

Reserved

Neutral Citation No. - 2024:AHC-LKO:22802-DB

A.F.R.

Court No. - 1

Case :- SPECIAL APPEAL No. - 537 of 2023

Appellant :- Vishwash Kanaujia

Respondent :- Dr. Ram Chandra Pathak And Others

Counsel for Appellant :- Utsav Mishra, Abhineet Jaiswal, Gaurav Mehrotra

Counsel for Respondent :- Raj Kumar Pandey, C.S.C.

along with

Case :- SPECIAL APPEAL DEFECTIVE No. - 930 of 2023

Appellant :- State Of U.P. Thru. Addl. Chief Secy. Deptt. Sugar Indust. And Cane Development Lko. And Others

Respondent :- Dr. Ram Chandra Pathak

Counsel for Appellant :- C.S.C.

Counsel for Respondent :- Raj Kumar Pandey

Hon'ble Attau Rahman Masoodi, J.

Hon'ble Brij Raj Singh, J.

[Per Attau Rahman Masoodi, J.]

- (1) Heard Sri Vimal Kumar Srivastava, learned Additional Advocate General assisted by Sri Praful Kumar Yadav, learned Additional Chief Standing Counsel appearing for the applicants/appellants and Sri S.C. Mishra, learned Senior Advocate assisted by Sri Raj Kumar Pandey, learned counsel appearing for the sole respondent on the application for condonation of delay in Special Appeal No. 930 (D) of 2003, as the appeal has been filed beyond time by five days, as reported by the Office.
- (2) Learned Counsel appearing for the respondents submits that he has no objection, if the application for condonation of delay is allowed.
- (3) In view of above, the application for condonation of delay (C. M. Application No.1 of 2023 moved in Special Appeal No. 930

(Defective) of 2023 is **allowed** and the delay in filing the special appeal is hereby condoned. Office is directed to allot regular number to the appeal.

On the memo of appeals

- (4) Heard learned counsel for the respective parties in both the Special Appeals.
- (5) Special Appeal No. 537 of 2023 is directed against the judgment and order dated 31.10.2023 passed in Writ-A No. 4705 of 2023, *Dr. Ram Chandra Pathak v. State of U.P. and others*, whereby the writ petition filed by the respondent No.1/petitioner, challenging the inquiry report dated 05.04.2021 and punishment order dated 31.05.2023, has been allowed with a direction to the State-authorities to hold a review Departmental Promotion Committee (D.P.C.) for consideration for promotion of petitioner/respondent No.1 along with appellant/opposite party No.4/in Special Appeal No. 537 of 2023 on the post of Additional Cane Commissioner, Department of Sugar Industries and Cane Development ignoring the impugned punishment order dated 31.05.2023.
- (6) The State has also filed its Special Appeal No. 930 (D) of 2023 assailing the judgment and order dated 31.10.2023 passed in Writ-A No. 4705 of 2023, *Dr. Ram Chandra Pathak v. State of U.P. and others*.
- (7) Since both the Special Appeals are directed against the judgment and order dated 31.10.2023 passed in Writ-A No. 4705 of 2023, they are being decided by a common judgment and for the purpose of disposal, the contents made in Special Appeal No. 537 of 2023 are being considered.

BRIEF FACTS

- (8) The case has chequered history. The respondent No.1/petitioner (Dr. Ram Chandra Pathak) in Special Appeal No. 537 of 2023 had joined the services on the post of District Cane Officer on 01.01.1999 and later on he was promoted on the post of Deputy Cane Commissioner in the year 2012 and on the post of Joint Cane Commissioner in the year 2015.
- (9) While he was discharging his duties on the post of Joint Cane Commissioner, vide order dated 20.09.2015, respondent No.1/petitioner was sent on deputation as Chief Cane Development Officer to the U.P. Co-operative Sugar Mills Federation Limited, Lucknow for five years, whose term came to an end on 27.09.2020. Thereafter, he was attached in the aforesaid Office vide order dated 19.11.2020 till closure of crushing season 2020-2021 or till issuance of Government Order, whichever was earlier.
- (10) While he was on deputation, the respondent/petitioner was required to be a Member of Selection Committee as an expert alongwith four other members for selection on the post of Cane Officer. On the complaints moved by thirteen different persons alleging irregularities, the State Government constituted three member committee for conducting a fact finding inquiry and the said Committee submitted its report on 31.07.2017. In the meantime, in compliance of the order dated 19.08.2018 sent by the Ministry of Agriculture and Farmers Welfare, the Special Secretary sent his Examination/Audit report on 20.01.2020.
- (11) Thereafter, a departmental/disciplinary proceeding was initiated against the respondent No.1/petitioner vide Office Memorandum dated 04.06.2020. While serving a copy of the office memorandum on the respondent No.1/petitioner on

23.06.2020, a copy of the charge sheet containing six charges, on the basis of the alleged fact finding/preliminary inquiry report dated 31.07.2017 and the Audit Report dated 20.01.2020 submitted by the Special Secretary/Vigilance Officer, Sugar Industries and Cane Development Department, Government of U.P., were enclosed requiring him to file his reply within fifteen days from the date of service of charge sheet. Consequently, the respondent No.1/petitioner requested the General Manager (Complainant/Personnel) of Sugar Federation to permit him to peruse the original documents related to selection of the post of Cane Officer and provide him the photocopies of the same. Since the General Manager (Complainant/Personnel) did not accede to his request, he had again requested him by way of a reminder dated 21.09.2020 to provide him the requisite documents expeditiously in order to file a reply to the charge sheet. In the meantime, pursuant to the transfer of Inquiry Officer, Sri Bachchu Lal, Joint Secretary, Sugar Industries and Cane Development Department was appointed as Inquiry Officer on 13.11.2020. Since nothing was provided to the respondent No.1/petitioner, he submitted an inconclusive reply denying all charges levelled against him to the Inquiry Officer.

- (12) On receipt of reply from the respondent No.1/petitioner the Inquiry Officer had directed the respondent No.1/petitioner to appear before him on 25.02.2021 at 3.00 P.M. in his chamber for providing evidence in support of the charges levelled against him. It was also mentioned in the said letter that since the respondent No.1/petitioner denied all the charges, the proceedings will be held in accordance with U.P. Government Servant (Discipline and Appeal) Rules, 1999 and the Government Order dated 22.04.2015 issued in this regard. Thereafter, the Inquiry Officer submitted his report on 05.04.2021.

