and replacing it with 'very good' category, private respondent was severely prejudiced

D

Since DPC did not follow the procedure as laid down even in the OM, the promotion of appellant was rightly set aside by High Court - Uttar Pradesh Medical Health (Group A) Service Rules, 1990 - r.8 -- Uttarakhand Government Servant (Criteria for Recruitment by Promotion) Rules, 2004- rr. 4 and 8 - Government Order dated 16.4.2003 - Para 2(a) - Costs.

E

F

Recovery of excess amount - Held: Since appellant has already retired and promotion given to her is because of the wrong exercise of the Department in not applying Rules/OM correctly and it was not because of any misrepresentation or suppression by the appellant, no recovery of the excess amount paid to her is called for.

G

CONSTITUTION OF INDIA, 1950:

H

Art. 226 - Writ jurisdiction - Held: High Court rightly

concluded that the criterion of merit was violated by giving promotion to the appellant on such a comparative assessment where the respondent was rated more meritorious than the appellant - It cannot, therefore, be said that High Court assumed the role of DPC. A

ADMINISTRATIVE LAW: B

Subordinate legislation - Government of Uttarakhand O.M. dated 16.4.2003 - Providing classification as 'excellent', 'good' and 'unsuitable' - However, ACRs also providing Grade 'very good' which is not the category in O.M. - Held: It is for the Government to consider amendment in the procedure of selection on the basis of merits - Government Order dated 16.4.2003 - Para 2(a). C

The appellant's appointment on the post of Director, Medical Health was challenged by the private respondent on the ground that his ACRs were much superior to that of the appellant inasmuch as in the last 10 years under consideration he had obtained either 'excellent' or 'very good' rating; whereas in the case of appellant ACRs of only 9 years were considered out of which in one year she obtained 'good' and in the remaining 8 years 'excellent' or 'very good'. The Public Service Tribunal rejected the respondent's claim petition. However, the High Court allowed his writ petition. Since on the date of the judgment, both the appellant as well as private respondent had retired, the High Court directed to treat the private respondent as having been promoted to the post of Director, Medical Health on and from 14.7.2008 and he be paid the arrears of salary, accordingly. D
E
F

In the petition for special leave filed by the appellant, limited notice was issued as regards recovery of amount already paid to her on account of promotion to the post of Director, Medical Health. G

Dismissing the appeals, the Court H

**A HELD: 1.1 Rule 8 of the U.P. Medical Health (Group
A) Service Rules, 1990, as amended in 1998, states that
merit is the sole consideration for promotion to the post
of Director. Further, as per r.8 of the Uttarakhand
Government Servant (Criteria for Recruitment by
B Promotion) Rules, 2004, the promotion is on the basis of
merit to the post in question. The relevant Rules are
statutory in nature as they are made in exercise of power
vested in proviso to Article 309 of the Constitution.
C However, the Rules do not provide the procedure for
adjudging the merit of various candidates. In the instant
case, the promotion is on the basis of merit alone, where
the seniority should play the role only if two candidates
are of equal merit and not otherwise. [para 4,5,13 and 16]
[329-G-H; 330-A; 331-F; 335-C-D; 337-F]**

**D 1.2 OM dated 16.4.2003 provides for the procedure for
evaluating the comparative merit of the candidates. As per
sub-para (b) of para 2 of the O.M., comparative evaluation
has to be on the basis of service record and, particularly,
ACRs recorded in the service record for last 10 years.
E Next step which the DPC is required to undertake is to
classify the officers in three categories, namely,
'excellent', 'good' and 'unsuitable'. [para 13-14] [335-D-E,
G-H; 336-A]**

**F 1.3 In the instant case, the procedure laid down in the
OM has not been strictly adhered to by the DPC. It
committed the mistake by grading the officers in 'very
good', 'good' and 'unfit' category. Thus, the DPC invented
and substituted the category of 'very good' in place of the
category mentioned in the OM, namely, 'excellent'. This
G has made all the difference in evaluating the appellant vis-
à-vis the private respondent and that is a serious error
committed by the DPC. It is pertinent to mention that in
the counter affidavit filed by the State Government before
the High Court, it is admitted that DPC assigned 20 marks
H**

to the appellant and 29 marks to the private respondent. A
By eliminating 'excellent' category and replacing it with
'very good' category, the private respondent was severely
prejudiced as he was put along the appellant in the same
lower category not specified in the OM. Such an exercise
on the part of the DPC is contrary to the mandate and B
spirit of part 2(a) of OM dated 16.4.2003 which
categorically states that selection on the basis of merit
means to select the best available officer on the basis of
comparative evaluation. [para 15] [336-B-C, F-H; 337-A]

