



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

WRIT PETITION NO.2850 OF 2023

Rahul Pramod Yadav	]	
Age 34 years, Occ: Service	]	
R/o. 003, B Wing, Shree Samarth Krupa	]	
Apt. Near Appollo Hospital, Aptewadi,	]	
Badlapur (East), Pin Code 421 503.	]	.. Petitioner.
v/s.		
1 The Registrar (General)	]	
High Court of Bombay	]	
Fort, Mumbai 400 032.	]	
2 The Registrar Personnel	]	
High Court of Bombay	]	
Fort, Mumbai 32.	]	.. Respondents.

Mr. Sandeep Dere, for the Petitioner.

Mr. Rahul Nerelkar, for Respondent Nos. 1 & 2.

**CORAM: SUNIL B. SHUKRE &
FIRDOSH P. POONIWALLA, JJ.**

**RESERVED ON : 5th SEPTEMBER, 2023.
PRONOUNCED ON : 5th OCTOBER, 2023.**

ORAL JUDGMENT (Per FIRDOSH P. POONIWALLA, J.):

By this Petition, the Petitioner seeks an order that the process of promotion initiated by the Respondents is illegal, unconstitutional and ultra vires the fundamental rights guaranteed to the Petitioner under the Constitution of India. The Petitioner further seeks a direction to the Respondents to consider the Petitioner for promotion to the post of Assistant Section Officer as per the Bombay High Court Appellate Side Service Rules, 2000 ("the Service Rules"). Further, the Petitioner also

seeks that he may be granted deemed date of 10th February, 2022 with all arrears and other consequential service benefits.

2 The Petitioner was appointed as a Clerk. On 9th July, 2013, Respondent No.1 issued an appointment order for the post of Clerk to the Petitioner and by an order dated 19th July, 2013 posted the Petitioner as a Clerk on the Appellate Side of this Court with effect from 18th July, 2013.

3 The Petitioner completed his probation period on 6th October, 2015. Thereafter, the Petitioner participated in a Lower Standard Departmental Examination in 2015 as per the Service Rules and secured 225 out of 300 marks.

4 It is the case of the Petitioner in the Petition that, in 2018, he became eligible for promotion to the post of Assistant Section Officer since, as per Rule 26 of the Service Rules, he was having experience for more than 5 years, was holding a degree and had successfully passed a Lower Standard Departmental Examination.

5 Respondent No.2 published a Circular dated 1st February, 2022 whereby Respondent No.2 call twenty candidates for *viva-voce* for the post of Assistant Section Officer. It is the case of the Petitioner that, in the said Circular, Respondent No.2 did not mention any eligibility criteria or the terms and conditions of the selection process for the post of Assistant Section Officer. It is further the case of the Petitioner that he was under the impression that the selection for the said post was conducted as per Rule 26 of the Service Rules and he participated in the *viva-voce* on 5th February, 2023.

6 Thereafter, Respondent No.2 published a Notice dated 10th February, 2022 whereby Respondent No.2 published a list of selected candidates for the post of Assistant Section Officer. The Petitioner's name was not included in the list of selected candidates. It is the case of the Petitioner that, from the ten persons so selected, seven persons were junior to the Petitioner. In other words, seven persons junior to the Petitioner were promoted to the post of Assistant Section Officer.

7 Being aggrieved by the said Notice dated 10th February, 2022, the Petitioner made a representation dated 11th February, 2022 to Respondent No.1. On 11th February, 2022, the Petitioner also filed an 'Application under the Right to Information Act, 2005 ("the RTI Act"), seeking information regarding the criteria for selection to the post of Assistant Section Officer in this Court and other related information regarding the said selection process.