- (13) After receipt of letter dated 01.07.2022 alongwith inquiry report dated 05.04.2021, the respondent No.1/petitioner preferred a letter dated 25.07.2022 to provide the requisite documents for submission of effective reply to the inquiry report. The same very request was done by him thrice. Since no heed was paid towards his request, the respondent No.1/petitioner while replying to the inquiry report pointed out the irregularities committed in conducting the inquiry denying all the charges levelled against him. At last, the disciplinary authority culminated the proceedings with the passing of order dated 31.05.2023 by withholding five annual increments with cumulative effect along with censure entry in his character roll.
- (14) Challenging the order dated 31.05.2023, the respondent No.1/petitioner preferred his representation dated 08.06.2023 that no further meeting of Departmental Promotion Committee (D.P.C.) be held.
- (15) In these circumstances, the respondent No.1/petitioner filed Writ-A No. 4705 of 2023 which was allowed with certain directions.
- (16) Sri Gaurav Mehrotra, learned Counsel for the appellant/respondent No.4 has submitted that for promotion to the post of Additional Commissioner, Department of Sugar Industries and Cane Development, the Uttar Pradesh Government Servant Criterion for Recruitment by Promotion Rules, 1994 [for the sake of brevity, it is referred to as '**Rules, 1994**'] as amended from time to time. Rule 4 of the Rules, 1994 provides the criterion for recruitment by promotion to the post one rank below the Head of Department, shall be made on the basis of merit. For ready reference, the same is reproduced as under:-

“4. Criterion for recruitment by promotion – Recruitment by promotion to the post of Head of Department to post just one rank below the Heads of Department and to a post in any service carrying the pay scale the maximum of which is Rs.18,300/- or above shall be made on the basis of merit, and to the rest of the posts in all services to be filled by promotion including a post where promotion is made from a non-gazetted post to a gazetted post or from one service to another service, shall be made on the basis of seniority subject to the rejection of the unfit.”

- (17) On 24.06.2023, a Departmental Promotion Committee (DPC) was convened for consideration of promotion of the candidates for the post of Additional Cane Commissioner. Since the criteria for promotion on the post of Additional Cane Commissioner, being the post one rank below the Head of Department, was merit as per Rule 4 of the Rules, 1994, the Annual Confidential Reports (ACRs) of all such candidates falling within the zone of eligibility was considered by the DPC on 24.06.2023.
- (18) Learned counsel for the appellant has vehemently submitted that **the marks of the appellant are more than that of the respondent No.1/petitioner on the basis of ACRs for the last 10 years.** Since the appellant having scored more marks than the respondent No.1/petitioner was, therefore, rightly recommended by the DPC for promotion on the post of Additional Cane Commissioner.
- (19) Since the post of Additional Cane Commissioner is just below the post of Cane Commissioner, the provisions of Rule 4 of Rules, 1994 would be applicable and the sole criteria is **merit**. Thus seniority has no role and it would come into play when

the appellant/respondent No.4 and respondent No.1/petitioner were awarded equal marks in merit.

- (20) In support of his submissions that the criterion for promotion on the post in question was merit and it is only when two candidates have equal marks, the role of seniority comes into play, he has relied upon the judgment of Hon'ble Supreme Court in the case of ***Premlata Joshi v. Chief Secretary, State of Uttarakhand and others [(2013) 16 SCC 482]***. Accordingly, in light of the recommendations made by the DPC and relying upon the aforesaid judgment, the appellant/respondent No.4 was promoted vide Office Order dated 12.09.2023.
- (21) Learned counsel for the appellant/respondent No.4 has further submitted that in the writ proceedings, by way of an amendment application, the writ petitioner assailed the entire proceedings of the Departmental Promotion Committee (DPC) held on 24.06.2023 which was allowed vide order dated 06.07.2023, but the learned Single Judge did not interfere with the recommendation of DPC convened on 24.06.2023. Since the learned Single Judge did not interfere with the aforesaid recommendations, no occasion arises for issuance of a direction for holding a review DPC, which was not prayed by the writ petitioner and as such, the direction given by the learned Single Judge was beyond the relief sought by the writ petitioner.
- (22) When a party does not pray for a specific relief, the Courts ought not to have granted relief. In support of this, he has relied upon the judgments passed by the Apex Court in the cases of ***Manohar Lal (Dead) by LRs. v. Ugrasen (Dead) by LRs and others [(2010) 11 SCC 557]***, ***Bharat Amratlal Kothari v. Dosukhan Samadkhan Sindhi [(2010) 1 SCC 234]*** and ***Akella***

Lalitha v. Konda Hanumantha Rao and another [2022 SCC OnLine SC 928].

- (23) Further submission of learned counsel for the appellant is that since the impugned judgment is based upon the findings which are beyond the pleadings pleaded in the writ petition, the judgment rendered by the learned Single Judge is unsustainable on this count alone. More over, the learned Single Judge has not returned any finding as to why a direction for holding review DPC was warranted **when the proceedings of DPC convened on 24.06.2023 were not quashed. Thus, no direction to hold DPC could have been issued by the learned Single Judge for considering the case of the appellant/respondent No.4 and respondent No.1/petitioner.**
- (24) In the facts and circumstances of the instant case, the judgment of the Apex Court in ***Uttar Pradesh Power Corporation Limited v. Ayodhya Prasad Mishra and another [(2008) 10 SCC 139]*** relied upon by the writ petitioner is not applicable for the reason that equals cannot be treated unequally. But it is equally well settled that unequals cannot be treated equally. Treating of unequals as equals would as well offend the doctrine of equality enshrined in Articles 14 and 16 of the Constitution of India. The High Court was, therefore, right in holding that Executive Engineers placed in Category I must get priority and preference for promotion to the post of Superintendent Engineer over Executive Engineers found in Category II. Here in this case, both the appellant and respondent No.1 were holding the post of Joint Cane Commissioner and were eligible for promotion to the post of Additional Cane Commissioner. Thus, there are no two categories for applying the observations made by the Apex Court in the aforesaid judgment.

- (25) Further submission of the learned counsel for the appellant is that the Government Order dated 27.09.2019 which was relied upon by the writ petitioner to negate the provisions of Rule 4 of Rules, 1994 was neither produced before the learned Single Judge nor any specific pleadings were made in the writ petition in this respect.
- (26) In paragraphs 20 to 24 of the counter affidavit dated 12.07.2023 before the writ court, the appellant/respondent No.4 has asserted that since the criteria for promotion on the post of Additional Cane Commissioner being the post one rank below the Head of Department was merit as per Rule 4 of Rules, 1994, the highest marks secured by the candidates are eligible for promotion to the post of Additional Cane Commissioner. Since the appellant/respondent No.4 had secured more marks than the respondent No.1/writ petitioner, he was rightly recommended by the DPC for promotion on the said post.
- (27) Learned counsel for the appellant has further submitted that in response to the aforesaid specific contention of the appellant/respondent No.4, the respondent No.1/petitioner instead of denying the provisions of Rule 4 of Rules, 1994 has stated that he was covered by the Government Order dated 27.09.2019 without substantiating the averments. In absence of any pleading by the respondent No.1/petitioner with regard to the applicability of the Government Order dated 27.09.2019, **no cognizance shall be taken for the first time at the appellate stage.**
- (28) The contention of the learned Counsel for the appellant is that it is trite law that the arguments of a litigant as also findings cannot traverse beyond the pleadings and have to be in

consonance with the judgments passed by the Apex Court as well as by this Court.

