

[REPORTABLE]

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.1713-1714 OF 2022
(@ SLP (c) Nos.30487-30488 OF 2017)

RAMA NEGI

APPELLANT(S)

VERSUS

UNION OF INDIA & ORS.

RESPONDENT(S)

WITH

CIVIL APPEAL NOS.1715-1716 OF 2022
(@ SLP (c) Nos.10513-10514 OF 2018)

J U D G M E N T

Hrishikesh Roy, J.

1. Leave granted. The challenge in these two appeals is to the judgment dated 22.9.2017 in the Special Appeal Nos.87 and 88 of 2014, filed by Appellant Rama

Negi and Special Appeal Nos. 96 of 2014 and 97 of 2014, filed by the Cantonment Board, Ranikhet. The Division Bench of the Uttarakhand High Court under the impugned judgment dismissed the Appeals and upheld the judgment of the learned Single Judge whereby the appellant Rama Negi's promotion to the post of Office Superintendent in the Cantonment Board was quashed and the Writ Petitions of the respondent no.3, Gopal Ram Arya were allowed.

2. Heard Mr. P.S. Patwalia, learned senior counsel appearing for the appellant. The Cantonment Board, Ranikhet is represented by Mr. Jayant Bhushan, learned senior counsel. Also heard the learned counsel appearing for the Respondent no.3.

3. As the contentions of the learned counsel are based on the *inter se* seniority of the two contesting parties, their service details in the Cantonment Board, Ranikhet are reproduced, in the following chart.

S.No.	Gopal Ram Arya (R-3/WP in	Rama Negi (appellant)
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HC)				
	Date	Description	Date	Description
1.	16.07.1990 09.07.1997	Appointed as Typist/Junior Clerk on ad-hoc basis. Promoted to Senior Clerk	01.09.1995	Appointed as Steno Typist equivalent to Senior Clerk
2.	01.09.2005	Promoted to Revenue Superintendent (feeder cadre) (as SC category)	01.10.2009	Promoted to the post of Accountant (feeder cadre)
3.	28.11.2011	Charge sheet for dereliction of duty, negligence		
4.			01.02.2012 25.3.2013	Officiating charge as Office Superintendent. Retrospectively promoted to Office Superintendent w.e.f. 1.2.2012
5.	17.8.2016	Penalty of recovery of Rs. 10,000/- on DP by Board (R2)		

4. As can be seen from above, the appellant initially joined service in the Cantonment Board, as a Steno Typist (equivalent to Senior Clerk), on 1.9.1995. The respondent no.3 after entering service initially as a Junior Clerk on 16.7.1990, was promoted to the Post of Steno Typist/Senior Clerk on 9.7.1997, around 22 months after the appellant directly joined service in the higher post. Thereafter, the respondent no.3 though junior, was promoted to the post of Revenue Superintendent on 1.9.2005 by giving him the benefit of reservation as a Scheduled Caste person. The appellant was subsequently promoted to the equivalent post of Accountant on 1.10.2009. Since promotion to the respondent no.3 was by conferring reservation benefit, appellant being subsequently promoted to the said cadre on 1.10.2009, she expected restoration of her seniority.

5. The promotion for the next post of Office Superintendent is governed by Rule 5-B (8) of the

Cantonment Fund Servant Rules, 1937 ("the Rules" for short), and the same reads as under:

"Rule 5-B(8) - Appointments to promotion posts shall be made [by the appointing authority] on the basis of seniority lists maintained for this purpose by the Board, subject to rejection of those considered unfit:

Provided that promotion of selection posts shall be made on the basis of seniority-cum-merit."

6. Under Annexure E of the Rules, the post of Office Superintendent together with other posts of Accountant, Toll Superintendent and Revenue Superintendent in the Cantonment Board of Ranikhet, is included in the category of "selection posts" and the relevant portion reads as under:

"ANNEXURE 'E'

1. Post declared as Selection posts under Cantonment Boards in Central Command.

Authority: GOC-in-C, Central Command, Lucknow Letter No., 82562/Classification/LC6 dated 12.1.77 and [dated 25.4.1980]

24. Ranikhet Office Supdt. Accountant, Toll Supdt. Rev. Supdt. Forest Ranger, Jamadar (PWD) Sanitary Jamadar, Head Mali and Toll Moharrir (Non-Matric)."