8 By a letter dated 22nd February, 2022 addressed to the Petitioner by Respondent No.2, the Petitioner was informed that his representation dated 11th February, 2022 was placed before the Registrar General of this Court, and, on considering it, the same was rejected. Further, by a letter dated 22nd February, 2022, the Petitioner received a response to his Application under the RTI Act. By the said letter, the Petitioner was informed that the selection for the post of Assistant Section Officer was based on marks allotted to the Annual Confidential Reports of the last four years (20 marks) and marks allotted in *viva-voce* (30 marks). The Petitioner was also informed that the minimum passing marks are 25. Further, the Petitioner was informed that he had secured 24 marks out of the total 50 marks i.e. 10 marks in his Annual Confidential Reports and 14

marks in *viva-voce*, against the minimum passing marks of 25. It should be noted that, at page 45 of the Petition, the Petitioner has attached a letter dated 31st May, 2021 issued to him by the Assistant Registrar (Personnel) of this Court, whereby, at his request, the Petitioner was furnished copies of his Annual Confidential Reports for the Years 2017-18 to 2019-20. These Annual Confidential Reports have been annexed by the Petitioner at pages 46 to 55 of the Petition.

9 Being aggrieved by the said letter dated 22nd February, 2022 issued by Respondent No.2, whereby he was informed that his representation dated 11th February, 2022 had been rejected, the Petitioner filed an Administrative Appeal dated 7th March, 2022 before the Hon'ble Chief Justice of this Court through the Registrar General. Respondent No.2 filed a Reply dated 3rd August, 2022 to the said Appeal. In the said Reply, Respondent No.2 stated that the Guidelines framed for considering the selection to the post of Assistant Section Officer were confidential and were not published.

10 By an Order dated 23rd November, 2022 passed by an Hon'ble Judge of this Court, in his capacity as the Hon'ble Appellate Authority, the said Appeal filed by the Petitioner was found to be devoid of merits and was accordingly dismissed. The said Order was furnished to the Petitioner by a letter dated 5th December, 2022 addressed to him by Respondent No.2.

11 Thereafter, on 2nd March, 2023, the present Petition was filed. The Respondents filed an Affidavit-in-Reply dated 6th April, 2023 of one Yogesh Rane, being the Registrar (Legal & Research) of this Court, in response to the Petition.

12 In support of the Petition, Mr. Sandeep Dere, the learned Advocate appearing on behalf of the Petitioner, referred to Rule 26 of the Service Rules, which reads as under:-

“26. Assistant – Appointment shall be by promotion from amongst eligible clerks on Seniority-cum-Suitability basis. Only those clerks shall be eligible who -

- (a) have put in not less than five years service;*
- (b) hold a University Degree;*
- (c) have passed Lower Standard Departmental Examination or has been exempted from appearing in that examination.”*

13 Mr. Dere submitted that the said Rule 26 of the Service Rules provides that appointment to the post of Assistant Section Officer shall be by promotion from amongst eligible clerks on ‘*Seniority-cum-Suitability*’ basis. He submitted that the ‘*Suitability*’ had to be decided only on the basis of the three criteria laid down in Rule 26 of the Service Rules. He further submitted that unpublished criteria like Annual Confidential Reports and *viva-voce* cannot be considered for deciding the suitability of the candidates. Mr. Dere submitted that, if only the said three criteria were considered, along with Seniority, the Petitioner, having fulfilled the said three criteria and being senior than most persons who were selected, would necessarily have been selected to the post of Assistant Section Officer.

14 Mr. Dere further submitted that, by considering the Annual Confidential Reports and marks obtained in *viva-voce*, which were unpublished criteria, the Respondents had acted arbitrarily and ultra vires Article 14 of the Constitution of India.

15 On the interpretation of the expression, '*subject to seniority and suitability*', Mr. Dere relied on the judgment of the Hon'ble Supreme Court in the case of ***Valsala Kumari Devi M v/s. Director, Higher Secondary Education and Others***¹ .

16 Further, Mr. Dere also relied upon the judgment of the Hon'ble Supreme Court in the case of ***Hargovind Yadav v/s. Rewa Sidhi Gramin Bank and Others***², in which the Hon'ble Supreme Court has considered as to how seniority-cum-merit and merit-cum-seniority criteria were to be applied.

17 Mr. Dere also relied on a judgment of the Hon'ble Supreme Court in the case of ***Dev Dutt v/s. Union of India and Others***³ and submitted that non-communication of entries in the Annual Confidential Reports by the Respondents was arbitrary and violative of Article 14 of the Constitution of India.