- (29) Further, he contends that in the Government Order dated 27.09.2019 nowhere merit has been defined. Thus, the said Government Order is not applicable to the facts and circumstances of the instant matter as it supplants the same instead of supplementing the Rules, 1994.
- (30) Elaborating his submissions, he has emphasized the contents of para – 11 of the Government Order wherein it has been provided that on the basis of the provisions contained in paragraph Nos. 7 (1) to (10) of the aforesaid Government Order, those applicants/employees who secure 80 or above out of 100 marks, would be placed in the eligible list and to the extent of posts available, on the basis of their seniority, such employees would be promoted. Further such employees who are placed in the eligibility list would not be discriminated on the basis of merit. For ready reference, contents of paragraph No.7(11) of the Government Order dated 27.09.2019 are reproduced hereunder:-

“(11) उपर्युक्त उप प्रस्तर-1 से 10 के आधार पर 100 अंकों में से 80 अंक का बेन्चमार्क निर्धारित करते हुए 80 या 80 से अधिक अंक पाने वाले अभ्यर्थी/कार्मिक को "उपयुक्त" श्रेणी में वर्गीकृत करते हुए, वास्तविक रक्तियों की उपलब्धता की सीमा तक, उनकी पोषक संवर्ग की वरिष्ठता के क्रम में, चयन सूची में शामिल किया जायेगा तथा उनकी पोषक संवर्ग की ज्येष्ठता के आधार पर उनके पदोन्नति के आदेश निर्गत किये जायेंगे। ज्ञातव्य हो कि 'उपयुक्त' श्रेणी में वर्गीकृत अधिकारियों के मध्य मेरिट के आधार पर कोई विभेद

नहीं होगा। अर्थात् चयनित अधिकारियों का अधिक्रमण (Surpersession) नहीं होगा। 80 अंक से कम पाने वाले अभ्यर्थियों को अनुपयुक्त श्रेणी में वर्गीकृत किया जायेगा।

उपर्युक्त के अतिरिक्त यदि 80 अंक के बेन्चमार्क के आधार पर रिक्तियों की संख्या के अनुरूप 'उपयुक्त' श्रेणी में वर्गीकृत कार्मिक उपलब्ध नहीं हो पाते हैं, तो चयन समिति उक्त 80 अंक के बेन्चमार्क को घटाने हेतु सक्षम होगी।”

- (31) He further contends that on perusal of the aforesaid Government Order dated 27.09.2019 and more particularly paragraph No. 7(11), it is evident that instead of supplementing the Rules, 1994, it tries to supplant the statutory provisions that for grant of promotion to the employees placed in the eligibility list, **‘merit would not be decisive factor’**.
- (32) Further contention of the learned counsel for the appellant is that since the contents of paragraph No.7(11) of the Government Order dated 27.09.2019 are in the teeth and derogative of the statutory provisions contained in Rule 4 of the Rules, 1994, the statutory rules cannot be amended or superseded merely by issuance of an executive order. In support of this, he has relied upon the judgments of the Apex Court in *State of U.P. and others v. Babu Ram Upadhyaya [AIR 1961 SC 751]*, *P.D. Agrawal and others v. State of U.P. and others [(1987) 3 SCC 622]*, *Naga People’s Movement of Human Rights v. Union of India and others [AIR 1998 SC 431]* and *C. Rangaswamaiah and others v. Karnataka Lokayukta and others [AIR 1998 SC 96]*.

- (33) In the case of ***Union of India and another v. Ashok Kumar Aggarwal [(2013) 16 SCC 147]***, the Apex Court held as under:-

“It is settled proposition of law that an authority cannot issue orders/office memorandum/executive instructions in contravention of the statutory Rules. However, instructions can be issued only to supplement the statutory rules but not to supplant it.”

- (34) The Apex Court in the case of ***Government of Andhra Pradesh and others v. P. Laxmi Devi [(2008) 4 SCC 720]*** has explained the ‘Grundnorm’ in the Indian Constitution and the hierarchy as under:-

“34. In India the Grundnorm is the Indian Constitution, and the hierarchy is as follows :

- (i) The Constitution of India;*
- (ii) Statutory law, which may be either law made by Parliament or by the State Legislature;*
- (iii) Delegated legislation, which may be in the form of Rules made under the Statute, Regulations made under the Statute, etc.;*
- (iv) Purely executive orders not made under any Statute;*

35. If a law (norm) in a higher layer in the above hierarchy clashes with a law in a lower layer, the former will prevail. Hence a constitutional provision will prevail over all other laws, whether in a statute or in delegated legislation or in an executive order. The Constitution is the highest law of the land, and no law which is in conflict with it can survive. Since the law made by the legislature is in the second layer of the hierarchy, obviously it will be invalid if it is in conflict with a provision in the Constitution (except the Directive Principles which, by Article 37, have been expressly made non enforceable).

- (35) In a Constitution Bench judgment of the Apex Court in ***B. N. Nagarajan and others v. State of Mysore and others [AIR***

1996 SC 1942] it was held that if there is a statutory rule or an act on the matter, the executive must abide by that act or rule and it cannot, in exercise of executive power under Article 162 of the Constitution of India, ignore or act contrary to that rule or act. Thus, the Government Order dated 27.09.2019 relied upon by the writ petitioner do not supplement the Rules, 1994.

- (36) Next he has contended that since the writ petition filed by the writ petitioner was allowed by the learned Single Judge on the ground of fallacies in the inquiry report and not following the procedure for holding disciplinary proceedings, the matter should have been remanded to the concerned authority so that the inquiry could be conducted afresh from the stage of furnishing reply to the charge sheet.
- (37) Further submission of the learned Counsel for the appellant is that in the event of the matter being remitted to the Disciplinary Authority for holding fresh inquiry from the point it stood vitiated, the provisions of Government Order dated 28.05.1997 issued by the Department of Personnel, Government of Uttar Pradesh would come into play and the recommendations of the DPC would be kept in a sealed envelope as the disciplinary proceedings against the writ petitioner would still be pending.
- (38) The next contention of the learned Counsel for the appellant is that while setting aside the punishment order dated 31.05.2023, liberty was not granted to the State authorities for proceeding against the writ petitioner afresh from the point the inquiry stood vitiated. In support of this submission, he has relied upon the cases of ***The Inspector of Panchayats and District Collector, Salem v. S. Arichandran and others [2022 SCC Online SC 1282]***, ***The State of Uttar Pradesh and others v. Rajit Singh [2022 SCC Online SC 341]*** and ***Chairman, Life***

Insurance Corporation of India and others v. A. Masilamani [(2013) 6 SCC 530].

