
(2010) 06 AHC CK 0001
In the Allahabad High Court
Case No : C.M.W.P. No. 34825 of 2010

Ashok Kumar Nigam

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 16-06-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 146, 148, 16, 16(2)

Uttar Pradesh Forest Service Rules, 1952 — Rule 27

Uttar Pradesh Higher Judicial Service Rules, 1975 — Rule 16, 18, 20, 20(1), 20(2)

Citation : (2010) 5 AWC 4826

Hon'ble Judges : Sabhajeet Yadav, J; Rakesh Sharma, J

Bench : Division Bench

Judgement

Rakesh Sharma and Sabhajeet Yadav, JJ.—We have heard Sri Vikas Budhwar, learned Counsel for the petitioner, learned standing counsel for respondent No. 1 and Sri Amit Sthalekar for respondent No. 2 at great length.

2. While working on the post of Additional District and Sessions Judge under Rule 22(3) of U.P. Higher Judicial Service Rules, 1975 (hereinafter referred as 1975 Rules) since 20.3.2001, the petitioner has filed above noted writ petition challenging the select list of U.P. Higher Judicial Service Examination 2009 prepared under Rule 20 of the said Rule so far as it denies regular promotion of the petitioner against substantive vacancies of Additional District and Sessions Judge in U.P. Higher Judicial Service. In alternative he has prayed for issue of writ order or direction in the nature of mandamus commanding the respondents to include his name in the list of successful candidates for appointment against substantive vacancies of Additional District and Sessions Judge in pursuant to U.P. Higher Judicial Service Examination 2009 and grant him all consequential benefits and pay salary to the petitioner on the post of Additional District and Sessions Judge as and when it becomes due and any other suitable writ or direction which this Court may deem fit and proper in facts and circumstances of the case.

3. The reliefs sought in the writ petition rest on facts that the petitioner was initially appointed as Munsif on 6.4.1981 after due selection. He was confirmed on the post of Munsif on 20.2.1988 thereafter he was confirmed as Civil Judge (Sr. Div.) on 17.2.1990. After serving in cadre of Civil Judge (Senior Division) in various capacities for quite long time, by virtue . of notification dated 20.3.2001 he was granted promotion on the post of Additional District and Sessions Judge in stop-gap arrangement under Rule 22 (3) of 1975 Rules. It is stated that while working on the post of Additional District and Sessions Judge in the said capacity a complaint dated 17.10.2003 was made against the petitioner, in pursuant thereof he was placed under suspension vide order dated 8.4.2005. Thereafter Departmental Inquiry was held against him and he was punished with stoppage of two increments with cumulative effect vide order dated 8.5.2007 and the order of suspension was revoked forthwith. The period of suspension ending with the reinstatement of the petitioner was treated as period spent on duty for retiral benefits only. During the period of suspension except the subsistence allowance paid to him, he was not paid his salary over and above the subsistence allowance already paid to him.

4. Feeling aggrieved against the aforesaid order dated 8.5.2007, the petitioner had filed Civil Misc. Writ Petition No. 52482 of 2007 seeking relief for quashing the said order dated 8.5.2007 passed by this Court in administrative side, contained in Annexure 13 of the said writ petition and also the decision notified on the internet of the High Court as down loaded by the petitioner, contained in Annexure 16 to the said writ petition and Circular letter of Registrar General dated 24.8.2007, contained in Annexure 15 of the aforesaid writ petition alongwith the other reliefs including the grant of promotion against substantive post under Rule 22 (1) of 1975 Rules with consequential benefits with effect from the date the persons junior to the petitioner have been granted such benefits. It is stated that the aforesaid writ petition is still pending before this Court and without any prejudice to the rights and contentions of the parties in the said writ petition, the petitioner has filed instant writ petition for the above noted reliefs in respect of subsequent recruitment/selection against the substantive vacancies of Additional District and Sessions Judge in U.P. Higher Judicial Service Examination 2009.

5. It is further stated that while working on the post of Additional District and Sessions Judge under Rule 22 (3) of 1975 Rules on being found fully eligible in all respect to appear in suitability test scheduled to be held on 29th November, 2009 for selection and appointment against substantive vacancies of U.P. Higher Judicial Service the petitioner was issued admit card to appear in the said suitability test for promotion under Rule 5 (a) read with Rule 20 of 1975 Rules. In pursuant thereof the petitioner has appeared in suitability test which was held on 29th November, 2009 but the result which was uploaded in the official internet of respondent No. 2 the name of petitioner was found to be missing. The photostat copy of the admit card and true copy of result of U.P. Higher Judicial Service Examination 2009 are on record as Annexures 3 and 4 of the writ

petition.

6. Being aggrieved by the result of said selection of U.P. Higher Judicial Service the petitioner made a representation on 14.4.2010 before respondent No. 2 through proper channel but nothing has been communicated to him about the fate of said representation. A copy of representation made by petitioner is on record as Annexure 5 of the writ petition. The petitioner has reliably learnt that though he has secured more than 100 marks out of 200 marks in suitability test held for the purpose of adjudging the suitability of the candidates for regular promotion but he was denied promotion merely on account of the order dated 8.5.2007 passed by this Court in administrative side awarding the punishment of stoppage of two increments of petitioner with cumulative effect.

7. It is stated that under Rule 5 of 1975 Rules the source of recruitment to the service is provided which stipulates that recruitment to the service shall be made; (a) By promotion from amongst the Civil Judges (Sr. Div.) on the basis of principle of merit-cum-seniority and passing a suitability test; (b) By promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Sr. Div.) having not less than five years qualifying service; (c) By direct recruitment from amongst the advocates of not less than seven years standing on the first day of January of the next following year in which the notice inviting applications is published. Rule 6 provides quota for various sources of recruitment. It is stated that the petitioner's case is covered under Rule 5 (a), i.e., recruitment by promotion from amongst Civil Judges (Sr. Div.) on the basis of merit-cum-seniority and passing a suitability test in 50% quota for promotion from the post of Civil Judge (Senior Division) to the post of Additional District and Sessions Judges. The procedure for such promotion is provided under Rule 20 (1) of 1975 Rules which stipulates that recruitment by promotion of the members of Nyayik Sewa shall be made on the principle of merit-cum-seniority and on passing such suitability test as prescribed, in Appendix G (1) of the said Rules. The suitability test consists of two parts; first part provides that all candidates will have to appear in written test carrying a maximum of 100 marks under which 50 objective types of questions carrying 2 marks each to be answered within one hour. The other part of suitability test under said Appendix G (1) of the said Rules will be for assessment of candidate for his continued efficiency which will be adjudged on the basis of his service record of preceding 10 years from the year of suitability test. This part of the test will also carry a maximum 100 marks which will be allotted on the basis of grading of the officer reflected in the Court's Annual Confidential Remarks recorded in Character Roll. However, two marks for each year shall be deducted for adverse entry. The marks secured by candidate in both the parts of suitability test for being eligible for promotion will not be less than 50% in aggregate, i.e., 100 marks.