18 Finally, Mr. Dere relied on the judgment of the Hon'ble Supreme Court in the case of ***The General Manager, South Central Railway, Secunderabad & Another v/s. A. V. R. Siddhantti and Others***⁴ to contend that the Petitioner was not required to join the other successful candidates to the present Petition.

19 In conclusion, Mr. Dere submitted that the present Petition be allowed.

1 (2007) 8 SCC 533

2 (2006) 6 SCC 145

3 (2008) 8 SCC 725

4 (1974) 4 SCC 335

20 Mr. Rahul Nerlekar, the learned Advocate appearing on behalf of the Respondents, submitted that the Petitioner had participated in the selection process and had appeared for the *viva-voce*. He submitted that, having participated in the said process without any protest and being unsuccessful, it was not open for the Petitioner to now turn around and challenge the selection process itself.

21 Mr. Nerlekar next submitted that the Appeal filed by the Petitioner had been rejected by the Hon'ble Appellate Authority by a speaking Order dated 23rd November, 2022. Despite the same, the Petitioner had not challenged the said Order dated 23rd November, 2022 in the present Petition. Mr. Nerlekar submitted that, having failed to challenge the said Order dated 23rd November, 2022, the Petitioner cannot seek the reliefs sought by him in the present Petition.

22 Further, Mr. Nerlekar submitted that the present Petition also ought to be dismissed on the ground of non-joinder of necessary parties. He submitted that the Petitioner had not made parties to the Petition the employees who had been promoted by Office Order dated 10th February, 2022. In these circumstances, the present Petition ought to be dismissed for non-joinder of necessary parties.

23 Mr. Nerlekar also submitted that, in the present case, promotion was governed by Rule 26 of the Service Rules and the Guidelines framed by this Court on 18th March, 2004. He submitted that the draft Guidelines were prepared by a Committee and placed before the Hon'ble Recruitment Rules Committee for approval. The Hon'ble Recruitment Rules Committee approved the said draft Guidelines in its

meeting held on 12th March, 2004 with some modification. The said Guidelines were placed before the then Hon'ble Chief Justice of this Court, who approved the same on 18th March, 2004 and permitted circulation of the same in this Court and at the benches of this Court. Mr. Nerlekar submitted that the said Guidelines had prescribed the minimum passing marks of 25 out of 50 for being considered for promotion for the post of Assistant Section Officer. These Guidelines were modified in 2015 but the minimum passing marks criteria to assess suitability remained unchanged. He submitted that this criteria was in existence and followed since 2004 and that the said Guidelines were in force much prior to the commencement of the selection process under challenge, which commenced in November, 2021 and concluded on 10th February, 2022. He submitted that, therefore, the rules remained the same during the selection process and were not changed after the selection process had begun. Mr. Nerlekar further submitted that the Petitioner was not promoted as he failed to secure the said minimum 25 marks on the basis of his Annual Confidential Reports for the last four years and *viva-voce*.

24 In support of his submissions, Mr. Nerlekar relied on an Order of the Hon'ble Supreme Court in the case of *Hon'ble Chief Justice, High Court, Bombay & Others v/s. B. S. Nayak & Others*⁵ and on a judgment of this Court in *Smt. Kalpana w/o. Shrish Deshmukh & Others v/s. The State of Maharashtra & Others* passed in Writ Petition No.8415 of 2013 by a Division Bench of this Court (Aurangabad Bench).

25 We have considered the rival contentions of the parties. It can be seen that, as contended by the Respondents, the Petitioner participated

5 (2001) 9 SCC 763

in the selection process without any protest. Despite it being the case of the Petitioner that the criteria mentioned in Rule 26 of the Service Rules were the only criteria to be considered, and despite the said criteria not including any *viva-voce*, the Petitioner chose to appear for the *viva-voce* without any protest. Further, being aggrieved by his non-selection, the Petitioner made a representation dated 11th February, 2022, and, on rejection of the same, filed an Appeal challenging the same. The said Appeal was dismissed by the Hon'ble Appellate Authority by a speaking Order dated 23rd November, 2022 wherein the case of the Petitioner was found to be devoid of merits. Despite the same, the Petitioner has not challenged the said Order dated 23rd November, 2022 in this Petition. In the absence of any challenge to the said Order dated 23rd November, 2022, the findings against the Petitioner in the said Order dated 23rd November, 2022 have become final. In these circumstances, the Petitioner cannot seek any of the reliefs sought by him in the present Petition, either in respect of the legality of the selection process or for being appointed to the post of Assistant Section Officer. In our view, for this reason alone, the present Petition is liable to be dismissed.