- (39) Lastly, he has submitted that in the event of the matter being remitted for holding inquiry afresh from the point it stood vitiated, the writ petitioner would still not be entitled for being considered for promotion on the post of Additional Cane Commissioner as the disciplinary proceedings against him would be pending.
- (40) Sri Vimal Kumar Srivastava, learned Additional Advocate General assisted by Sri Praful Kumar Yadav, learned Additional Chief Standing Counsel appearing for the State authorities has raised a preliminary objection before the Writ Court that the respondent No.1/petitioner was having statutory alternative remedy to prefer review under Rule 14 of U.P. Government Servants (Disciplinary & Appeal) Rules, 1999 and further he was having an efficacious remedy of filing a claim petition before the Tribunal under U.P. Public Services Tribunal Act, 1976, but the same has not been considered by the learned Single Judge.
- (41) The grounds of challenge are that the learned Single Judge has apparently exercised his jurisdiction beyond the scope of judicial review in respect of the punishment order, which is major in nature and the learned Single Judge has acted as an appellate authority over the decision taken by the disciplinary authority inasmuch as the learned Single Judge has substituted his own findings to the findings recorded by the Disciplinary Authority by appreciating the evidence afresh which is not permissible so far as judicial review of matters related to disciplinary proceedings is concerned.

- (42) Further ground taken by the learned Additional Government Advocate is that once the evidence on record has been accepted by the Disciplinary Authority and the findings returned by the Disciplinary Authority in respect of misconduct are supported by evidence available on record, setting aside the order of punishment cannot be justified as the allegations were such amounting to misconduct in terms of the provisions of U.P. Government Servants Conduct Rules, 1956. Lastly, he has submitted that if there is any flaw in the procedure followed during the course of conduct of the inquiry, the punishment order could not have been set aside; rather, it should have remanded to the authority concerned for conducting the inquiry from the stage it stood vitiated.
- (43) *Per contra*, Sri S. C. Mishra, Senior Advocate assisted by Sri Raj Kumar Pandey, learned Counsel appearing for the writ petitioner submits that complaints were filed by 13 persons against Sri B. K. Yadav, the then Managing Director and Chairman of Selection Committee and appointing authority for the post of Cane Officers. On the basis of the complaints, a preliminary inquiry was held by the Commissioner, Lucknow Division, Lucknow. **In the said inquiry, the respondent No.1/ petitioner was not found guilty**, however, **Sri B. K. Yadav was found guilty of five charges**. None of the 13 complainants were ever examined or produced in the inquiry to press and verify their status.
- (44) Elaborating the above submissions, he asserted that vide Office Memorandum dated 29.11.2016, a selection committee consisting of five members was nominated for the post of Cane Officer wherein the writ petitioner was nominated as a Subject Specialist and Sri B. K. Yadav was a Chairman of the Selection Committee. Sri B. K. Yadav was exonerated by the competent

authority on the ground that none of the complaints were filed in consonance with the guidelines framed in the Government Orders dated 09.05.1997 and 06.08.2018, whereas the writ petitioner was served with a copy of Office Memorandum/charge sheet dated 04.06.2020 issued by the Principal Secretary, Sugar Industries and Cane Development, U.P. for initiation of disciplinary proceedings against him. In support of the charge sheet only two evidences were relied upon - one is the report dated 31.07.2017 of the Commissioner, Lucknow and the other report is dated 20.01.2020 of the Special Secretary/Vigilance Officer of Sugar Industries and Cane Development Department. No list of witnesses was given nor anyone was examined, meaning thereby both the reports were never got proved. A perusal of the head note and Para – 1 (source) column and para – 2 (gist of allegations) of the said report dated 20.01.2020 itself shows that it was prepared under the directions of order dated 19.08.2018 of Government of India which required the State Government to submit a report in the case of Sri B. K. Yadav as per the prescribed proforma of Central Vigilance Commission, New Delhi for holding disciplinary inquiry against him as per the request of Government of India.

- (45) He went on submitting that on the basis of the report of the Commissioner, Lucknow Division, Lucknow dated 31.07.2017, whereby five charges levelled against the Chairman of the Selection Committee were found proved, the State requested the Government of India to hold disciplinary inquiry against Sri B. K. Yadav. It is clear from the report that **no finding was given against the writ petitioner as all the allegations were made against Sri B. K. Yadav.** Consequently, vide letter dated 14.12.2017 sent by the Principal Secretary, Sugar Industries to Department of Agriculture and Farmer's Welfare

(Administrative Vigilance Unit), Government of India, New Delhi seeking disciplinary action against the then Managing Director Sri B. K. Yadav who was the Chairman of the Selection Committee as also the Appointing Authority of Cane Officers. **It is made clear that both the inquiries were held against Sri B. K. Yadav and not against the writ petitioner.**

- (46) In sequence, he has urged that the writ petitioner was never associated either in the inquiry conducted by the Commissioner or in the inquiry of Special Secretary, Vigilance whose reports have been relied as evidence. Both the inquiry officers of inquiry reports were never produced as witnesses in the inquiry proceedings to authenticate and prove their inquiry reports nor named as witnesses. In the second inquiry held by the Vigilance Officer of Sugar Industries and Cane Development Department, objection No.12 refers to the appointment of Cane Officers, but the allegations were made against the Chini Mill Sangh Committee for appointment of less number of Scheduled Caste candidates as per the prescribed quota. Further, it reveals from the report of Vigilance Officer that the entire inquiry is based upon some *ex parte* audit report conducted by Sri Vishisth Lekha Prativedan 2016-17 Sahkari Evam Lekha Pariksha Sangathan, but the said report was never made available to the writ petitioner.
- (47) He has pointed out that one Shri Tulsi Ram, Finance Controller was inducted as subject specialist in the Selection Committee for appointment of Accounts Officer. When the disciplinary proceedings were initiated against him, he was found guilty of charge of backward class candidates being appointed against Scheduled Caste quota posts and the Disciplinary Authority has passed the punishment order dated 13.04.2022 awarding stoppage of one increment and censure entry in his character

roll. When he approached this Court by filing Writ-A No. 3074 of 2022, vide judgment and order dated 30.03.2023 the writ petition was allowed setting aside the order dated 13.04.2022 on the ground of vague charges having been levelled against him in the charge sheet. The said order has become final as it has not been challenged by the State Government. Since the case of the writ petitioner is identical to Shri Tulsi Ram, he should be treated on similar terms.