8. The submission of learned Counsel for the petitioner in nut-shell is that under the Rules of recruitment contained in 1975 Rules, there is nothing to indicate that a candidate who is otherwise eligible for promotion on the post and passed

suitability test under the aforesaid Rules can be denied of his promotion merely on account of punishment by stoppage of two annual increments awarded to him. While elaborating his submission learned Counsel for the petitioner has submitted that the Hon"ble Selection Committee has to make selection/promotion under relevant rules, i.e., Rule 5 (a) read with Rule 20 and Appendix G (1) of 1975 Rules and not otherwise as the Selection Committee has no jurisdiction or authority under law to prescribe its own norms for holding selection/promotion for the post in question, which is not prescribed under said Rules. The Selection Committee has no jurisdiction to prescribe any additional norm for holding selection/promotion on the post in question. As such, in given facts and circumstances of the case, the denial of promotion to the petitioner on substantive vacancy of Additional District and Sessions Judge in regular/substantive capacity in U.P. Higher Judicial Service Examination 2009 Is contrary to the aforesaid provisions of statutory Rules of recruitment, as such is not sustainable in the eye of law. Having regard to his seniority position and merits assessed according to Rules read with the relevant provisions of Appendix G (1) aforestated, the petitioner ought to have been included in the select list and be placed on the top of select list and his name would have been forwarded to the State Government under Rule 22 (1) of 1975 Rules for appointment against substantive vacancies of Additional District and Sessions Judge falling under 50% quota of promotion. In support of his submission learned Counsel for the petitioner has placed reliance upon some decisions of Hon"ble Apex Court inasmuch as this Court, which will be referred hereinafter at relevant places.

9. Contrary to it, the submission of Sri Amit Sthalekar, learned Counsel for High Court is that the petitioner"s promotion has been rightly denied on account of fact that he was punished by stoppage of two increments with cumulative effect vide order dated 8.5.2007 passed by this Court in administrative side, as such he could not be adjudged suitable for promotion under Rule 20 read with Appendix G (1) of 1975 Rules accordingly his name could not be included in the preliminary select list prepared by Selection Committee and final select list prepared by the High Court in its Full Court Meeting held on 9.1.2010. Therefore, his name could not be sent to the State Government for appointment against substantive vacancies of Additional District and Sessions Judge in 50% quota prescribed for the promotion.

10. At this juncture it is necessary to point out that at the time of hearing of writ petition afresh the Registry of this Court was directed to produce the record pertaining to selection in question and annual confidential remarks of the Court recorded in character roll of the petitioner. In pursuant thereof the records of selection inasmuch as annual confidential remarks recorded by the Court in character roll of the petitioner have been produced before us at the time of arguments and in chamber also.

11. Besides this, we have also perused the records of selection in question at Agenda No. 2 of Full Courts meeting dated 9.1.2010 which also contains some

relevant records of selection in question. From the perusal of the records of selection it is clear that the name of the petitioner was included in the eligibility list for promotion, accordingly he was allocated Roll No. 4 to appear in written examination for suitability test held on 29.11.2009, but after participation in the said suitability test the petitioner's name finds place in the List "F" prepared by the Selection Committee under Rule 5 (a) read with Rule 20 (3) of 1975 Rules. From a perusal of page 8 aa of the paper book of Agenda of Full Court Meeting dated 9.1.2010 it appears that the aforesaid list was prepared by the Selection Committee on 24.12.2009 under Rule 20 (3) of 1975 Rules which is termed as preliminary selection for promotion on the post in question. For ready reference it is necessary to extract the observations/remarks of Selection Committee dated 24.12.2009, contained in the List-F in respect of the petitioner as under:

LIST-F HIGH COURT OF JUDICATURE AT ALLAHABAD SUITABILITY TEST UNDER RULE 5 (a) READ WITH RULE 20 OF U.P.H.J.S. RULES, 1975 SELECT LIST UNDER RULE 20 (3) OF U.P.H.J.S. RULES. List of candidates who stood punished in the Departmental Inquiries.

Name	Marks of Test	Marks in Grand	Remarks	No. No. ACR out	Suitability	Total	Out of
100	Test			of		200	
Ashok	46	54	100	The officer has been Kumar found guilty in Nigam Departmental Enquiry culminating him punishment by Hon"ble Full Court vide Resolution dated 5.5.2007 withholding two increments with cumulative effect. Taking into consideration the overall circumstances, the Committee does not find him suitable for promotion.			

24.12.09

12. From a perusal of List-F contained in the agenda No. 2 of Full Court's Meeting dated 9.1.2010 it is clear that the petitioner has secured 100 marks in aggregate out of 200 marks on the basis of grading of A.C.R. for last ten years preceding to the year of suitability test, as such he could become successful in preliminary selection held by the Selection Committee under Rule 20 (3) of 1975 Rules, but for the reasons recorded in the remarks column the Selection Committee by taking into consideration the over all circumstances did not find him suitable for promotion. The reason for holding the petitioner not suitable or for denial of promotion was that the petitioner has been found guilty in departmental inquiry culminating his punishment by Hon"ble Full Court resolution dated 5.5.2007 withholding two increments with cumulative effect.

13. Now main question arises for consideration is that as to whether for aforestated reason the Hon"ble Selection Committee could be held justified in holding the petitioner not suitable for promotion or for denial of promotion? We are conscious about the limited scope of Judicial review of decision of Selection Committee but the ground on which the judicial review of decision of selection is

sought for, in our considered opinion, cannot be held to be beyond the scope of judicial review. Therefore, in order to answer the aforesaid question it would be useful to state legal nature and status of 1975 Rules under which the recruitment is sought to be made.

14. 1975 Rules has been framed by the Governor of the State of U.P. in exercise of the power conferred by the proviso to Article 309 read with Article 233 of the Constitution in consultation with the High Court, in supersession of existing rules, regulating the recruitment and appointment to the U.P. Higher Judicial Service and conditions of service of persons appointed thereto as revealed/reflected from 1975 Rules itself. In this connection it is to be pointed out that while considering the powers to enact the rules of recruitment of members of subordinate judiciary of the State including the District and Sessions Judge and Additional District and Sessions Judges under Article 233 and 234 of the Constitution, the Hon''ble Apex Court in *State of Bihar and Another Vs. Bal Mukund Sah and Others*, of the decision has held that the rules regulating the recruitment and conditions of service of members of subordinate judiciary can only be framed by the Governor of State in consultation with the High Court under Articles 233, 234 and 235 of the Constitution of India. No other authority like Central or State Legislature and Government can intervene in such rule making process. The power of outside agency has been completely excluded by the provisions of Articles 233, 234 and 235 of the Constitution. It was further held that Article 309 and Article 245 of the Constitution of India will have to be read subject to provisions of Articles 233, 234 and Article 235 of the Constitution.