1.4 Even OM dated 16.4.2003 is not entirely in sync C
with the grading done in the Annual Confidential Reports.
Sub-para (c) of para 2 provides for classifying the officers
in three categories, namely 'excellent', 'good' and
'unsuitable' and there is no category of 'very good' which D
is one of the grading provided in ACR. However, it is for
the Government to have a re-look into the classifications
mentioned in sub-para (c) of para 2 and consider
amendment in the procedure of selection on the basis of
merit. [para 16] [337-B-D]

B.V. Sivaiah & Ors. Vs. K.Addanki Babu & Ors. 1998 (3) E
SCR 782 = 1998 (6) SCC 720 - referred to.

1.5 Since the DPC did not follow the procedure as laid F
down even in the OM dated 16.4.2003, the promotion of
the appellant on the basis of the exercise undertaken by
the DPC was clearly unwarranted and rightly set aside by
the High Court. [para 16-A] [337-G-H]

1.6 The High Court rightly concluded that the criterion G
of merit was violated by giving promotion to the appellant
on such a comparative assessment where the respondent
was rated more meritorious than the appellant. It is,
therefore, not correct to say that the High Court has
assumed the role of the DPC. [para 17] [338-D-E]

2. In so far as payment of excess salary made to the H
appellant in promotional post is concerned, since the

A appellant has already retired and the promotion given to
her is because of the wrong exercise of the Department
in not applying Rules/OM correctly and it was not
because of any misrepresentation or suppression by the
appellant, no recovery of the excess amount paid to her
is called for. [para 17] [338-E-G]

3. The private respondent shall also be entitled to
cost of Rs.15,000/-which shall be paid by the
Government. [para 17] [338-G]

Case Law Reference:

C 1998 (3) SCR 782 referred to para 16
CIVIL APPELLATE JURISDICTION : Civil Appeal No.
10236 of 2013.

D From the Judgment and Order dated 05.10.2010 of the
High Court of Uttarakhand at Nainital in Writ Petition (SB) No.
200 of 2009.

WITH

E C.A. No. 10237 of 2013.

L. Nageswara Rao, ASG, Prasenjit Keswani, Manu Beri
(for Yash Pal Dhingra), Rachana Srivastava, Utkarsh Sharma
for the Appellant.

F Gaurav Agarwal (for Jatin Zaveri) for the Respondents.

The Judgment of the Court was delivered by

A.K. SIKRI, J. 1. Leave granted.

2. Dispute in these appeals pertains to the validity of
appointment to the post of Director, Medical Health. Ms.
G Premlata Joshi appellant in one of these appeals was
appointed to the post of Director, Medical Health, which was
in general category and available to all eligible candidates,
irrespective of their category, along with one Dr. C.P. Arya,
H who was promoted to the post of Director, reserved for

Scheduled Caste candidate. Promotion of C.P.Arya is not in question. However, Dr. Y.S.Bisht, who is private respondent in these appeals, and was also considered for the said post but was not appointed, challenged the appointment of Ms Premlata Joshi (hereinafter referred to as the "appellant"). The Public Service Tribunal, Uttarakhand, where the Original Application was filed, dismissed the said application of Dr. Bisht (hereinafter referred to as the "private respondent") vide orders dated 18th August 2009. This order was challenged by the private respondent before the High Court of Uttarakhand in the form of a Writ Petition. The High Court has allowed the said Writ Petition holding that the selection to the post was on the basis of merit and since private respondent was more meritorious than the appellant, he should have been promoted to the post of Director, Medical Health instead of the appellant. On the date of the judgment, both the appellant as well as private respondent had retired. Therefore, the direction is given by the High Court to treat the private respondent as having been promoted to the post of Director, Medical Health on and from 14.7.2008 till the date of his retirement and he be paid the arrears of salary, accordingly, after fixing his salary on the post of Director. Direction is also given to work out his pension and other retirement dues on the same post.

3. This judgment of the High Court is challenged by the appellant as well as the State of Uttarakhand (hereinafter referred to as the "official respondent"). This is how we have the instant two appeals against the same judgment filed by two parties.

4. Two posts of Director, Medical Health had fallen vacant in the year 2007. One was reserved for Scheduled Caste Candidate. Against the other post eligible candidates were entitled to be considered for promotion. The Rules, which govern the promotion to the post of Director, are contained in U.P. Medical Health (Group A) Service Rules, 1990, as amended in 1998. Rule 8 thereof states that merit is the sole

A consideration for promotion to the post of Director. There is yet another set of Rules known as Uttarakhand Government Servant (Criteria for Recruitment by Promotion) Rules, 2004. Rule 8 thereof which deals with the procedure for promotion to the post reads as under:

B "8. Procedure of appointment on the basis of promotion

C 1. The appointment of Director General, Director and Additional Director on the basis of superiority and Joint Director and senior class officers, discarding the unsuitable, on the basis of seniority will be done by Selection Committee according to Uttar Pradesh Departmental Promotion Committee Constitution (leaving the posts outside Public Service Commission) Rule, 1992.