- (48) Further discrimination pointed out by the learned counsel for the respondent No.1/petitioner is that there were nine committees for different posts and Sri B. K. Yadav was Chairman of all nine Selection Committees. After obtaining report from the Central Vigilance Commission and no complaints have been authenticated, Sri B. K. Yadav has been exonerated by the Government of India on 24.08.2022.
- (49) Learned Counsel for the respondent No.1/petitioner submits that the selection committee has only recommended the names of the suitable candidates in order of their merit in respective categories to the appointing authority, who is Sri B. K. Yadav, Managing Director of the Corporation and it is the appointing authority to approve the list and issue appointment orders following the Rules, Reservation Quota and Regulations prescribed in this matter.
- (50) Elaborating his submissions, learned Counsel has submitted that as per The Uttar Pradesh Co-operative Factories Federation Limited, Employees Service Regulations, 1988, the role of the selection committee is to select the candidates on the basis of their merit after which list of selected candidates including the list containing wait-listed candidates has to be forwarded to the appointing authority for appointment and it is the duty of

appointing authority to take the final decision of appointment by following the Rules applicable for selection and appointment. In the present case, the appointing authority, Sri B. K. Yadav, has issued all appointment letters to the selected candidates. More over, mere selection does not give any vested right of appointment unless he has given appointment letter by the appointing authority who alone has to follow the Reservation Rules and other Rules applicable in this regard and therefore, the charge that the respondent No.1/petitioner has violated the reservation rules and appointed less number of Scheduled Caste Candidates is perverse.

- (51) He further submitted that the punishment order dated 31.05.2023 has been passed without application of mind and no independent findings agreeing/disagreeing with the inquiry officer have been recorded by the punishing authority while passing the order.
- (52) Next, he has contended that even though the inquiry officer has proved only one charge pertaining to reservation rules (charge No.1 and partly charge No.2) against the respondent No.1/writ petitioner but the punishing authority has held that charge No.6 is also proved against the respondent No.1/petitioner without giving any reason as to why he is differing from the view of the inquiry officer because the punishing authority was to retire on 30.06.2023. Therefore, he hurriedly passed the order dated 31.05.2023 and thereafter, he directed for holding Departmental Promotion Committee (DPC) on 24.06.2023.
- (53) It was then submitted that the promotion of the respondent No.1/petitioner was due from the post of Joint Cane Commissioner to the post of Additional Cane Commissioner for which Departmental Promotion Committee (DPC) was

constituted earlier which had held its meeting on 04.08.2022 and the result of outcome of the Committee was kept in a sealed cover but on account of impugned order of punishment dated 31.05.2023, his promotion could not be issued and the recommendation lapsed.

- (54) His next leg of submission is that the Special Appeal filed by Shri Vishwash Kanaujiya, who was impleaded as opposite party No.4 before the writ proceedings after his application for impleadment was allowed in Writ-A No. 4705 of 2023 on the ground that the writ petitioner has sought for quashing of proceedings of Departmental Promotion Committee (DPC) held on 24.06.2023 and no order has been passed against the appellant in the impugned judgment dated 31.10.2023. During pendency of writ petition, the appellant had been promoted on the post of Additional Cane Commissioner vide order dated 12.09.2023.
- (55) Elaborating submissions on the maintainability of Special Appeal, learned counsel appearing for the writ petitioner has submitted that the learned Single Judge has only directed to hold a review Departmental Promotion Committee (DPC) on the post of Additional Cane Commissioner considering the candidature of the writ petitioner for the same alongwith respondent No.4/appellant ignoring the punishment order dated 31.05.2023 which has been quashed by the learned Writ Court. The said direction of review DPC has been given **as the recommendation for promotion of the petitioner was kept in sealed cover in earlier DPC held on 04.08.2022** and while holding the subsequent DPC on 24.06.2023 the candidature of the writ petitioner for promotion has been rejected only on account of the punishment order dated 31.05.2023.

- (56) The contention of the appellant/opposite party No.4 is that the criteria of promotion is merit which cannot be ground of challenge of the impugned judgment inasmuch as in the review DPC which will be held both the incumbents will be considered as per the relevant Rules and prevailing guidelines on the basis of which promotions are made in all Government Services throughout Uttar Pradesh and which were followed while holding the earlier DPC dated 04.08.2022 and 24.06.2023. Therefore, there is no occasion for the appellant/opposite party No.4 to file special appeal. More over, the appellant/opposite party No.4 has no concern with the inquiry initiated against the writ petitioner or punishment order as also the impugned judgment and order dated 31.10.2023. Thus, he has no *locus standi* to challenge the impugned judgment and order. Further, he has submitted that whosoever will be suitable for the promotion as per the prevailing procedure in review DPC will be promoted and the criteria of promotion was not the subject matter of the writ petition. The direction for holding review DPC is as a consequence of quashing of the order of punishment passed against the writ petitioner. The review DPC will obviously be held in accordance with law and prevailing rules and guidelines framed by the competent authority in this regard.
- (57) Lastly, he has submitted that after filing of the writ petition, the DPC was held on 24.06.2023 and on 26.06.2023, an interim order was passed to the effect that the result of the DPC be not finalized. However, the said interim order was modified vide order dated 06.07.2023 to the effect that the result of DPC held on 24.06.2023 shall be subject to final outcome of the writ petition. Subsequently, on 12.09.2023, the appellant/respondent No.4 was given promotion with the condition that **the said promotion shall subject to the final order of Writ-A No.4705**

of 2023. In these circumstances, the Special Appeals filed by the State and appellant/respondent No.4 are liable to be dismissed.

- (58) After hearing learned counsel for the parties extensively at length and perusing the material on record, we find it necessary to reproduce the relevant directions given by the learned Single Judge in the impugned judgment and order dated 31.10.2023 as under:-

“36. As per material on record, it is also evident that a departmental promotion committee has in the meantime been held on 24th June, 2023 whereafter the opposite party No.4 has been promoted on the post of Additional Cane Commissioner with non consideration of petitioner due to impugned order. Considering the fact that this Court has found not only the inquiry report but also the punishment order to be vitiated in law the impugned order dated 31st May, 2023 is consequently quashed by issuance of writ in the nature of Certiorari. A writ in the nature of Mandamus is issued to the opposite parties to hold a review D.P.C. for consideration for promotion on the post of Additional Cane Commissioner, Department of Sugar Industries and Cane Development considering the petitioner for the same along with opposite party No.4, ignoring the impugned order dated 31st May, 2023.

37. In view of aforesaid directions, there is no occasion for this Court to quash the Departmental Promotion Committee proceedings held on 24.06.2023 which even otherwise would be subject to the Review Departmental Promotion Committee recommendations.”

- (59) The aforesaid directions contained in the impugned judgment can be categorized into two parts. One part is relating to the inquiry proceedings and the other part is relating to the competent authority for holding review Departmental Promotion of Committee (DPC) of both the persons, i.e.,

appellant/respondent No.4 and respondent No.1/petitioner. We first deal with the inquiry proceedings, which are as under:-

- (60) Before delving into the merits of inquiry proceedings, we would go through the charge No.1, charge No.2 and charge No.6 which are relevant for consideration as under, as the impugned punishment order has been passed on the aforesaid three charges:-

“(a) **Charge No.1** – In the selection for the post of Cane Officer (vacancies-General/Unreserved 07, OBC 05 and SC 03) in the Uttar Pradesh Sugar Factories Federation Ltd., the Selection Committee, in violation of the constitutional provision, had only 02 candidates selected under the SC category while 06 candidates were selected under the OBC category against a vacancy of 05 posts. Thus, instead of carrying forward 01 vacancy under the SC category in case of unavailability of suitable candidates, to the next selection, the same was filled from amongst OBC category candidates.