26 Further, it is the case of the Petitioner, in paragraph 10 of the Petition, that seven candidates junior to him were promoted. These are candidates at Serial Nos.4 to 10 of the Notice dated 10th February, 2022, which is annexed as Exh. 'E' to the Petition. If the reliefs sought by the Petitioner in the present Petition are granted, and especially the relief seeking an order that the whole selection process is illegal etc., then the same would affect the rights of the candidates mentioned in Exh. 'E', and more particularly the candidates at Serial Nos. 4 to 10 of Exh. 'E'. In our view, those candidates were, therefore, necessary parties to the present

Petition. Since those candidates have not been joined as parties to the present Petition, the present Petition is liable to be dismissed on the ground of non-joinder of necessary parties.

27 It is the case of the Petitioner that he was not required to join those candidates as parties to the Petition, and, in support of the same, the Petitioner relied upon paragraph 15 of the judgment of the Hon'ble Supreme Court in the case of **The General Manager, South Central Railway** (supra) which reads as under:-

“15:- As regards the second objection, it is to be noted that the decisions of the Railway Board impugned in the writ petition contain administrative rules of general application, regulating absorption in permanent departments, fixation of seniority, pay etc. of the employees of the erstwhile Grain Shop Departments. The respondents-petitioners are impeaching the validity of those policy decisions on the ground of their being violative of Articles 14 and 16 of the Constitution. The proceedings are analogous to those in which the constitutionality of a statutory rule regulating seniority of Government servant is assailed. In such proceedings the necessary parties to be impleaded are those against whom the relief is sought, and in whose absence no effective decision can be rendered by the Court. In the present case, the relief is claimed only against the Railway which has been impleaded through its representative. No list or order fixing seniority of the petitioners vis-a-vis particular individuals, pursuant to the impugned decisions, is being challenged. The employees who were likely to be affected as a result of the re-adjustment of the Petitioner's seniority in accordance with the principles laid down in the Board's decision of October 16, 1952, were, at the most, proper parties and not necessary parties, and their non-joinder could not be fatal to the writ petition.”

28 In our view, the judgment in **The General Manager, South Central Railway** (supra) is clearly distinguishable on facts. In that case, the decision of the Railway Board impugned in the Writ Petition contained administrative rules of general application regulating absorption in permanent departments, fixation of seniority, pay etc of the employees of the erstwhile Grain Shop Departments. These policy decisions were impeached as being violative of Articles 15 and 16 of the Constitution of India. As observed by the Hon'ble Supreme Court, the proceedings were analogous to those in which the constitutionality of statutory rules regulating seniority of a Government servant were assailed. In the present case, the Petitioner is not challenging the constitutionality of Rule 26 of the Service Rules. The Petitioner is seeking a declaration that the selection process was illegal and unconstitutional and that he should be selected to the post of Assistant Section Officer. Further, as stated by the Hon'ble Supreme Court in paragraph 15 of the judgment in that case, no list or order fixing seniority of the Petitioners vis-a-vis particular individuals, pursuant to the impugned decisions, was being challenged. On the other hand, in the present case, the reliefs which are sought by the Petitioner would affect the list of selected candidates and, in particular, those candidates at Serial Nos. 4 to 10 in the said list. For all these reasons, in our view, the judgment in **The General Manager, South Central Railway** (supra) is clearly distinguishable on facts and does not take the case of the Petitioner any further. In our view, the present Petition is liable to be dismissed on the ground of non-joinder of necessary parties.