D Note: In selection committee the names of officers belonging to Schedule Caste. Schedule tribe and other backward caste will be considered according to orders given under section-3 of Uttar Pradesh Public Service Commission (reservation for schedule caste, schedule tribe and other backward caste) Act, 1994.

E Explanation: For this rule the citizen of other backward caste would mean the same which has been mentioned in the sub-rule under the aforesaid Act.

F 2. Appointment Officer (for the post outside of Public Service Commission) will prepare the merit list of the eligible candidates according to Uttar Pradesh Selection Merit List Rule-1986: Where two separate categories are there, then-

G (a) In case of different pay-scale, the candidates of upper pay scale will be kept above in the merit list.

H (b) In case of similar pay scale the candidates will be kept in the merit list according to their date of appointment.

(c) If the pay scale and appointment in the category is same then the candidates having more age will be kept above in the merit list. A

3. Selection Committee will prepare a list on the basis of documents mentioned in sub-rule (3) and if necessary can conduct the interview of the candidates. B

4. Selection Committee will prepare a list of selected candidates on the basis of seniority of candidates as in that category where promotion has to be made and will forward it to appointment officer." C

Rule 4 prescribes the criteria for appointment by way of promotion which reads as under:

"Criteria for appointment by way of promotion - The appointment on the post of Head of Department, post just below the Head of Department and any such other post of any service where the pay scale is Rupees 18300.00 or more will be made on the basis of merit and apart from these on the remaining posts, the post filled on the basis of promotion where such other posts are including where the promotion is made from non-gazetted to gazette post or from one service to other service, then discarding the ineligible, the appointment will be made on the basis of seniority." D E

5. As per this Rule, the promotion is on the basis of merit to the post in question. F

6. The Government issued Order dated 16.4.2003 laying down the criterion for judging the merit. This criterion, inter-alia, provides that in order to ascertain merit, the ACRs of the candidates for the entire length of service shall be considered with special attention to last 10 years. Since much turns on the prescription given in this Order to adjudge the respective merit of eligible candidates for the post, we would like to produce the relevant portion thereof hereunder: G

H _

- A "Procedure of selection on the basis of merit -
- (a) Name of all the officers should be considered who is eligible in the proportion against the available vacancy. The selection on the basis of "merit" means to select the best available officer from the whole eligible officer. Therefore, the decision should be taken after doing comparative evaluation of all the eligible officers in regard of merit.
- B
- (b) The entries of the entire service period should be seen while making selection of officers under the merit criteria but stress should be there on the entries of last 10 years.
- C
- (c) On the basis of entries of Character register of Officers, for evaluation, they have been classified under three categories:-
- D
1. Excellent
 2. Good
 3. Unsuitable.
- E
- On the basis of entries of character register, after evaluating the officers and classifying those under 3 categories, the vacancies be filled first of all from the excellent categories officers in seniorities wise and thereafter if necessary the vacancies be filled from the officers of good category. The selected officers from
- F
- excellent and best class a list should be again made according to their original seniority which will be their seniority list.
- G
- It is therefore stated that in future the aforesaid procedure be followed in the selection being done in the future."
- H
7. As per the aforesaid procedure, after evaluating the ACRs of the officers they are to be put in three categories, namely 'excellent' 'good' and unsuitable'. In each category, the officers are then to be placed according to their seniority and vacant posts are to be filled on the basis of the said seniority,

first from 'excellent' category list and thereafter from 'good' category list, if after the exhaustion of 'excellent' category, posts are still available. A

8. In the present case, we find that after considering the cases of eligible candidates for the post of Director, including the appellant and private respondent, DPC put both of them in "very good" category and since the appellant was senior to private respondent, she was placed above him, and therefore appointed to the post of Director as per her seniority. B

9. This mode of grouping was challenged by the private respondent by filing Claim Petition before the Tribunal. His submission was that on comparison it was clear that his ACRs. were much superior to that of the appellant inasmuch as in last 10 years. The private respondent had obtained either 'excellent' or 'very good' rating. On the other hand, in the case of appellant 9 years ACRs were considered as one year ACR was not available, even these 9 years she had got 'good', in one year and in remaining 8 years either 'excellent' or 'very good'. He, thus, submitted that he was more meritorious than appellant and since the criteria was merit based, as per the procedure laid down in Government Order dated 16/4/2003, he should have been ranked above the appellant. C D E