(b) **Charge No.2** – For selection on the post of Cane Officer, the name of an Applicant namely Shri Pradeep Kumar son of Shri Tilak Ram, who had participated in the interview was shown to have been absent from the aforesaid interview, and against which a Writ Petition was filed before this Hon’ble Court which is still pending consideration. More over, the documents including experience certificate of the aforesaid candidate namely Shri Pradeep Kumar was verified, however, till date, the documents including educational as well as experience certificate of selected candidates have not been verified. Thus, by showing the aforesaid SC candidate namely Shri Pradeep Kumar as absent from the interview, 06 candidates under the OBC category were declared to be selected against a vacancy of 05 posts.

(c) **Charge No. 6** – The Selection Committee, on its own accord, whimsically, had allotted marks to the selected candidates, which were at variance with the marks allotted by the interview board. The merit list was not prepared on the basis of the actual marks obtained by the candidates. On 30.11.2016 alongwith selection for the post of Cane Officer, selection of A.E.D.P., was also held and the Petitioner along with the Managing Director and Shri Lalita Prasad were members of both the Selection Committees. Thus, it is not possible that the Petitioner was part of two selection board at the same time.”

- (61) Admittedly, the respondent No.1/petitioner was nominated as a Subject Specialist to interview the candidates for the post of Cane Officer alongwith four members. The respondent No.1/petitioner being member of the Committee had joined with other Members including Chairman of the Selection Committee, namely, (1) Sri B.K. Yadav, Managing Director/Chairman, Selection Committee; (2) Shri Anil Kumar Singhal, General Manager (Personnel)/Member; (3) Shri R.C. Pathak, Chief Cane Development Adviser, Expert Member/Subject Matter Specialist **(respondent No.1/petitioner)**; (4) Sri Ram Avatar Singh, General Manager, Expert Member/Subject Matter Specialist/Member and (5) Sri Lalta Prasad, Chief Engineer (representative of Scheduled Caste)/Member to interview the candidates.
- (62) When thirteen complaints were filed against the Selection Committee, they were thoroughly probed and disciplinary proceedings were initiated against the Chairman of the Committee initially. Though the allegations made in the complaints were relating to the Chairman, but later on the respondent No.1/petitioner has been dragged to the disciplinary proceedings.
- (63) It is strange thing that Chairman of the Selection Committee being Managing Director is the appointing authority. When the matter reached the Central Government to take action, he has been exonerated from the charges levelled against him on the ground that none of the complaints were got authenticated in terms of the guidelines framed in the Government Orders dated 09.05.1997 and 06.08.2018. Since the allegations have been levelled mainly against the Chairman, against whom exoneration order has been passed by the Central Government,

as to how and under what circumstances, the respondent No.1/petitioner being a Member of Selection Committee, that too in the capacity of Subject Expert can be penalized.

- (64) Further, it is to be noted that even if the respondent No.1/petitioner has selected any candidate, mere selection does not confer any right of appointment unless and until the selection proceedings are approved by the competent authority. The Chairman who is responsible for all misdeeds has been exonerated by the Government of India, but a person who has been nominated as subject expert has been punished for the mistake committed by the Chairman which amounts to hostile discrimination and violation of Articles 14 and 15 of the Constitution. Here in this case, the competent authority is Managing Director/Chairman of the Selection Committee. Thus, he is solely responsible against whom the Central Government has exonerated him.
- (65) In support of above submissions, the case laws of '***M. Ramesh v. Union of India [(2018) 16 SCC 195]***, ***Dinesh Kumar Kashyap v. South East Central Railway [(2019) 12 SCC 798]***, ***State of U.P. v. Rajkumar Sharma [(2006) 3 SCC 330]***, ***Jatinder Kumar v. State of Punjab [(1985) 1 SCC 122]*** and ***UPSC v. M. Sathiya Priya [(2018) 15 SCC 796]*** relied upon by the learned counsel for the respondent No.1/petitioner are applicable.
- (66) More over, one Sri Tulsi Ram, who is a similarly situated person like respondent No.1/petitioner, has been nominated as Subject Expert to interview the candidates for the post of Accounts Officer. When the similar allegations have been levelled against him and on initiation of disciplinary proceedings, it had culminated into passing of stoppage of one

increment and censure entry in his character rolls, he filed Writ-A No. 3074 of 2022 which was allowed vide judgment and order dated 20.03.2023 and quashed the impugned punishment order dated 13.04.2022 on the ground that the charge-sheet should not contain any vague charge and the charge should be specified so that employee may be put to notice that what is charge against him for giving reply to the same. As per reading of the charge-sheet, in respect of charge no. 1, it is evidently clear that the same is vague and, the inquiry report is also vague.

- (67) The aforesaid order has not been challenged by the State till date which indicates that it attains finality.
- (68) At this stage, it is necessary to reproduce the relevant paragraphs of the impugned judgment dated 31.10.2023 as under:-

“32. It is the case of opposite parties that petitioner made recommendations regarding selection on the post of Cane Officer, which were contrary to Article 338 of Constitution of India. It is not a case of opposite parties that petitioner had any role in issuance of appointment letters to the selected candidates. Even otherwise the only major charge levelled against petitioner regarding violation of Article 338 of Constitution of India is of a single recommendation being made over and above the vacancy pertaining to OBC quota. In the considered opinion of this Court, only a recommendation had been made by the selection committee of which petitioner was one of the members. A recommendation even against law may not be construed to be a misconduct, unless specifically indicated in the service rules, particularly since such recommendations are not binding in nature and it is for the appointing authority to adhere to or reject the same. The opposite parties have not been able to indicate any service regulation

pertaining to petitioner whereby such a recommendation, even if assumed to be against law, can be held to be a misconduct requiring imposition of such punishment.

33. Learned State Counsel has adverted to judgment rendered by Supreme Court in the case of State of U.P. versus Rajit Singh, 2022 SCC Online SC 341 to submit that doctrine of equality would not be applicable where other officers involved in an incident have been exonerated since misconduct is required to be considered as per role of each individual officer in the light of their duties of office and where charges against individual concerned are held to be proved in a departmental inquiry since there can not be any claim of negative equality.