15. Relying upon the aforesaid decision of Hon''ble Apex Court in *Bal Mukund Sah's case (supra)* a Division Bench of this Court comprising Hon''ble Mr. Justice Anjani Kumar and one of us (Hon''ble Mr. Justice Sabhajeet Yadav) in *Devendra Nath Tiwari Vs. State of U.P., Union of India (UOI), Ministry of Law, High Court of Judicature and Public Service Commission*, of the decision observed as under:

28. Thus, from mere reading of the provisions of Article 235 of the Constitution, it is clear that the first part of Article 235 itself lays down that it is for the High Court to control the District Courts and Courts subordinate thereto and in exercise of that control vesting in the High Court, regulation of posting and promotions and granting of leave to persons belonging to the judicial services has to be done by the High Court. It is no doubt true that in the second part of Article 235 judicial officers already appointed to the service have their statutory right of appeal and the right to be dealt with regarding other service conditions as laid down by any other law for the time being in force, expressly protected. But these provisions of the second part only enable the Governor under Article 309, in the absence of any statutory enactment made by the competent Legislature for regulating the conditions of service of judicial officers who are already recruited and have entered and become part and parcel of the State service, to promulgate appropriate rules on the subject. But so far as the entry points are concerned, namely, recruitment and appointment to the posts of

Presiding Officers of the Courts subordinate to the High Courts, only Articles 233 and 234 would govern the field.

29. It has also to be kept in mind that neither Article 233 nor Article 234 contains any provision of being subject to any enactment by appropriate Legislature as we find in Articles 98, 146, 148, 187, 229(2) and 324(5). These latter articles contain provisions regarding the rule making power of the concerned authorities subject to the provisions of the law made by the Parliament or Legislature. Such a provision is conspicuously absent in Articles 233 and 234 of the Constitution of India. Therefore, there can be no scope for doubt to hold that while enacting the aforesaid Articles, the framers of our Constitution have provided a complete Code for regulating recruitment and appointment to District Judiciary and to Subordinate Judiciary, which has virtually excluded the interference of any other outside agency. This scheme of the Constitution is also in consonance with the concept of separation of Judiciary from the Executive. Therefore, in our opinion, the general sweep of Article 309 has to be read subject to this complete Code as carved out by Articles 233 and 234 of Constitution regarding appointment of District Judges and Judges in the subordinate judiciary.

30. In this connection, it is to be further noted that similarly Article 245 which in its express terms is made subject to other provisions of the Constitution, which will also include the provisions of Articles 233 and 234, which cover the field regarding the recruitment and appointment of District Judges and Judges of the subordinate judiciary at base level are not made subject to any other provisions of Constitution, accordingly exclude the legislative powers of Parliament as well as State Legislature to operate on this field and exercise of legislative powers by aforesaid constitutional functionaries, would be subject to the provisions of Articles 233 and 234 so far as recruitment and appointment of District Judges and Judges of subordinate judiciary at grass root level are concerned. Therefore, in our opinion, both the Articles 309 and 245 will have to be read subject to Articles 233 and 234 of the Constitution. It also implies that the complete code projected by Articles 233 and 234 of the Constitution would itself be an exclusion of the legislative powers of Parliament as well as Legislature of States and equally the Governor's power under Article 309 qua that field. Thus, the powers conferred upon aforesaid constitutional functionaries cannot be exercised independently qua the exclusive field carved out by Articles 233 and 234, and the powers of Parliament, State Legislature and Governor of State would stand excluded to the aforesaid extent.

16. We have been told that against the aforesaid decision of this Court in Devendra Nath Tiwari's case (supra) the SLP has been dismissed and decision of this Court stood affirmed by the Hon''ble Apex Court.

17. At this juncture it is necessary to mention here that like other service Rules, 1975 Rules also contains rules of recruitment and other conditions of service of members of service and there is difference between the expressions "Rules of

recruitment" and conditions of service" of members of service. In this connection it would be useful to refer the decision of Hon''ble Apex Court in Keshav Chandra Joshi and others etc. Vs. Union of India and others, wherein while considering the scope of power of relaxation under Rule 27 of U.P. Forest Service Rules a distinction between the "Rules of recruitment" and "conditions of the service" normally contained in service rules, has been drawn by Hon''ble Apex Court.

18. In para 32 of the said decision the Apex Court observed as under:

32. ...There is a distinction between "rules of recruitment" and "conditions of service". To become a member of the service in a substantive capacity, appointment by the Governor shall be preceded by selection of a direct recruit by the Public Service Commission; undergoing training in Forestry for two years " in the College and passing Diploma are conditions precedent. If the contention of the promotees that rules of recruitment are conditions of service is accepted, it would be open to the Governor to say that "I like the face of "A" and I am satisfied that he is fit to be appointed; I dispense with the rules of recruitment and probation and appoint "A" straightway to the service in a substantive capacity as Asstt. Conservator of Forest. Take another instance. Passing the prescribed tests during probation is a condition of service. Similarly efficiency bar stands as an impediment for the promotee's confirmation. On consideration of the record and on objective satisfaction, in an appropriate case, the Governor may relax those or other similar conditions. So passing the tests prescribed is a condition of service. Therefore, the rule which effects the right to confirmation or similar provision is a condition of service. The rules relating to recruitment to the service either under Rule 5 (a) or 5 (b) or the manner of recruitment to service as per Appendix "A" or "B" are basic rules of recruitment to service. Satisfaction of the Governor that the operation of the rules regarding the conditions of service would cause undue hardship in a particular case or cases and the need to relieve hardship and to cause just and equitable results is a precondition. Even otherwise the Court cannot substitute its satisfaction to the satisfaction of the Governor in exercise of the power of deemed relaxation. In Narendra Chadha's case the power to relax was wide enough to cover "any rule" and there was no precondition of objective satisfaction by the Governor. We hold that Rule 5 (a) and (b) and Appendices "A" and "B" are basic rules of recruitment and would not be subject to Rule 27.

19. Now coming to the relevant provisions of U.P. Higher Judicial Service Rules, 1975, Rule 5 of said rules provides source of recruitment which reads as under:

5. Source of recruitment.- The recruitment to the Service shall be made:

(a) By promotion from amongst the Civil Judges (Senior Division) on the basis of principle of merit-cum-seniority and passing a suitability test;

(b) by promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years qualifying service;

(c) by direct recruitment from amongst the Advocates of not less than seven years standing on the first day of January next following the year in which the notice inviting applications is published.

20. Rule 6 of 1975 Rules prescribes quota for different sources of recruitment which reads as under:

6. Quota.- Subject to the provisions of Rule 8, the quota for various source of recruitment shall be:

(i) Uttar Pradesh Nyayik Sewa:

(a) from amongst the Civil Judges (Senior Division) on the basis of merit-cum-seniority and passing a suitability test - 50%

(b) on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years qualifying service:

Provided that in case of there being any shortfall in the vacancies to be filled up on the basis of in cadre competitive examination, the shortfall of 25% reserved for such promotion will be made good by corresponding increase in the quota reserved for promotion of Civil Judges (Senior Division) referred to in Clause (i) (a).