29 Further, we are of the view that the Petitioner does not have a case even on the merits of the matter. Rule 26 of the Service Rules provides that appointment shall be by promotion from amongst eligible

clerks on ‘*Seniority-cum-Suitability*’ basis. In our view, the Petitioner is not right in contending that the suitability of a candidate has to be decided on the basis of the three criteria mentioned in Rule 26 of the Service Rules. The three criteria mentioned in Rule 26 of the Service Rules are for the purpose of deciding as to which Clerks would be eligible for promotion to the post of the Assistant Section Officer. Without meeting those criteria, a clerk would not even be considered for the said promotion. However, independent of these criteria for considering eligibility, the Hon’ble Chief Justice of this Court is free to decide as to how the ‘*Suitability*’ has to be decided. To decide ‘*Suitability*’ of the candidate, as referred to hereinabove, Guidelines have been framed and approved by the then Hon’ble Chief Justice of this Court on 18th March, 2004. As held by the Hon’ble Supreme Court in the case of **Hon’ble Chief Justice of Bombay** (supra), the Hon’ble Chief Justice is well within his jurisdiction in framing the said Guidelines for deciding the norms of merit or suitability for filling up such posts. The relevant portion of the said Order in **Hon’ble Chief Justice of High Court, Bombay** (supra), as found in paragraph 2 of the said Order, reads as under:-

“ The appointments to the posts of Private Secretaries in the High Court could be made by the Chief Justice as indicated in Article 229 of the Constitution. In the absence of any rules framed by the Court or the learned Chief Justice, the direction of the learned Chief Justice operates in the field of appointment. That being the position the Chief Justice was well within his jurisdiction in deciding the norms of merit-cum-seniority for filling up the posts of Private Secretaries and, in our opinion, that is the most befitting criteria for filling up the posts which takes into consideration the merit as of prime importance though seniority is not totally obliterated.”

30 Further, the Petitioner's contention, that these Guidelines framed for deciding the suitability of the candidates have to be given publicity, cannot be accepted in the light of the said Order of the Hon'ble Supreme Court in the case of **Hon'ble Chief Justice of High Court, Bombay** (supra). The relevant portion thereof, as found in paragraph 2, reads as under:-

“ We do not find any justification for the Division Bench of the High Court to strike down the criteria in question on the ground that the same had not been given due publicity. The question of giving publicity to the criteria would not arise as the learned Chief Justice has formulated the criteria for filling up the posts of Private Secretaries which he thought appropriate for efficient administration and for efficient discharge of the duties of the Hon'ble Judges. It cannot be disputed that the Private Secretaries to the Hon'ble Judges play an important role in taking down dictations and writing judgments and, if merit is not given its due consideration and appointments are made on the basis of seniority, then it would be difficult for any Judge to discharge his obligations.”

For the reasons given in the said Order, which would also apply to the present case, we are unable to accept the submissions of the Petitioner that the said Guidelines had to be given publicity.

31 As stated hereinabove, the Petitioner was not selected as he did not get the minimum passing marks of 25 as required by the said Guidelines. The said Guidelines provide that 20 marks would be allotted to the Annual Confidential Reports of the candidate for the last four years and 30 marks would be allotted for the performance of the candidates in *via-voce*. As explained in the Reply dated 3rd August, 2022 filed by Respondent No.2 to the Appeal of the Petitioner, 20 marks of the Annual

Confidential Reports are calculated from the grading offered in Annual Confidential Reports by the Reporting Officer according to the performance. The minimum passing marks are 25 out of 50 for both the Annual Confidential Report and *viva-voce*. Further, as stated in the said Reply, the Selection Committee had conducted the *viva-voce* of all 20 eligible candidates and, as far as the Petitioner was concerned, he had availed leave of 106 days on 23 occasions during the period of three years from 1st December, 2018 to 30th November, 2021. Accordingly, the Petitioner secured 10 out of 20 marks in respect of the Annual Confidential Reports of the last four years and 14 out of 30 marks in the *viva-voce*. Hence, in the said selection process held as per the Guidelines, the Petitioner secured 24 marks out of 50. Since the Petitioner had secured less than the minimum passing marks of 25, he failed and was not selected for the post of Assistant Section Officer. Further, as stated in the said Reply dated 3rd August, 2022, and also recorded in the said Order dated 23rd November, 2022, three senior candidates at Serial Nos. 3, 4 and 6 (Petitioner being at Serial No.8) namely – Smt. Meena S. Nirmale, Kum. Pratibha V. Shinde and Shri Nimish P. Kadam had also secured less than the minimum passing marks, and, like the Petitioner, were not selected for the post of Assistant Section Officer. As recorded in the said Order dated 23rd November, 2022, the same clearly shows that there was no bias against the Petitioner and the Petitioner was not treated in a different manner than the other candidates.