34. So far as aforesaid judgment is concerned, it is quite evident that opposite parties have failed to make out the distinguishing feature as indicated in the said judgment of Rajit Singh (supra). Neither the inquiry report nor the impugned punishment order have adverted to any individual role of petitioner regarding allegations levelled against him and his role even with respect to same misconduct in the light of his duties of office have also not been distinguished. As has been indicated herein above, the conduct of inquiry itself indicates that the inquiry officer himself was unable to reach any subjective satisfaction regarding involvement of petitioner in the allegations levelled against him. With due respect, in the considered opinion of this Court, the aforesaid judgment would be inapplicable in the present facts and circumstances of the case.”

- (69) Since there is no role of the respondent No.1/petitioner to appoint the candidates and the inquiry conducted by the department is wholly unfounded, we are of the firm opinion that setting aside of the impugned punishment order by the learned Single Judge is wholly in consonance with law and the same is hereby affirmed. The matter, even if not**

remitted to the competent authority for being dealt with afresh, does not suffer from any illegality.

- (70) Consequent upon the setting aside of the punishment order, the next direction issued by the learned Single Judge for holding review DPC will come into play. In this regard, it is necessary to mention that in the writ proceedings, when the punishment order dated 31.05.2023 passed against the respondent No.1/petitioner was set aside, as to whether the Departmental Promotion Committee (DPC) held on 24.06.2023 would consequently require to be reviewed or the emerging position of law is different is the next question that would crop up. The relevant orders which were passed by the learned Single Judge during pendency of writ petition are as under:-

26.06.2023

“As per the submission of learned counsel for the petitioner, the Additional Chief Secretary has passed the order against the petitioner against which this petition has been filed. Learned C.S.C. contended that there is provision of filing revision against the aforesaid order as per the Rule 13 of U.P. Government Servant (Disciplinary and Appeal) Rules, 1999 and this writ petition cannot be entertained. On which learned counsel for the petitioner contends that the punishing authority itself is the State, therefore, revision cannot be a remedy for the petitioner.

In view of the above, learned C.S.C. is directed to seek instructions in this regard as to who will decide the revision filed against the order in question in this writ petition.

At the request of learned C.S.C., list this case on 28.06.2023 as fresh.

Supplementary affidavit filed by learned counsel for the petitioner today is taken on record in which he has made a prayer that a D.P.C. was held on 24.06.2023 in hurriedly manner to harm the

*petitioner, therefore, instructions in this regard be also called from the learned C.S.C. and **the result of the D.P.C. be not finalized in the meantime/till the next date of listing.***

06.07.2023

“On C.M. Application No.Nil of 2023

Heard.

This application seeks amendment in the memo of writ petition.

Application is allowed.

Let necessary amendment is to be incorporated in the memo of writ petition during the course of the day.

On C.M. Application No.Nil of 2023

Heard.

This application seeks impleadment in the array of parties.

Application is allowed.

Let Mr. Vishwash Kanaujia be impleaded as opposite party no.4 in the array of parties during the course of the day.

Since S/Sri Gaurav Mehrotra and Utsav Misra have appeared on behalf of the newly impleaded opposite party no.4, therefore, no notice is required to be issued to opposite party no.4.

On Memo of Writ Petition

The State is directed to file its response/counter affidavit before the next date of listing of this petition.

Counter affidavit shall be served on the learned counsel for the petitioner at least one day before the next date of listing of this petition.

List this petition on 13.7.2023 peremptorily.

Interim order dated 26.6.2023 is modified to that the result of the Departmental Promotion Committee held on 24.6.2023 shall be subject to the final outcome of this petition.

It is made clear that no adjournment shall be granted on the next date to either of the parties on any ground.

When the case is listed next, names of S/Sri Gaurav Mehrotra and Utsav Misra shall be shown in the cause list as counsels for opposite party no.4.”

- (71) While granting the interim order dated 26.06.2023, it was provided that **the result of the DPC be not finalized in the meantime/till the next date of listing. The said interim order was modified on 06.07.2023 to the extent of DPC held on 24.06.2023 shall be subject to final outcome of the petition.**

It is on this basis, the appellant/respondent No.4 has been promoted vide order dated 12.09.2023. Since the promotion of the appellant in Special Appeal No. 537 of 2023 has been made on the basis of recommendations of DPC based on the sole criteria of merit, number of arguments have been putforth by the learned counsel for the appellant/respondent that the criteria of merit as postulated under Rule 4 of the Rules, 1994 cannot be overridden by the administrative instructions.

- (72) The consequence for issuing a direction for review DPC may or may not be a natural concomitant particularly where the criteria of selection is merit, the selection proceedings have to be viewed from a different perspective altogether and the stipulations of the interim order would *ipso facto* not give legitimacy to the direction for review of the selection proceedings held on 24.06.2023, unless the same were faulty in the eye of law.

- (73) We have already narrated above that the criteria of selection in the case at hand is 'merit' alone, therefore, it is desirable to have a look at the second part of controversy, i.e., **whether the direction for holding review DPC was at all desirable to be issued in the facts and circumstances of this case where the recommendations of the DPC were acted upon though under the interlocutory orders passed by this Court.** In order to test the operation of Rule – 4 of the abovementioned Rules, 1994 and the Government Order dated 27.09.2019 placed reliance upon, there is no dispute on the point that the aforesaid Rules, 1994 are applicable to the post in question and have an overriding effect.
- (74) Insofar as the Government Order dated 27.09.2019 is concerned, it has more significant facets than one. The Government Order in paragraph Nos.7(1) to 7(10) elaborates as to how the candidates in the zone of consideration have to be assessed by the Departmental Promotion Committee (DPC). Marks are specified for each category of ACRs of which the sum becomes relevant both for touching the benchmark and merit.
- (75) Learned counsel for the appellant would contend that the marks once provided to be the criteria of merit for touching the benchmark and once scored above 80 marks would equally be relevant for the assessment of merit, therefore, a candidate, whose marks on the prescribed scale of assessment are higher, must reap the benefit of recommendations made by the DPC.
- (76) It is further argued that merit of a candidate and punishment are compartmentalized. A candidate, even if higher in merit, would lose his opportunity of promotion, if he is punished in the disciplinary or judicial proceedings. The record produced

before this Court demonstrates that the comparative merit of the eligible candidates touching the benchmark is assessed as per the norms prescribed in paragraph Nos.7(1) to 7(10) of the Government Order dated 27.09.2019 and **the appellant has scored 96 marks (rounding off), whereas the respondent No.1/petitioner has scored 86 marks (rounding off).**