(ii) direct recruitment from Bar- 25%:

Provided that where the number of vacancies to be filled in by any of these sources in accordance with the quota is in fraction, less than half shall be ignored and the fraction of half or more shall ordinarily be counted as one;

21. Rule 16 of 1975 Rules contains provisions for constitution of Selection Committee to hold selection under 1975 Rules. The provisions contained under Rule 16 are quoted as under:

16. Selection Committee.-(1) The Chief Justice shall, for each requirement to the Service, appoint a Selection Committee consisting of such number of Judges of the Court, not less than three, as he may decide.

(2) No proceeding of the Selection Committee shall be invalid merely by reason of a vacancy occurring in it, or by a member or members being not present at one or more of its meetings, provided that a majority of the members of the Committee have been present at each meeting.

22. Rule 20 of 1975 Rules provides procedure for recruitment by promotion which reads as under:

20. Promotion of members of Nyayik Sewa as referred to in Rule 5 (a).-(1) Recruitment by promotion of the members of the Nyayik Sewa shall be made by selection on the principle of merit-cum-seniority and on passing such a suitability test, as prescribed in Appendix G (i).

(2) The field of eligibility for recruitment by promotion shall" be confined to four times the number of vacancies to be filled by promotion. The Selection Committee shall prepare a list in order of seniority of the officers eligible under Rule 5 (a) of these rules.

(3) The Selection Committee shall, after examining the record of the officers including in the list prepared under Sub-rule (2) of this rule make a preliminary selection of the officers who in its opinion are fit to be appointed on the basis of seniority-cum-merit. In assessing the merits of a candidate, the Selection Committee have due regard to his service record, ability, character and seniority. The list shall contain the name of officers twice the number of vacancies required to be filled by promotion of the members of the Nyayik Sewa.

(4) The Selection Committee shall forward the list of the candidates chosen at the preliminary selection to the Chief Justice alongwith the names of the officers who, if any, in the opinion of the Committee have been passed over for promotion to the service.

(5) The Court shall examine the recommendations of the Selection Committee and make a final selection for promotion and prepare a list in order of seniority of the candidates who are considered fit for promotion and forward the same to the Governor. The list shall remain operative only till the next recruitment.

23. Rule 22 of 1975 Rules deals with the appointment by the Governor of the State on the substantive vacancies of Additional District and Sessions Judge. The provisions contained therein are extracted as under:

22. Appointment-(1) Subject to the provisions of sub-rules (2) and (3), the Governor shall on receipt from the Court of the lists mentioned in Rules 18, 20 and 21 make appointments to the service on the occurrence of substantive vacancies by taking candidates from the lists in the order in which they stand in the respective lists.

(2) Appointment to the service shall be made on the rotational system, the first vacancy shall be filled from the list of officers of the Nyayik Sewa. The second vacancy shall be filled from the list of direct recruits (and so on), the remaining vacancies, shall therefore be filled by promotion from the list of the officers of the Nyayik Sewa:

Provided that for so long as suitable officers are available from the cadre of the Judicial Magistrates, appointments to the Service shall be made in such a way that the second fifth and eighth (and so on), vacancy shall be filled from the list of Judicial Magistrates.

(3) In the eventuality of delay in making appointment under Sub-rule (1) and further if exigency of service so requires, the Governor may, in consultation with the Court, make short term appointment as a stop-gap arrangement from amongst the members of Nyayik Sewa in the vacancy in these services within the quota fixed by the Court till the appointment are made under sub-rules (1) and

(2):

Provided that the period of service spent by a member of Nyayik Sewa on short term appointment to the service as a stop-gap arrangement shall not be computed for seniority under Rule 26.

24. The provisions contained in Appendix G (1) appended to the 1975 Rules which is part of same statutory rule read as under:

Syllabus prescribed for the suitability test for promotion of the officers from amongst the offices of the Civil Judges (Senior Division) of 5 years qualifying service indicated under Rule 5 (b).

(A) The subjects for the aforementioned test will include:

(i) The Law of contracts, the Law of Partnership, the Law concerning easements and torts, the Law relating to transfer of property including the principles of equity specifically applicable thereto, the principles of equity with special reference to the law of trust and specific relief, Hindu Law and Mohammedan Law and Constitutional Law.

(ii) The Law of evidence, the Code of Criminal Procedure and Code of Civil Procedure, including the principles of pleading. The questions set will relate mainly to practical matters such as the framing of charges and issues, the methods of dealing with the evidence of witnesses, the writing of judgment of session trials, appeals, revision and the conduct of cases generally but will not be restricted to them.

(iii) Indian Penal Code, the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, U.P. Municipalities Act, U.P. Panchayat Raj Act, U.P. Consolidation of Holding Act, U.P. Urban (Planning and Development) Act, 1973 together with rules framed under the aforesaid Acts.

(B) (a) The suitability test for adjudging the level of the legal knowledge of the candidate and his awareness of the relevant case law on the subjects, indicated here-in-above, will consist of two parts:

All candidates will have to appear in a written test carrying a maximum of 100 marks, which will be a test of objective type requiring answering of 50 questions of 2 marks each in one hour duration.

(i) The other part of the suitability test will be for the assessment of the candidate for his continued efficiency which will be adjudged on the basis of his service record of preceding 10 years from the year of the suitability test. This part of the test will also carry a maximum of 100 marks which will be allotted on the basis of the grading of the officer reflected in the Court's annual confidential remarks recorded in the character roll providing however for the deduction of marks for adverse entry as indicated below:

-----	Grading	Marks	to	be	allotted
-----	Outstanding	10	-----	Very	
good 08	-----	Good 06	-----		
Average 04	-----	Poor 00	-----		
Adverse entry Minus 2 marks for each year. -----					

(C) The marks secured by the candidate in both parts of the suitability test for being eligible for promotion will not be less than 50% in aggregate, i.e., 100 marks.

25. A careful reading of Rule 20 (1) of 1975 Rules it is clear that recruitment by promotion of the members of Nyayik Sewa is made by selection on the principle of merit-cum-seniority and on passing such suitability test as prescribed in Appendix G (1). Sub-rule (2) provides that the field of eligibility for recruitment by promotion shall be confined to four times the number of vacancies to be filled by promotion. The Selection Committee shall prepare a list in order of seniority of the officers eligible under Rule 5 (a) of these rules. Sub-rule (3) provides that Selection Committee shall after examining the record of the officers included in the list prepared under Sub-rule (2) of this Rule make a preliminary selection of the officers who in its opinion are fit to be appointed on the basis of seniority-cum-merit. While assessing the merit of a candidate the Selection Committee have due regard to his service record, ability, character and seniority. As reflected from Appendix G (1) of 1975 Rules the suitability test consists of merely two parts. In one part all the candidates will have to appear in written test carrying 100 marks containing 50 questions of two marks each to be answered in one hour and another part of suitability test will be for the assessment of the candidate for his continued efficiency which will be adjudged on the basis of his service record of preceding ten years from the year of suitability test. This part of the suitability test will also carry a maximum of 100 marks which will be allotted on the basis of the grading of the officer reflected in the Court's annual confidential remarks recorded in character roll. The marks secured by a candidate in both the parts of suitability test for being eligible for promotion will not be less than 50% in aggregate, i.e., 100 marks.