10. The Tribunal did not accept this plea holding that as per the said Government Order, 'excellent' remarks were to be given as 'very good' inasmuch as the officers were to be put in three categories, namely, 'very good', 'good' and 'unfit'. It held that once both the appellant and the private respondent were placed in the same category, namely, 'very good' thereafter inter-se placement in the select list was to be on the basis of their seniority. The Tribunal, accordingly, dismissed the Claim Petition of the private respondent. For proper appreciation we reproduce the discussion in the judgment of the Tribunal, verbatim, on this aspect: F G

"On the basis of above Office Memorandum dated 16.4.2003; the departmental promotion committee has H

A amalgamated excellent and very good entries and put them
together as very good. Therefore, the excellent entries were
considered as very good at the time of selection. Since,
the respondent No.5 was senior most amongst the 7
B candidates in very good category of Character Roll. The
name of respondent No.5 was rightly recommended for
promotion on the post of Director."

11. Unsatisfied with the outcome of the decision, private
respondent approached the High Court challenging the decision
of the Tribunal by filing Writ Petition under Article 226 of the
C Constitution. The High Court has held that since the private
respondent had more number of 'excellent' remarks in the
ACRs. as compared to the appellant, on the basis of
parameters laid down in the Government Order dated
16.4.2003, the private respondent could not be equated with
D the appellant and therefore private respondent should have been
appointed to the post of Director, Medical Health. On this
premise, Writ Petition has been allowed and direction given,
as already noted in the beginning of the judgment.

E 12. At the time of hearing, Mr. Rao, learned ASG appearing
for the State of Uttarakhand relied upon the aforesaid reasoning
and rationale given by the Tribunal. His submission was that on
the application of OM dated 16.4.2003, it was permissible for
DPC to classify the candidates into three categories and once
F it was found that appellant as well as private respondent fall in
the same category, in that category the appellant was rightly
placed above the private respondent in view of her seniority over
him. He submitted that this exercise done by the DPC, based
on the entries of character register, could not be interfered with
by the High Court as the High Court could not assume the role
G of departmental promotion committee and make comparative
assessment by itself of the two candidates, viz. the appellant
and the private respondent. He also argued that it is no where
challenged that grading of 'very good' to the appellant was
uncalled for. Once, the appellant finds berth in 'very good'
H category to which private respondent was also included, for the

purpose of promotions both were in the same category and private respondent could not say that he was superior to the appellatant. From that stage onward, it is the seniority which becomes the governing factor when two or more candidates have attained same grading. A

13. The aforesaid argument appears to be attractive, in the first blush. However, a little deeper scrutiny of the procedure adopted by the DPC would expose the hollowness of this argument thereby taking entire sheen out of it. In the first place, we have to keep in mind the position contained in the relevant Rules which are statutory in nature as they are made in exercise of power vested in proviso of Article 309 of the Constitution. Rule 4 of Rules, 2004 deals with the criteria for appointment by way of promotion. For the post in question, it clearly lays down that the promotion is to "be made on the basis of merit". Rules do not provide the procedure for adjudging the merit of various candidates. For this reason, OM dated 16.4.2003 needs to be referred to which provides for the procedure for evaluating the comparative merit of the candidates. We have reproduced para 2 of the said OM hereinabove. In sub-para (a) of para 2, the expression 'merit' is defined stating as under: B
C
D
E

"The selection on the basis of "Merit" means to select the best available officer from the whole eligible officer. Therefore, the decision should be taken after doing comparative evaluation of all the eligible officers in regard of merit." F

14. It follows from the above that while making selection on the basis of merit, DPC is required to select 'the best available officer'. For this purpose, it is also incumbent upon the DPC to undertake the "comparative evaluation of all eligible officers in regard of merit". As per sub-para (b) of para 2, for comparative evaluation the entries of the entire service period, with emphasis on the entries of last 10 years, is to be examined by the DPC. This shows that comparative evaluation has to be on the basis of service record and particularly ACRs recorded G
H

A in the service record for last 10 years. Next step which the DPC is required to undertake is to classify the officers in three categories, namely, 'excellent', 'good' and 'unsuitable'.

B 15. We may point out that the private respondent has questioned the propriety of putting the candidates in three categories on the ground that it is not in tune with the system of ACRs. That aspect will be discussed a little later. What we find that even the procedure laid down in the aforesaid OM has not been strictly adhered to by the DPC. The first mistake which is committed is that the DPC has graded the officers in 'very good', 'good' and 'unfit' category. Thus, the DPC invented and substituted the category of 'very good' in place of the category mentioned in the OM namely 'excellent'. This has made all the difference in evaluating appellant vis-à-vis the private respondent and that is a serious error committed by the DPC.