- (77) On account of the implications of punishment order, such an assessment did not become redundant but for the higher marks the other candidate, viz., the appellant/respondent No.4 has scored. Two situations arise out of the assessment made by the DPC. Firstly, if a candidate obtains higher marks in the zone of eligibility but is punished and the other situation would be that the eligible candidate who is punished scores lower marks as compared to the one who is offered promotion.
- (78) In *Uttar Pradesh Power Corporation Limited v. Ayodhya Prasad Mishra and another (supra)*, the Apex Court has observed that the Executive Engineers having 90% marks i.e. 180 or more out of 200 are to be placed in Category I, while Executive Engineers having 60% or more i.e. 120 or more (up to 179) are to be found in Category II. Such classification, in the considered opinion of the Apex Court, is perfectly reasonable and wholly rational. The classification neither offends Article 14 nor Article 16 nor is otherwise unreasonable infringing Article 19 of the Constitution. Therefore, the conclusion arrived by the Apex Court is that Executive Engineers placed in Category I and Category II are 'unequals'. Further, it has been held that once an Executive Engineer is considered eligible and fit for promotion and placed in a particular category (Category I or Category II) he will retain his *inter se* seniority in the said category. Relevant paragraphs are reproduced as under:-

“39. An Executive Engineer having 90% marks i.e. 180 or more out of 200 are to be placed in Category I, while Executive Engineer having 60% or more i.e. 120 or more (up to 179) are to be found in Category II. Such classification, in our considered opinion, is perfectly reasonable and wholly rational. The classification neither offends Article 14, nor Article 16 nor is otherwise unreasonable infringing Article 19 of the Constitution. We have, therefore, no hesitation in coming to the conclusion that Executive Engineers placed in Category I and Category II are ‘unequals’.

43. In our opinion, however, the above principle does not help the appellant- Corporation in the present case. As observed by us, under the Scheme of Regulations, 1970, promotion to the post of Superintending Engineer, Chief Engineer II and Chief Engineer I is based on ‘merit’. If it is so, consideration of merit alone is relevant and material. **It is, therefore, provided that once an Executive Engineer is considered eligible and fit for promotion and placed in a particular category (Category I or Category II), he will retain his inter se seniority in the said Category.** But that will apply only to those Executive Engineers who are placed in one and the same Category and not in a different Category. An Executive Engineer of Category II cannot, under the scheme of regulations, claim promotion over an Executive Engineer placed in Category I. Such interpretation may possibly result in regulations being declared ultra vires. The High Court, in our opinion, rightly not accepted such interpretation and we see no infirmity therein.

44. There cannot be two opinions that a concession of law cannot bind a party. [Vide B.S. Bajwa & Anr. v. State of Punjab & Ors.(1998) 2 SCC 523; Union of India v. Mohanlal Likumal Punjabi, (2004) 3 SCC 628; Union of India & Anr. v. S.C. Parashar, (2006) 3 SCC 167]. The learned counsel appearing for the writ petitioner also did not dispute this proposition. In our opinion, however, the so called ‘concession’ was not against law. On the contrary, it was in consonance with the scheme of statutory regulations as also

consistent with the Constitution. We have, therefore, kept aside the 'so called' concession and have considered the question in the light of statutory regulations referred to above. Under the regulations, only one view is possible which has been taken by the High Court and to us, the said view is correct."

- (79) If the above analogy is applied in this case, at the relevant time, both the appellant/respondent No.4 and respondent No.1/petitioner were Joint Cane Commissioners and they were eligible for promotion on the post of Additional Cane Commissioner and though both had crossed the benchmark, but on account of the punishment order having been passed against the respondent No.1/petitioner and besides his marks being low, he was not to be promoted. Although setting aside of the punishment order of the respondent No.1/petitioner has brought them on an equal footing but they stand classified on the yardstick of marks as have been derived by applying the procedure mentioned in paragraph Nos. 7(1) to 7(10) of the Government Order dated 27.09.2019. There is no other classification prescribed in the Government Order according to which Rule – 4 of the Rules, 1994 may operate, therefore, any deviation from the actual value of marks as has been suggested based on seniority in paragraph No.11 of the Government Order dated 27.09.2019 is nothing but a breach of the statutory Rules, which is impermissible. On comparison of both cases, i.e., the case at hand and the judgment of ***Uttar Pradesh Power Corporation Limited v. Ayodhya Prasad Mishra and another (supra)***, the only difference is that in matter of ***Uttar Pradesh Power Corporation Limited***, if the candidature of category – I is not suitable for promotion on the higher post, then the candidature of category – II can be considered, whereas in the instant case, the benchmark of 80 marks testing the suitability of candidates is merely an eligibility for determination of merit

and it is for this reason that the same is not to be rigidly observed in the eventuality of non-availability of candidates touching the same. Considering all these facts of the matter, we are of the firm opinion that the above case law is not fully applicable in the facts and circumstances of the present case because allowing the Court to form an opinion on the strength of actual marks obtained by a candidate is the only classification.

- (80) It may also be noted that the records of Annual Confidential Remarks (ACRs) have undergone a drastic change in the matter of official secrecy and the manner in which they are maintained. An entry in the confidential record used to be exposed only when there was an adverse remark. Now, as per law, all entries, irrespective of adverse or not, are being made known to all employees well-in-time. Since there is no grievance raised before us in the matter of assessment of marks, as such, the application of Government Order dated 27.09.2019 for assessment of marks as per paragraphs Nos. 7(1) to 7(10) being unquestionable leads us to no other conclusion except that the merit derived in the selection proceedings is binding upon the eligible/suitable candidates having qualified the benchmark. The assessment of marks being a well guided procedure leaves no scope for interference in the matter of assessment which is binding on the eligible candidates.
- (81) In view of above, the direction issued by the learned Single Judge for holding review DPC is not an emerging necessity and would offend the principle of merit as prescribed under Rule – 4 of the Rules, 1994. We may also observe that any procedure giving precedence to seniority as contemplated under para – 11 of the Government Order would clearly stand contrary to the essence of merit wherever it is deciphered on the scale of

marks. Therefore, the argument put forth by the respondent/petitioner herein that seniority would assume the decisive role on a candidate obtaining the benchmark is fallacious and deserves to be rejected, inasmuch as the real classification is based on the actual marks obtained above the benchmark.

(82) This Court may further note that the respondent/petitioner at no point of time has assailed the proceedings of selection committee or the assessment of merit to be affected on account of punishment order, which on setting aside, may automatically lead to the consequence of review selection. The assessment of merit being an independent process would only lead to the consequence of review when the marks awarded to a candidate are higher as compared to his counterpart in the zone of consideration chosen to have been appointed. The classification of candidates in the zone of consideration being on the scale of marks above the benchmark, therefore, would not constitute a single category giving precedence to the rule of seniority contrary to the mandate of Rule 4 of Rules, 1994.

(83) For all the reasons stated above, we hereby **allow the Special Appeals in part** and set aside the direction issued by the learned Single Judge to the extent of holding the review DPC. Insofar as setting aside of the punishment order is concerned, we affirm the impugned judgment/order dated 31.10.2023. No order as to costs.

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(Brij Raj Singh, J.) (Attau Rahman Masoodi, J.)

Order Date :- 15.03.2024
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Vishwash Kanaujia v. Dr. Ram Chandra Pathak And Others