26. Thus, from a careful reading of the provisions of Rule 20 (1) and Rule 20 (3) of the 1975 Rules it is clear that Rule 20 (1) of the Rules clearly postulates that recruitment by promotion of the members of Nyayik Sewa shall be made by selection on principle of merit-cum-seniority and on passing suitability test as prescribed in Appendix G (1) of the 1975 Rules, whereas sub- rule (3) of Rule 20 provides that Selection Committee shall after examining the records of officers included in the list prepared under Sub-rule (2) of this Rule shall make a preliminary selection of the officers who in its opinion are fit to be appointed on the basis of seniority-cum-merit. As settled by Hon"ble Apex Court from time to time both the expressions namely "merit-cum-seniority" and "seniority-cum-merit" are conceptually distinct and different from each other. Thus, in our considered opinion, Rule 20 (1) and Rule 20 (3) create anomalous situation and

virtually make the aforesaid rules for promotion unworkable. In this connection it would be useful to refer some decisions of Hon''ble Apex Court rendered from time to time hereinafter.

27. In *State of Kerala and Another Vs. N.M. Thomas and Others*, (Seven Judges Constitution Bench) has observed that with regard to promotion the normal principles are either merit-cum-seniority or seniority-cum-merit. The seniority-cum-merit means that given the minimum necessary merit requisite for efficiency of administration, the senior though the less meritorious shall have priority. The relevant portion of said paragraph is extracted as under:

38. ...With regard to promotion the normal principles are either merit-cum-seniority or seniority-cum-merit. Seniority-cum-merit means that given the minimum necessary merit requisite for efficiency of administration, the senior though the less meritorious shall have priority. This will not violate Articles 14, 16 and 16(2)...

28. In *Sant Ram Sharma Vs. State of Rajasthan and Another*, a Five Judges Constitution Bench of Hon''ble Apex Court while dealing with the rules of Indian Administrative Service Rules, 1954 and Indian Police Service and Regulation of Seniority Rules, 1954, where the promotion is primarily based on merit and not on seniority alone, in para 6 of the decision has observed as under:

6. ...The circumstance that these posts are classed as Selection Grade Posts itself suggests that promotion to these posts is not automatic being made only on the basis of ranking in the Gradation List but the question of merit enters in promotion to selection posts. In our opinion, the respondents are right in their contention that the ranking or position in the Gradation List does not confer any right on the petitioner to be promoted to selection post and that it is a well-established rule that promotion to selection grades or selection posts is to be based primarily on merit and not on seniority alone. The principle is that when the claims of officers to selection posts is under consideration, seniority should not be regarded except where the merit of the officers is judged to be equal and no other criterion is, therefore, available....

29. In *Union of India (UOI) Vs. Mohan Lal Capoor and Others*, while considering the case of selection based on merit and suitability with due regard to seniority in Indian Administrative Service and Indian Police Service, Hon''ble Apex Court held that where the selection is primarily based on merit and suitability, seniority be given a secondary importance. The pertinent observation made in para 22 of the decision is extracted as under:

22. ...A simple reading of the Regulation 5(2) clearly indicates this to be the correct view. The required number has thus to be selected by a comparison of merits of all the eligible candidates of each year. But, in making this selection, seniority must play its due role. Seniority would, however, only be one of the several factors affecting assessment of merit as comparative experience in service should be. There could be a certain number of marks allotted, for

purposes of facilitating evaluation, to each year of experience gained in the service. When the required number for the list is thus chosen, the respective roles of seniority and exceptional merit would be governed by Regulation 5 (3). This seems to be the correct interpretation of rules as they stand.

30. In *B.V. Sivaiah and Others etc. Vs. K. Addankl Babu and Others etc.*, , while considering the principle of promotion based on seniority-cum-merit in para 18 of the decision Hon"ble Apex Court has observed as under:

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

31. In *K. Samantaray Vs. National Insurance Co. Ltd.*, Hon"ble Apex Court has drawn distinction between two principles of promotion based on "merit-cum-seniority" and "seniority-cum-merit" and in para 7 of the decision it was held that the principle of the seniority-cum-merit and merit-cum-seniority are conceptually different. For the former, greater emphasis is laid in seniority, though it is not the determinative factor, while in latter merit is determinative factor and in para 11 of the decision it was further observed that while laying down the promotion policy or Rule, it is always open to the employer to specify area and parameter of weightage to be given in respect of merit and seniority separately so long as policy is not colourable exercise of power or has the effect of violating of any statutorily scope of interference and other relatable. For ready reference the relevant portion of paragraphs 7 and 11 of the aforesaid decision are extracted as under:

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

11. While laying down the promotion policy or Rule, it is always open to the employer to specify area and parameter of weightage to be given in respect of merit and seniority separately so long as policy is not colourable exercise of power or has the effect of violating of any statutorily scope of interference and other relatable. The decision in *B. V. Sivaiah* case (supra), is clearly distinguishable on facts and in law. That was a case, where statutory Rules governed the field. This Court, inter alia, held that fixing terms which are at variance with the statutory Rules is impermissible.

32. In Harigovind Yadav Vs. Rewa Sidhi Gramin Bank and Others, the Hon''ble Apex Court has again emphasized the distinction between both the principles of promotion based on merit-cum-seniority and seniority-cum-merit and in para 13 of the decision the Hon''ble Apex Court observed as under:

13. ...This Court also noted that while principle "seniority-cum-merit lays greater emphasis on seniority, merit-cum-seniority" laid greater emphasis on merit and ability and seniority plays a less significant role, becoming relevant only when merit is approximately equal....

33. In Sankar Deb Acharya and Others Vs. Biswanath Chakraborty and Others, while explaining the meaning and import of principle for promotion based on merit-cum-seniority in para 39 of the decision Hon''ble Apex Court has observed as under:

39. When the principle of merit-cum-seniority is applied, it is now well-settled principle that great emphasis is on merit and ability and seniority plays a less significant role. Seniority has to be given weightage only when merit and ability are approximately equal.

34. Similar distinction has also been drawn by Hon''ble Apex Court in Bhagwandas Tiwari and Others Vs. Dewas Shajapur Kshetriya Gramin Bank and Others,

35. Thus, from the aforesaid decisions of Hon''ble Apex Court it is clear that where the promotion is based on "merit-cum-seniority", great emphasis has to be given on merit and ability, the seniority plays a less significant role. Seniority has to be given weightage only when the merit and ability are approximately equal. However, where the selection is primarily based on "merit and suitability with due regard of seniority", the seniority has to be given secondary importance and in cases of "seniority-cum-merit", much emphasis has to be laid down on the seniority. For promotion based on "seniority-cum-merit" a minimum merit has to be evolved as a requisite for efficiency, which may be based on ACR and other suitability test devised for the purpose. The candidates who secured minimum merit requisite for efficiency of administration, their names should be included in the select list on the basis of their seniority position in the feeding cadre. In such a situation senior person having less merit but having requisite minimum merit has to be selected, whereas much meritorious junior person has to be ignored or excluded.