The Rules above specify, the post of Office Superintendent as a "selection post" and under Rule 5B(8), promotion to the post is to be considered on the criterion of *seniority cum merit*.

7. The Cantonment Board in its meeting held on 11.1.2012 considered the candidature of the persons serving in the feeder cadre and it was resolved to recommend the appellant for promotion to the "selection post" of Office Superintendent, overlooking the respondent no.3. The appellant was held to be senior as per the rule. The decision was taken after due consideration of the relevant materials, including the fact that the respondent no.3 was drawing a lower pay scale than the appellant, in the feeder cadre. The Board also took into account that the Office Superintendent position required a service record without misconduct. Respondent no.3, it was noted, was a charge sheeted person, who had accepted the charges levelled against him. To determine the appellant to be

senior to the respondent no.3 in the feeder cadre, the Board relied upon the criterion that "Persons in the feeder grades given the same grading, those in higher scales of pay will rank senior to those in the lower scale of pay". It was noted that the pay scale of the appellant Rama Negi was Rs.9300-34800 with grade pay of Rs.4200 whereas, the pay scale of respondent no.3 Gopal Ram Arya was Rs.5200-20200 with grade pay of Rs.2800 and accordingly the *inter se* seniority of the appellant was found above the respondent no.3, in the feeder cadre.

8. Following the above Resolution on 11.1.2012 for appointment to the post of Office Superintendent, the Cantonment Board sought the advice of the Central Command, Lucknow furnishing the details of those under consideration. Since nothing happened thereafter for several months, the appellant filed the W.P (C) No.1465 of 2012 before the Uttarakhand High Court. Parallely, the respondent no.3 filed the W.P (C) No.1645 of 2012 before the same High Court, challenging the Cantonment

Board's Resolution No.28 dated 11.1.2012 in favour of the appellant. At that stage, the Central Command, Lucknow with its letter dated 23.11.2012 informed that the issue of promotion to the post of Office Superintendent falls entirely within the purview of the Cantonment Board, under Rule 7(1) of the Rules.

9. Prompted by the above clarification, the Cantonment Board in its meeting held on 25.3.2013 passed the Resolution No.8 where, after having examined the rule position, it was recorded that the appellant "*Smt. Rama Negi is the best, suitable and fit candidate for the post of Office Superintendent. Hence she is promoted from the post of Accountant to Office Superintendent w.e.f. the date of her taking charge as an Officiating Office Superintendent i.e. Feb 1st, 2012 as per rules mentioned in the agenda side.*" The Board relied upon the legal advice tendered to it on the basis of the O.M. dated 12.12.1988 issued by the Ministry of Personnel, Public Grievances and Pensions, which stated "*that among the persons in the feeder grades given the*

same grading, those in the higher scales of pay will rank senior to those in the lower scale of pay."

10. Aggrieved by the above Resolution No.8 favouring the appellant, the respondent no.3 filed W.P (C) No.352 of 2013. In the meantime, the W.P (C) No.1465 of 2012 filed by the appellant for her promotion was dismissed as infructuous on 4.4.2013, by the High Court.

11. The two Writ Petitions filed by the respondent no.3 were analogously considered and the learned Single Judge in his judgment dated 25.2.2014 concluded that the respondent no.3/writ petitioner is senior and rejected the contention that the appellant is to be considered senior above the respondent no.3, by virtue of her higher pay scale in the post of Accountant in the feeder cadre. Insofar as the disciplinary proceeding pending against the respondent no.3, the learned Single Judge observed that the charge sheet was deliberately issued on 28.11.2011 to keep out the respondent no.3 from the zone of consideration. Such inference was drawn since no decision was taken on the

charges by the authorities which according to the learned judge, demonstrate malice on their part. The chargesheet itself was brushed aside by saying that it was a minor irregularity not involving moral turpitude. Therefore, the respondent no.3 by virtue of his accelerated earlier promotion in the year 2005 in the feeder cadre and the 2009 promotion of the appellant, the appellant's promotion was found to be unmerited. On this basis, the respondent no.3 was asked to officiate as the Office Superintendent, replacing the appellant who hitherto was discharging such responsibility. The Court also directed the Cantonment Board to expeditiously conclude the departmental proceeding against the respondent no.3 within 3 months and if the same is not concluded, the learned Judge declared that the chargesheet shall be deemed to have been revoked, and thereafter *denovo* exercise for promotion to the post of Office Superintendent should be undertaken. With this, both writ petitions filed by the respondent

no.3 were allowed by the learned Judge, under his judgment dated 25.2.2014.