32 For all these reasons, we are of the view that, even on merits, there is no infirmity in the Petitioner not being selected in the selection process. The selection process was conducted fairly as per Rule 26 of the Service Rules and the Guidelines framed by the then Hon'ble Chief Justice

of this Court and on, the basis of that, the Petitioner did not qualify, having failed to obtain the minimum passing marks of 25.

33 This leaves us to deal with the judgments cited on behalf of the Petitioner.

34 The Petitioner has relied upon paragraph 17 of the judgment of the Hon'ble Supreme Court in the case of **Vasala Kumari Devi** (supra), which reads as under:-

“17:- The expression “subject to seniority and suitability” occurring in G.O. dated 27-6-1990 does not mean the comparative assessment of suitability and it only means the suitability for the particular post and the suitability is related to the prescribed qualification and requisite experience. In view of the distinction between the appointment by promotion from General Education Subordinate Service and an appointment by promotion from vacancies earmarked for direct recruitment, we are of the view that the finding arrived at by the Director, Higher Secondary School, Thiruvananthapuram, Kerala that seniority is not the criterion for “appointment by promotion to HSST” is erroneous and is not in terms of the government orders referred to above.”

35 The Petitioner also relied upon paragraph 21 of the judgment of the Hon'ble Supreme Court in the case of **Harigovind Yadav** (supra), which reads as under:-

“21:- It is thus clear that this Court did not accept the promotion policy contained in the circular dated 2-2-1989 as being in consonance with the principle of seniority-cum-merit. This Court held that the policy which did not prescribe a minimum standard for assessing merit and which promoted candidates on the basis of comparative merit, with reference to total marks obtained by the eligible candidates, followed the merit-cum-seniority

principle. The decision in Sivaiah relating to Area/Senior Managers of the first Respondent Bank was followed by the High Court in the case of the appellant, in its judgment dated 13-10-1998 and it was held that the procedure adopted by the first respondents Bank for promotion of the third respondent and V. P. Singh as per the circular dated 2-2-1989 was contrary to the Rules which required promotions by seniority-cum-merit, and the Bank was directed to redo the promotions by considering the case of the appellant and other eligible candidates by adopting the criteria of seniority-cum-merit. That decision attained finality as the appeal and SLP were rejected. It may be stated that even prior to the decision in Sivaiah relating the Area/Senior Managers of the first respondent-Bank, the same view had been expressed in the earlier judgment dated 9-10-1996 on the Division Bench of the Madhya Pradesh High Court in LPA No.151 of 1996 and connected cases and civil appeals arising out of SLPs (C) Nos.17780-81 of 1997 filed against the said judgment dated 9-10-1996 had been dismissed. Therefore, we have several rounds of litigation which had been fought up to this Court where the High Court and this Court have repeatedly and clearly held that the procedure prescribed, in the promotion policy circular dated 2-2-1989, is not in consonance with the principle of seniority-cum-merit prescribed for promotion under the Rules but amounted to following the principle of merit-cum-seniority and therefore vitiated. What is surprising is that, in spite of these decisions, the first respondent Bank again adopted the very same procedure contained in the promotion policy of 2-2-1989 and again failed to promote the appellant by assessing him marks of 16(20, 10(10), 3(5), 24(40) and 9(25) and held that he was not eligible for promotion as he did not secure the minimum marks of 10 prescribed for interview. But, admittedly, there was no overall minimum and the procedure required assessment of comparative merit. This is not therefore a case of the appellant failing to secure the minimum necessary merit required for promotion but a case where the appellant's entitlement to promotion was sought to be assessed by adopting a procedure which allotted 20 marks for

seniority, 40 marks for performance, 15 marks for posting at rural and difficult centers and 25 marks for interview. The Bank has persisted in adopting the merit-cum-seniority procedure in spite of the decisions of this Court in several rounds of litigation referred to above. As the entire promotion procedure adopted by the Bank as per its policy dated 2-2-1989 has stood rejected by the High Court and this Court in Sivaiah as also in the earlier round of litigation of the appellant, the promotion of the third respondent and non-promotion of the appellant by adopting the very same procedure is liable to be interfered with.”