36. Now from a joint reading of provisions of Rules 20 (1), 20 (3) and Appendix G (1) of the 1975 Rules it is clear that the recruitment by promotion of members of Nyayik Sewa shall be made on the principle of "merit-cum-seniority" and on passing such a suitability test as prescribed in Appendix G (1) and while assessing the merits of a candidate the Selection Committee have due regard to his service record, ability, character and seniority. The suitability test consists of merely two parts. In one part candidates will have to appear in written test carrying maximum 100 marks and in another part of suitability test there will be

the assessment of the candidate for his continued efficiency to be determined on the basis of his service record of preceding ten years from the year of suitability test. This part of test also carries 100 marks which will be allotted on the basis of grading of the officer reflected in the Court's annual confidential remarks recorded in the character roll of the candidates for last ten years preceding to the year of selection and the marks secured by the candidate in both the parts of suitability test for being eligible for promotion will not be less than 50% in aggregate, i.e., 100 marks.

37. In this connection it is to be noted that in Appendix G (1) of 1975 Rules it is provided that while assessing the merits of the candidate the Selection Committee have due regard to his service record, ability, character and seniority. Although the expressions used hereinbefore have clear distinct meaning in service jurisprudence and there is nothing to indicate in the said Appendix and Rule 20 that any mark has been allocated to the service record, ability, character and seniority of the candidates instead thereof the assessment of merits of the candidate has been made as one of the parts of suitability test prescribed in Appendix G (1) of the said Rule wherein the continued efficiency of candidate for last 10 years preceding to the year of recruitment is to be determined on the basis of grading to the officers reflected in Court's Annual Confidential Remarks recorded in the Character Roll of candidates and the marks secured by the candidates in both the parts of suitability test for being eligible for promotion will not be less than 50% in aggregate, i.e., 100 marks.

38. Although the expressions used in the said rule for assessment of merit of candidate as assessment of continued efficiency of candidate for last ten years, are also full of ambiguity and do not convey clear meaning known in service law jurisprudence, but a harmonious construction of the said statutory rules reveals that the assessment of the merit of officer is based on the Court's Annual Confidential Remarks recorded in character roll for last ten years preceding the year of selection wherein outstanding entry is allocated 10 marks, very good entry is allocated 8 marks, good entry is allocated 6 marks, average entry is allocated 4 marks, poor entry is allocated zero mark and adverse entry is allocated minus 2 marks for each year. Except the marks obtained by a candidate in the written examination of suitability test and assessment based on A.C.R. of last preceding ten years from the date of selection in question no other parameter has been specifically provided under relevant statutory rules of recruitment. Therefore, we are of the considered opinion that Selection Committee constituted for making preliminary selection is bound to confine its decision only to the extent of aforesaid parameters specifically provided under the statute and it cannot travel beyond that.

39. Besides, there is nothing to indicate in the 1975 Rules that any provision has been made for denial of promotion on account of punishment of a candidate in departmental inquiry whereas the said Rule has taken note of the legal impact and implication of poor entry and adverse entry recorded in Annual Confidential

Remarks while assessing the merit of candidate for the purpose of said promotion but there is no mention about the legal impact and implication of punishment awarded to a candidate in a departmental inquiry. As such, having regard to the golden rule of interpretation of statute, it is very difficult for this Court to read down the punishment awarded to a candidate in departmental inquiry either in his service record or in his ability or in character as these expressions are well-known in service law jurisprudence and convey its own distinct and different meaning from punishment awarded to a candidate in departmental inquiry.

40. In this connection, it is also necessary to point out that character roll entries are recorded in Annual Confidential Remarks of an employee by superior officer on the basis of appraisal of his work and conduct during the course of a year, who has opportunity to look into the work and conduct of employee and such Annual Confidential Remarks are further required to be approved by next higher authority as indicated in various Government orders relating to the Government employees issued from time to time whereas the punishments awarded to a Government employee are always based on disciplinary action taken against such Government employee. Unless there is specific service rule regarding placement of the punishment in the service record and the punishing authority in pursuance of such rules indicates that such punishment be placed in service record of employee and further such punishment shall debar/deprive the employee for a particular service benefits to be accrued during the course of employment of employee, in our considered opinion, in absence of such specific rule debarring an employee from any service benefits, such punishment cannot automatically debar/deprive the service benefits to be accrued to the employee.

41. Normally, under service rules applicable to the Government employees of the State the legal impact and implication of punishments awarded to them have been provided. Such as dismissal and removal from service debar the dismissed and removed employee from post retiral benefits and certain civil rights on such dismissal, whereas the punishment of removal would not deprive removed Government servant from other civil rights except depriving him from post retiral dues and other service benefits. Likewise reduction in rank does not debar/deprive an employee from future promotion and other service benefits like post retiral dues. Similarly, stoppage of one increment for particular period debars/deprives the employee from financial benefit of said increment which is otherwise liable to be added in his pay scale on account of accrual of such increment. If two increments of an employee with cumulative effect have been stopped, such employee will not get the financial benefits of two increments which may be otherwise admissible to him in his pay scale. Thus, the legal impact and effect of stoppage of two annual increments with cumulative effect would be merely that the employee or officer would suffer loss in payment of his salary to the extent of denial of two increments which would be otherwise admissible to him but for the said punishment he has been deprived of from said benefit of service. Thus, in the service jurisprudence the employee who has been awarded punishment of

stoppage of two increments would not lose the other benefits of service except the aforesaid financial loss in payment of salary. Therefore, in our considered opinion, the stoppage of two annual increments of the petitioner with cumulative effect cannot deprive him from other benefits of service including his eligibility and entitlement for promotion to the next higher post if he is otherwise eligible and entitled for such promotion,

42. At this juncture it would be useful to take a classic example of Civil Judge (Junior Division) who is punished by stoppage of two annual increments with cumulative effect in departmental inquiry at very inception of his service career within three or four years of his initial service and he has to still serve the subordinate judiciary till attaining his age of superannuation for about more than 25 to 30 years. In case on account of such stoppage of two annual increments with cumulative effect he would be debarred or deprived from his promotion on the next higher post of even Civil Judge (Senior Division) and further on the post of Additional District Judge and thereafter on the post of District Judge, then his entire service career would be ruined merely on account of said punishment. It cannot be disputed that the matter regarding promotion is matter relating to employment and any rule depriving a Government employee from next higher promotion can be framed by competent authority provided the said rule withstands the twin test of Articles 14 and 16 of the Constitution of India and rule so framed must have rational nexus with the object sought to be achieved by it. In our opinion, framing of such rule for depriving a Government employee to next higher promotion or holding a Government employee unsuitable for promotion merely on account of stoppage of two annual increments with cumulative effect in disciplinary inquiry would create havoc in service law jurisprudence and would also be hit by the provisions of Articles 14 and 16 of the Constitution of India. Therefore, in our opinion, no such statutory rule can be framed by a competent authority in consonance with the provisions of Articles 14 and 16 of the Constitution of India depriving a Government employee for next higher promotion merely on account of punishment of stoppage of two annual increments with cumulative effect. That is why there appears conspicuous absence of specific service rule regarding denial of promotion to a Government employee or employee of other institution serving in connection of affairs of State on account of stoppage of two annual increments in disciplinary inquiry.