12. Aggrieved by the judgment favouring the respondent no.3 in his two writ petitions, the appellant Rama Negi and the Cantonment Board filed their respective Special Appeal Nos.87 & 88 of 2014 and Special Appeal Nos.96 & 97 of 2014. While the Special Appeals were pending consideration before the Division Bench, the disciplinary proceeding was concluded with the report of the inquiry officer against the delinquent, and it was found that the Board incurred a loss of Rs.3,50,000/- on account of dereliction of duty by the respondent no.3 and accordingly the penalty of recovery of Rs.10,000/- from the delinquent's salary was ordered by the disciplinary authority, on 17.8.2016.

13. The Division Bench considered the basis for declaring the appellant to be senior to the respondent no.3 by virtue of her higher pay scale in the feeder cadre, and by adverting to the wrong O.M. dated 10.09.1985 (Incorrectly mentioned as 1995) conclusion

was reached that the said O.M. does not provide for declaration of seniority, on the basis of higher pay scale. It was further held that the date of appointment in the feeder cadre should be the basis for considering *inter se* seniority for the purpose of promotion to the post of Office Superintendent. The disciplinary proceeding against the respondent no.3 was brushed aside in a summary manner by declaring that the same was initiated for the fault committed by the subordinate staff of the delinquent officer to deny him the benefit of promotion. With such finding the Special Appeals filed by the appellant and the Cantonment Board were dismissed, and the judgment rendered by the learned Single Judge favouring the respondent no.3 was affirmed by the Division Bench by their judgment dated 22.09.2017.

14. Taking exception to the above judgment, the present appeals are filed. We have heard the learned counsel for the parties and also read the relevant materials on record.

15. On the issue of *inter se* seniority, it is necessary to bear in mind that the respondent no.3 entered service earlier on 16.7.1990 but in the lower grade and was promoted to the post of Senior Clerk, only on 9.7.1997. In contrast, the appellant entered service on 1.9.1995 in the higher grade as a Steno-Typist (equivalent to Senior Clerk). Thus, she was senior to the respondent no.3 in the post, just below the feeder cadre. Overlooking the inter-se seniority position of the two, the respondent no.3 as a Scheduled Caste person was granted accelerated promotion on 1.9.2005, to the post of Revenue Superintendent.

16. Besides, the appellant by virtue of her higher pay scale in the post of Accountant in the feeder cadre, also deserves seniority above the respondent no.3 with his lower pay scale, on account of the provision made in the O.M. dated 12.12.1988.

17. The *Rule 5-B (8)* read with Annexure 'E' of *the Rules* makes it clear that the post of Office Superintendent is a "selection post" and the criterion

for promotion is seniority-cum-merit. The parameters for determining promotion based on such criterion are well established by this Court. Justice S.C. Agrawal in *B.V. Sivaiah v. K. Addanki Babu*¹, speaking for a three Judges Bench, held that,

"10. On the other hand, as between the two principles of seniority and merit, the criterion of "seniority-cum-merit" lays greater emphasis on seniority. In *State of Mysore v. Syed Mahmood* [AIR 1968 SC 1113 : (1968) 3 SCR 363 : (1970) 1 LLJ 370] while considering Rule 4(3)(b) of the Mysore State Civil Services General Recruitment Rules, 1957 which required promotion to be made by selection on the basis of seniority-cum-merit, this Court has observed that the Rule required promotion to be made by selection on the basis of "seniority subject to the fitness of the candidate to discharge the duties of the post from among persons eligible for promotion". It was pointed out that where the promotion is based on seniority-cum-merit, the officer cannot claim promotion as a matter of right by virtue of his seniority alone and if he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted.