36 In our view, what is held by the Hon’ble Supreme Court in the aforesaid judgments does not take the case of the Petitioner any further. As held by us hereinabove, the Petitioner is not right in contending that the suitability of the candidate has to be decided only on the basis of the three criteria mentioned in Rule 26 of the Service Rules. Further, as also held by us hereinabove, to decide the suitability of the candidate in accordance with Rule 26 of the Service Rules, Guidelines have been framed and approved by the then Hon’ble Chief Justice of this Court, and, as held by the Hon’ble Supreme Court in the case of **Hon’ble Chief Justice of Bombay** (supra), the Hon’ble Chief Justice is well within his jurisdiction in framing the said Guidelines for deciding the norms of suitability for filling up the posts.

37 In these circumstances, the interpretation of the expression “*subject to seniority-cum-suitability*” in the case of **Valsala Kumari Devi** (supra), and the consideration of the seniority-cum-merit and merit-cum-seniority principle in the case **Harigovind Yadav** (supra), are not applicable to the present case and do not help the Petitioner.

38 The last judgment relied upon by the Petitioner was the judgment of the Hon'ble Supreme Court in **Dev Dutt** (supra). The Petitioner relied upon paragraph 41 of the said judgment, which reads as under:-

“41:-In our opinion, non-communication of entries in the annual confidential report of a public servant, whether he is in civil, judicial, police or any other service (other than the military), certainly has civil consequences because it may affect his chances for promotion or get other benefits (as already discussed above). Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution.”

39 In our view, this judgment also does not come to the aid of the Petitioner for various reasons. Although, in the Appeal filed by the Petitioner, he has contended that the Annual Confidential Reports for the last four years were not provided to him within a reasonable time by the office, which restrained him from making representations for upgrading the same in that particular year, from the letter attached at page 45 of the Petition, it is clear that the Annual Confidential Reports for the years 2017-18 to 2019-20 were furnished to the Petitioner on 31st May, 2021 i.e. much before the impugned selection process commenced. Therefore, the present case is not a case where the Annual Confidential Reports had not been communicated to the Petitioner prior to the commencement of the selection process.

40 Further, in our view, the submissions of the Petitioner in the context of the Annual Confidential Reports have been rejected by this Court in the case of the **Smt. Kalpana w/o. Shirish Deshmukh** (supra) after considering the judgment of the Hon'ble Supreme Court in the case

of **Dev Dutt** (supra). Paragraphs 6,7 and 8 of the said judgment read as under:-

“6:- On the point of entitlement of employees to get information with regard to ACRs, the learned counsel for petitioners has cited many reported cases. It is not disputed that since the year 2013 the process of communicating ACRs came to be started by the respondent High Court. The learned counsel took this Court through the ACRs as they are now available with the petitioners also. There is force in the submission that immediate superior officer is not accepted by the verifying authority and the gradation is reduced. This Court has gone through these ACRs carefully and this Court has no hesitation and confirmation of the grade given by the immediate superior officers to the employees. The immediate superior officers for five years were different and for the different employee they were from different departments. It can be said that the immediate superior officers could have given particulars with regard to the work done or the work kept in arrears when the point of ‘industry and sincerity’ was considered and the material on other point could have been specifically mentioned for giving a particular grade. This Court hopes that in future, the immediate superior officers who are expected to writ ACRs are given necessary training in that regard. However, the process was uniform and nothing is pointed out to this Court on the basis of those ACRs that there was vindictiveness or other thing due to which the gradation was not proper.