43. It is also well-settled that the thing which cannot be done directly by constitutional functionaries, the same cannot be done indirectly also as held by Hon''ble Apex Court more than two decades ago in *Dr D.C. Wadhwa and Others Vs. State of Bihar and Others*, where in para 7 of the decision Hon''ble Apex Court observed that "it is well-settled law that a constitutional authority cannot do indirectly what it is not permitted to do directly." This principle, has been reiterated by Hon''ble Apex Court in subsequent decisions also. Therefore, in the wake of these legal and factual position as stated hereinbefore, it is very difficult for us to subscribe the view taken by the Selection Committee while holding said selection for promotion. In our opinion, the thing which cannot be done even by

framing the rules of recruitment, the same cannot be authorised to be done by selection committee while holding such selection for promotion in absence of any such statutory rule in consonance with the provisions of Articles 14 and 16 of the Constitution. The aforesaid view taken by us also finds support from the decision rendered by Hon''ble Apex Court in K. Samantaray Vs. National Insurance Co. Ltd.,

44. Now next question arises for consideration is that as to whether Selection Committee constituted under Rule 16 of 1975 Rules is empowered to hold selection contrary to the statutory rules of recruitment and/or as to whether on a topic where the aforesaid rule is silent, the Selection Committee is authorised under law to lay down its own norms for selection in addition to the statutory rule or such power can be assumed by Selection Committee by necessary implication?

45. In this connection it is pointed out that the law regarding the rules of recruitment vis-a-vis the power of Selection Committee or Selection Board has come for consideration of Hon''ble Apex Court earlier at several occasions. In Dr. Krushna Chandra Sahu and others Vs. State of Orissa and others, while determining the scope of power of Selection Committee vis-a-vis statutory rules of recruitment in paras 35, 36, 37 and 38 of the said decision the Hon''ble Apex Court held as under:

35. The members of the Selection Board or for that matter, any other Selection Committee, do not have the jurisdiction to lay down the criteria for selection unless they are authorised specifically in that regard by the Rules made under Article 309. It is basically the function of the rule making authority to provide the basis for selection.

36. The Selection Committee does not even have the inherent jurisdiction to lay down the norms for selection nor can such power be assumed by necessary implication. In P.K. Ramachandra Iyer and Others Vs. Union of India (UOI) and Others, it was observed (para 44, at p. 562 of AIR):

By necessary inference, there was no such power in the A.S.R.B. to add to the required qualifications. If, such power is claimed, it has to be explicit and cannot be read by necessary implication for the obvious reasons that such deviation from the rules is likely to cause irreparable and irreversible harm.

37. Similarly, in Umesh Chandra Shukla Vs. Union of India (UOI) and Others, it was observed that the Selection Committee does not possess any inherent power to lay down its own standards in addition to what is prescribed under the Rules. Both these decisions were followed in Durgacharan Misra Vs. State of Orissa and Others, and the limitations of the Selection Committee were pointed out that it had no jurisdiction to prescribe the minimum marks which a candidate had to secure at the viva voce test.

38. It may be pointed out that rule making function under Article 309 is

legislative and not executive as was laid down by this Court in B.S. Yadav and Others Vs. State of Haryana and Others, For this reason also, the Selection Committee or the Selection Board cannot be held to have jurisdiction to lay down any standard or basis for selection as it would amount to legislating a rule of selection.

46. In Hemani Malhotra Vs. High Court of Delhi, the Hon''ble Apex Court while referring and approving its earlier decisions referred in Dr. Krushna Chandra Sahu's case (supra) held that prescribing minimum marks for viva voce was not permissible at all after written test was conducted. There is no manner of doubt that the authority making rules regulating the selection can prescribe by rules the minimum marks both for written examination and viva voce but if the minimum marks are not prescribed for viva voce before commencement of selection process, the authority concerned cannot either during the selection or after selection process add an additional requirement/qualification that the candidates should also secure minimum marks in interview. The pertinent observations made by Hon''ble Apex Court in paras 9 of the said decision are extracted as under:

9. From the proposition of law laid down by this Court in the above mentioned case it is evident that previous procedure was not to have any minimum marks for viva voce. Therefore, prescribing minimum marks for viva voce was not permissible at all after written test was conducted. There is no manner of doubt that the authority making rules regulating the selection can prescribe by rules the minimum marks both for written examination and viva voce, but if minimum marks are not prescribed for viva voce before the commencement of selection process, the authority concerned, cannot either during the selection process or after the selection process add an additional requirement/qualification that the candidate should also secure minimum marks in the interview. Therefore, this Court is of the opinion that prescription of minimum marks by the respondent at viva voce, test was illegal.

47. A Division Bench of this Court comprising Hon''ble Mr. Justice Sunil Ambwani and one of us (Hon''ble Justice Sabhajeet Yadav) in Dr. Ravindra Kumar v. State of U.P. and Ors. (2008) 3 UPLBEC 2836 in para 36 : 2007 (6) AWC 6499, of the decision observed as under:

36. From a close analysis of legal position enunciated by Hon''ble Apex Court hereinbefore, it is clear that the members of Selection Board or Selection Committee have no jurisdiction to lay down any criteria for selection either as to eligibility of candidates or as to suitability of candidates, unless they are authorised specifically in that regard by rules made for the purpose. The Selection Committee does not have even inherent jurisdiction to lay down the norms for selection nor can such power be assumed by necessary implication. The Selection Committee must select the candidates in accordance with rules. It cannot prescribe additional requirement for selection either as to eligibility or as to suitability of candidates by its own.

48. Now applying the legal position stated hereinbefore in given facts and circumstances of the case, we find that the recruitment/promotion in question is sought to be made under 1975 Rules. The Selection Committee constituted under Rule 16 of said Rules has to hold preliminary selection of the officer eligible for promotion on the basis of criterion laid down under Rule 20 (1) read with Appendix G (1) of said Rules wherein under Rule 20 (3) of Rules the Selection Committee is obliged to forward the list of candidates chosen at the preliminary selection made on the basis of seniority-cum-merit to the Chief Justice alongwith the names of officers who, if any, in opinion of committee have been passed over for promotion to the service as contemplated under Rule 20 (4) of 1975 Rules. Under Sub-rule (5) of Rule 20 of 1975 Rules this Court in administrative side (Full Court) is given task of holding final selection for promotion and prepare a list in order of seniority of the candidates who are considered fit for promotion and forward the same to the Governor. Thus, the legal position of Selection Committee and Full Court in administrative side is merely of selection body or selection board for the purpose of holding selection and making recommendation of selected candidates to the Governor of the State who are found fit for appointment. While holding such selection, in our considered opinion, the Full Court though is one of the consultee in rule framing process, cannot simultaneously frame the rule of recruitment and holds selection as both the functions of holding selection and consultation in the process of framing the rules for recruitment under Articles 233, 234 and 235 of the Constitution of India are conceptually distinct and different from each other, therefore, Full Court should be confined to task of holding selection as prescribed under 1975 Rules and the exercise of power of framing the rules of recruitment cannot be assumed simultaneously for simple reason that the rules of recruitment for service in question can only be framed by the Governor of the State in prior consultation with the High Court.