11. In *State of Kerala v. N.M. Thomas* [(1976) 2 SCC 310 : 1976 SCC (L&S) 227] A.N. Ray, C.J. has thus explained the criterion of "seniority-cum-merit": (SCC p. 335, para 38)

"With regard to promotion the normal principles are either merit-cum-seniority or seniority-cum-merit. Seniority-cum-merit means that given the minimum necessary merit requisite for efficiency

¹ (1998) 6 SCC 720

of administration, the senior though the less meritorious shall have priority.

17. ... While applying the principle of seniority-cum-merit for the purpose of promotion, what is required to be considered is the inter se seniority of the employees who are eligible for consideration. Such seniority is normally determined on the basis of length of service, but as between employees appointed on the same date and having the same length of service, it is generally determined on the basis of placement in the select list for appointment. ...

18. We thus arrive at the conclusion that the criterion of "seniority-cum-merit" in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration, the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit, the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration 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 the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit. "

Justice Arijit Pasayat, speaking for a Division Bench in *K. Samantaray v. National Insurance Co. Ltd.*², noted the following distinction,

"7. The principles of seniority-cum-merit and merit-cum-seniority are conceptually different. For the former, greater emphasis is laid on seniority, though it is not the determinative

2 (2004) 9 SCC 286

factor, while in the latter, merit is the determinative factor."

18. The appraisal of the facts before us reveals that the respondent no.3 faced a disciplinary proceeding following the chargesheet issued against him on 28.11.2011. But the High Court questioned the timing of the disciplinary action and observed that the same was issued to deny promotion to the respondent no.3. On this, the inquiry report finding (17.8.2016) is important, which indicates that the Cantonment Board suffered a pecuniary loss of Rs.3,50,000/- due to dereliction of duty by the delinquent. Significantly, the respondent no.3 accepted the charge and the disciplinary authority imposed the penalty of Rs.10,000/- recoverable from his salary.

19. It was a "selection post" and the appellant contrastingly had an unblemished service record all throughout her career. Moreover, she was found to be senior by the Board on 11.1.2012 and for this reason was recommended for promotion, in preference to the

respondent no. 3. Adverting to the role of promotion committees, Justice P.B. Sawant, speaking for a three Judges bench in *Union of India & Ors. vs. K.V. Jankiraman & Ors.*³ has emphasized the necessity to consider the entire service record of the candidates in line for promotion,

"29. ...In fact, while considering an employee for promotion his whole record has to be taken into consideration and if a promotion committee takes the penalties imposed upon the employee into consideration and denies him the promotion, such denial is not illegal and unjustified. If, further, the promoting authority can take into consideration the penalty or penalties awarded to an employee in the past while considering his promotion and deny him promotion on that ground, it will be irrational to hold that it cannot take the penalty into consideration when it is imposed at a later date because of the pendency of the proceedings, although it is for conduct prior to the date the authority considers the promotion. ..."

20. On the same aspect, Justice Kuldip Singh, also held for a Division Bench in *Jagathigowda C.N. v. Chairman, Cauvery Gramina Bank & Ors.*⁴, that the totality of the circumstances factor as a pivotal consideration with respect to *seniority cum merit*,

3 (1991) 4 SCC 109

4 (1996) 9 SCC 677

"8. ... It is settled proposition of law that even while making promotions on the basis of seniority-cum-merit the totality of the service record of the officer concerned has to be taken into consideration. The performance appraisal forms are maintained primarily for the purpose that the same are taken into consideration when the person concerned is considered for promotion to the higher rank. ..." (emphasis added)

For a Division Bench in *Haryana State Electronics Development Corporation Limited & Ors. Vs. Seema Sharma & Ors.*⁵, Justice A.K. Ganguly also reiterated the distinguishable features for the criterion of *seniority cum merit*, and the requirement to consider the entirety of the candidate's service record,

"8. The principle of merit-cum-seniority puts greater emphasis on merit and ability and where promotion is governed by this principle seniority plays a less significant role. However, seniority is to be given weightage when merit and ability more or less are equal among the candidates who are to be promoted.