7:- The submissions made and the record show that the candidate at Sr. No. 1 in seniority list, Smt. Mahajan was also superseded, but she preferred not to challenge the process. Petitioner No.1 was at Sr. No.2 in seniority list and she secured 20 marks. Other petitioners like petitioner Nos. 2 to 5 were at Sr. Nos. 24 to 27 and they also secured marks between 21 and 24. Thus, they could not reach the bench mark. The ACRs of these employees show that at no point of time there was grading of ‘average’. Petitioner No.2

Shri Ingale had 'A' grading for one year, petitioner No.3 Shri Barote had one grading of 'very good' and two gradings of 'positively good'. Thus, it cannot be said that there was no fairness in the process or for some reason proper gradation was not given intentionally. Further, all these petitioners got promotion in the next year i.e. in the year 2014. So, there is question of only one year. It is true that many times losing seniority by one year also affects the entire career, but there are no circumstances in the present matter due to which interference is warranted.

8:- The learned counsel for petitioners placed reliance on some reported cases like (2017) 5 SCC 783 (Palure Bhaskar Rao and Ors. v/s. P. Ramaseshaiah and Ors). In this case the meaning of terms 'seniority-cum-merit' and 'merit-cum-seniority' is given and the difference between two is also given. There cannot be dispute over the proposition. In other case reported as (1997) 7 SCC 209 [Ajit Singh and Ors. v/s. State of Punjab and Ors], there are some observations with regard to seniority-cum-suitability. These observations do not show that there cannot be bench mark when the criteria is 'seniority-cum-suitability'. On the same point, some more cases are cited as under:-

- (i) (2012) 2 SCC 321 [N. C. Das v/s. Gauhati High Court through Registrar and Ors.]*
- (ii) (1984) 1 SLR 359 Bom. [Nathu Dharamji Palode and Ar. v/s. Commissioner of Nagpur and Ors.] (Writ Petition No.691/1982, dated 6th July, 1983).*
- (iii) (2013) 9 SCC 566 [Sukhdev Singh v/s. Union of India and Ors.]*
- (iv) (1973) 4 SCC 135 (Mr. Ghulam Hussan and Ors. v/s. The Union of India and Ors.)*
- (v) (2008) 8 SCC 725 (Dev Dutt v/s. Union of India and Ors.), and*
- (vi) 2014 (2) SCALE 262 (Renu & Ors. v/s. District & Sessions Judge, Tis Hazari and Anr.) (Civil Appeal No.979/2014 dated 12.2.2014).*

There cannot be dispute over the ratios laid down by

the Apex Court in the aforesaid cases. The facts and circumstances of each and every case are always different. In one case, the Apex Court had directed to consider the representation in respect of ACRs and then review the process of promotion as there was no communication of ACRs. It appears that the record of ACRs was available though subsequently. The submissions do not show that they had made representation against those ACRs. Further, in no case there was gradation like 'average' or 'below average'. If the marks given on the basis of ACRs to other candidates are compared, it cannot be said that they went ahead of the petitioners on the basis of marks given for ACRs. For all these reasons, this Court holds that it is not possible to interfere in the promotion process conducted by the respondent High Court. In the result, the petition stands dismissed. Rule stands discharged."

41 In our view, what is held by this Court in the case of **Smt. Kalapna w/o. Shrish Deshmukh** (supra) applies with equal force to the present case. In the present case also, nothing is pointed out to this Court, on the basis of the ACRs of the Petitioner, to show that there was any vindictiveness towards the Petitioner or any other thing due to which the gradation in the ACRs of the Petitioner was not proper. The Petitioner has not pointed out any factor which shows that any prejudice had been caused to him by what was stated in his ACRs. Further, in any case, all these aspects were considered by the Hon'ble Appellate Authority in the Order dated 23rd November, 2022 passed by him, which, as mentioned hereinabove, has not been challenged by the Petitioner.

42 In our view, for all these reasons, the judgment of the Hon'ble Supreme Court in the case of **Dev Dutt** (supra) also does not carry the case of the Petitioner any further.

43 In the aforesaid circumstances, and for all the aforesaid reasons, the present Writ Petition is dismissed.

44 In the facts and circumstances of the present case, there shall be no order as to costs.

(FIRDOSH P POONTIWALLA,J.)

(SUNIL B. SHUKRE,J.)