49. In view of legal position stated hereinbefore it is very difficult for us to subscribe the view taken by Selection Committee whereby the Selection Committee has held the petitioner not suitable for promotion merely on account of fact that he was punished by stoppage of two annual increments with cumulative effect in departmental inquiry, without any specific provisions under the statutory rules of recruitment for denying such promotion to him on the said ground, particularly when he has secured requisite minimum marks (100 marks) prescribed for such promotion under the rules of recruitment under which to become a successful candidate for promotion he was required to secure total 100 marks jointly in A.C.R. and written suitability test both. Thus, on the basis of his seniority position he was entitled to be placed on top of the preliminary select list prepared on the basis of seniority-cum-merit under Rule 20 (3) of 1975 Rules and for the same reason we cannot also subscribe the view taken by the Full Court in its meeting held on 9.1.2010 while excluding the name of petitioner from the final select list for appointment against substantive vacancy of Additional District and Sessions Judge in pursuant of selection in question. In

given facts and circumstances, in our view the Selection Committee had no power to lay down its own procedure except the procedure prescribed under the aforesaid 1975 Rules for holding said selection. Under the said Rules the Selection Committee has not been any way remotely authorised to lay down any additional rule required for promotion than that of prescribed under Rule 20 read with Appendix G (1) of 1975 Rules under which there is nothing to indicate that if any officer has been punished in departmental inquiry by stoppage of two annual increments with cumulative effect he can be held unsuitable for promotion. In absence of such statutory rule in consonance with the provisions of Articles 14 and 16 of the Constitution authorising the Selection Committee to take aforesaid view in the matter, in our view the Selection Committee could not make over all assessment of service record of the officers eligible for promotion as Screening Committee for the purpose of compulsory retirement of the officers. The Selection Committee has to confine its decision as specifically provided under rule as indicated hereinbefore and interpreted by us. It cannot travel beyond its jurisdiction.

50. From the perusal of service record, nothing objectionable is found against the petitioner in his Confidential Remarks recorded by Court for the last 10 preceding year of selection in question. It is no doubt true that while he was under suspension during the pendency of disciplinary inquiry against him the Annual Confidential Remarks have not been recorded by the Court for the year 2005-2006 and 2006-2007 but during preceding 10 years from the year of selection there is nothing to indicate that integrity of petitioner has either been withheld or doubted by the Court. Absence of annual confidential remarks in aforesaid years cannot be treated to be anything adverse against the petitioner particularly when he has secured requisite minimum 100 marks in both the tests indicated hereinbefore which was essential for promotion under the rules.

51. Further it is also not in dispute that the petitioner was found eligible to appear in suitability test by the Selection Committee and he was accordingly permitted to appear in the said test held on 29th November, 2009 under the 1975 Rules and on the basis of criteria laid down in the said rules he has secured minimum 50% marks, i.e., 100 marks out of 200 total marks requisite for promotion, as such in our opinion, he is entitled to be treated as successful candidate in the said suitability test held for promotion. Thus, we are of the view that the petitioner was entitled to be included in the list of selected candidates by Selection Committee inasmuch as by Full Court in its meeting held on 9.1.2010. Therefore, instead of quashing the entire select list, as interim measure we direct the respondents No. 1 and 2 to keep one substantive vacancy of Additional District and Sessions Judge reserve for promotion of the petitioner during the pendency of writ petition.

52. It is stated that the petitioner is continuously working on the post of Additional District and Sessions Judge under Rule 22 (3) of 1975 Rules since 20.3.2001 and during the course of argument learned Counsel for petitioner has

told us, which has not been disputed by the Registry of this Court present in the Court that functioning of Fast Track Courts is likely to be ended. They are not sure that functioning of Fast Track Courts can be continued during the pendency of writ petition. Therefore, apprehension of learned Counsel for petitioner that in the event of discontinuance of Fast Track Courts the petitioner can be reverted back to the post of Civil Judge (Sr. Div.) cannot be held unfounded, as such during the pendency of writ petition interest of the petitioner should be protected by this Court otherwise on account of discontinuance of Fast Track Courts he can be reverted back to the post of Civil Judge (Sr. Div.) due to impugned decision taken by Selection Committee and Full Court holding the petitioner unsuitable for promotion.

53. There is another sound reason for grant of interim relief protecting the interest of the petitioner. We cannot lose sight of situation that the person who has been appointed against the substantive vacancy of Additional District and Sessions Judge at the time of promotion of the petitioner on the said post on stop-gap arrangement basis are likely to be promoted on the next higher post of District Judge, whereas on account of discontinuance of Fast Track Courts in the State and impugned decision of Selection Committee and Full Court the petitioner would be placed on the post of Civil Judge (Sr. Div.), as such he would suffer from extreme mental agony and embarrassment. Therefore, as interim measure during the pendency of writ petition until further order of this Court, the petitioner shall not be reverted from the post of Additional District and Sessions Judge to the post of Civil Judge (Sr. Div.). The petitioner shall be permitted to continue on the post of Additional District and Sessions Judge and be paid his salary on the said post during the pendency of instant writ petition.

54. Before parting with the issue we must state that we have expressed our opinion on the questions of fact and law only for limited purpose of granting interim relief to the petitioner as indicated hereinbefore during the pendency of writ petition in given facts and circumstances of the case, therefore, the same should be treated to be tentative and prima facie opinion expressed by us which shall be subject to final decision to be taken in the writ petition by this Court.

55. We have also been told that in pursuance of recommendation made by Full Court in its Meeting dated 9.1.2010, whereby the names of candidates entitled to be appointed on the posts in question have been sent, the Governor of State has not yet issued any appointment letter to them, therefore, having regard to the legal position of persons included in the select list for promotion it is not necessary to hear them while deciding the writ petition in question as they have no indefeasible right of promotion merely on account of inclusion of their names in the select list for promotion but in order to afford opportunity of hearing to them, we think it fit and proper to direct the learned Counsel for the petitioner to implead atleast two persons included in the select list of promotion for hearing them in the representative capacity.

56. Issue notice to the newly impleaded respondents No. 3 and 4 fixing 12th

July, 2010.

57. Sri Amit Sthalekar learned Counsel appearing for the High Court is permitted to file counter-affidavit within two weeks. The respondents No. 3 and 4 shall also file counter-affidavit within same period. Learned Counsel for the petitioner may file rejoinder affidavit within one week thereafter.

58. Petitioner shall take steps within ten days from today. The notices shall be served upon the newly impleaded private respondents through Registrar General of this Court within a week.

59. List on 12th July, 2010 as part heard before us.