D By creating its own category of 'very good' which is not specified in OM dated 16.4.2003, the private respondent has also been included in the category of 'very good' in the absence of 'excellent' category. Had the categories mentioned in OM dated 16.4.2003 been maintained, in all likelihood the private respondent would have been rated as 'excellent'. In last 10 years, he had 9 ACRs with 'excellent' remarks and 1 ACR with 'good' remarks. On the basis of such a record, the DPC had itself awarded him 29 marks out of 30. On the other hand, the appellant's service record shows that in the last 10 years, ACR for one year was not available and as far as other 9 ACRs are concerned, she had earned three (3) 'excellent', five (5) 'very good' and one (1) 'good' entry. It is pertinent to mention that in the counter affidavit filed by the State Government before the High Court, it is admitted that DPC assigned 20 marks to the appellant and 29 marks to the private respondent. Therefore, it is anybody's guess as to whether appellant would have made her entry into the 'excellent' category. In this way, as pointed out above, by eliminating 'excellent' category and replacing it with 'very good' category, the private respondent was severely prejudiced by putting him along the appellant in the same lower

H

category not specified in the OM. Such an exercise on the part of the DPC is contrary to the mandate and spirit of part 2(a) of OM dated 16.4.2003 which categorically states that selection on the basis of merit means to select the best available officer on the basis of comparative evaluation.

16. We may also observe at this stage that even OM dated 16.4.2003 is not entirely in sync with the grading done in the Annual Confidential Reports. Sub-para (c) of para 2 provides for classifying the officers in three categories, namely 'excellent', 'good' and 'unsuitable' and there is no category of 'very good' which is one of the grading provided in ACR. However, we need not discuss this aspect any further and leave it to the Government to have a re-look into the classifications mentioned in sub-para (c) of para 2, more particularly when sub-para (a) specifically stipulates the criterion of comparative evaluation and the aim is to select 'best available officer' for the purposes of promotion on the basis of comparative merit. This would obviate the situation, like in the present case, where an officer with 20 marks is clubbed with another officer with 29 marks and in this way, she is able to steal march over much more meritorious officers giving undue advantage to her seniority. We leave the matter at that to be considered by the State Government for proper amendment in the procedure of selection on the basis of merit. We would, however, like to refer to the judgment of this Court in *B.V.Sivaiah & Ors. Vs. K.Addanki Babu & Ors.* 1998 (6) SCC 720 where principles of 'merit-cum-seniority' as well as 'seniority-cum-merit' are explained in detail. Here, the promotion is on the basis of merit alone, where the seniority should play the role only if two candidates are of equal merit and not otherwise.

16-A. In so far as the present case is concerned, as we have found that the DPC did not follow the procedure as laid down even in the said OM dated 16.4.2003, the promotion of the appellant on the basis of the exercise undertaken by the DPC was clearly unwarranted and rightly set aside by the High Court. It would be pertinent to mention that at the time of hearing

A of SLP filed by the appellant herein, this Court issued notice on 11.2.2011 on limited aspect in the following words:

B "Issue notice on the limited question regarding recovery of amount already paid to the petitioner on account of promotion to the post of Director, Medical Health.

Since respondent No.5 is present on caveat, service of notice on the said respondent is dispensed with."

C It is clear from the above that even at the time of issuing notice, this Court did not consider it proper to interfere with the directions of the High Court and the only question on which notice was issued was regarding recovery of the amount already paid to the appellant on promotional post.

D 17. Thus, we do not find any fault with the direction of the High Court keeping in view the facts of the present case. The appellants are not correct in their arguments that the High Court has assumed the role of the DPC. In fact the High Court only referred to the exercise undertaken by the DPC itself which had
E awarded marks to both the appellant as well as private respondent and rightly concluded that the criterion of merit was violated by giving promotion to the appellant on such a
F comparative assessment where the respondent was rated more meritorious than the appellant. In so far as payment of excess salary made to the appellant in promotional post is concerned,
G we are of the opinion that since the appellant has already retired and the promotion given to her is because of the wrong exercise of the Department in not applying Rules/OM correctly and it was not because of any misrepresentation or suppression by the appellant, no recovery of the excess amount paid to her is called for. Subject to the aforesaid, both the appeals are dismissed. The private respondent shall also be entitled to cost of Rs.15,000/- (Rupees Fifteen Thousand) which shall be paid by the Government.

H R.P. Appeals dismissed.