9. On the other hand, insofar as the principle of seniority-cum-merit is concerned it gives greater importance to seniority and promotion to a senior person cannot be denied unless the person concerned is found totally unfit on merit to discharge the duties of the higher post. **The totality of the service of the employee has to be considered for promotion on the basis of seniority-cum-merit (see *Jagathigowda, C.N. v.***

5 (2009) 7 SCC 311

***Cauvery Gramina Bank* [(1996) 9 SCC 677: 1996 SCC (L&S) 1310: AIR 1996 SC 2733])." (emphasis added)**

21. While rejecting the appellant's seniority claim in the feeder cadre by virtue of her higher salary vis-à-vis the respondent no.3, the Division Bench, unfortunately, referred to the incorrect O.M. (dated 10.9.1985), overlooking the applicable O.M. (dated 12.12.1988) of the Ministry of Personnel. In this O.M., as noted earlier, it was clearly stated that the persons in the feeder cadre drawing higher scale will rank senior to those drawing lesser pay scale. Admittedly, the pay scale drawn by the appellant as an Accountant in the feeder cadre was higher than the respondent no.3 and therefore the benefit of O.M. (dated 12.12.1988) would surely accrue to the appellant, in the determination of her *inter se* seniority. However, the learned Division Bench by adverting to the incorrect O.M., wrongly rejected the contention that the higher pay scale can be the basis

for claiming the seniority in the feeder cadre in the circumstances referred to in the O.M. dated 12.12.1988.

22. In the present case, the Cantonment Board in their deliberations made on 11.1.2012 not only considered the appellant to be senior to the respondent no.3 but also considered her to be more deserving for promotion as the best, suitable and fit candidate, for the responsible post. The respondent no.3 was penalized pursuant to the disciplinary proceeding for dereliction of duty and misconduct and he suffered the penalty of recovery of Rs.10,000/- from his salary. Seen in this context, the appellant was more deserving. That apart, the disciplinary action was not challenged by the respondent no.3. He cannot therefore set up a better claim for promotion, to a selection category post.

23. Insofar as the contention of the respondent no.3 that the issue of selection category post was not argued before the High Court, it is necessary to bear in mind that arguments based on the Rules were advanced by all the contesting parties before the High Court.

Therefore, the status of the promotion post and the criterion for promotion specified in the Rules, must in our opinion, receive due consideration.

24. As far as the issue of higher pay scale being the basis for seniority in the feeder cadre, the same is clearly provided in the O.M. dated 12.12.1988. The issue received due consideration by the Cantonment Board and was answered in favour of the appellant. But this aspect was held against both the appellant and the Board, due to an inadvertent reference to the wrong Office Memorandum dated 10.09.1985 by the High Court. Having regard to the manner in which the issue was examined and decided by the Board, we deem it appropriate to endorse the Board's declaration of seniority in favour of the appellant, based on the reasoning contained in the Board's Resolution dated 25.3.2013.

25. This Court must also be mindful of the fact that the Cantonment Board applied the criterion of *seniority-cum-merit* and treated the post to be of the

"selection category". Moreover, the unblemished service record of the appellant vis-à-vis the pending disciplinary proceedings against the respondent no.3, (eventually resulting in penalty), were taken into account. All these circumstances in our opinion, weigh in favour of the appellant Rama Negi. Her Suitability for the selection post was attributable to two factors i.e. merit of the candidate and the *inter-se* seniority. Despite the difficulty in encapsulating the parameters for 'merit', a significant marker can be found in the unblemished record of the employee. A marred service record, though not an insurmountable bar, must carry some consequences, and it could be a comparative disadvantage in promotion for a selection post. The employer's preference for a person with a clean service record can be well appreciated.

26. Moreover, the higher pay in the same grade as per the applicable O.M., is a reliable indicator for determining *inter-se* seniority. In this Court's perception, the decision to prefer the appellant over

the respondent no.3 for promotion is in tune with the applicable parameters. As such the contrary opinion by the High Court does not merit our approval. Accordingly, the Appeals stand allowed by setting aside the impugned judgment. The parties to bear their own cost.

.....J.
[K.M. JOSEPH]

.....J.
[HRISHIKESH ROY]

NEW DELHI
MARCH 2, 2022