
(1993) 11 J&K CK 0010
In the Jammu And Kashmir High Court
Case No : Writ Petition No. 1625 of 1992

C.L.Mattoo

APPELLANT

Vs

State and others

RESPONDENT

Date of Decision : 18-11-1993

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226
Criminal Procedure Code, 1973 (CrPC) — Section 193, 195, 209

Citation : (1995) 2 SCT 19

Hon'ble Judges : B.A.Khan, J

Bench : Single Bench

Advocate : S. Bhat, S. K. Anand, T. S. Thakur, Advocates appearing for the Parties

Judgement

B. A. Khan, J.

1.The petitioner is a Superintending Engineer in the Public Works Department of the State. He complains that he has been superseded and wants

to be promoted to the post of Chief Engineer a selection post. His grievance in nutshell is that he has not been considered for promotion to the post

and his juniors have been promoted in violation of his rights guaranteed to him under Article 16 of the Constitution. He accordingly seeks

quashment of promotion of respondents 2 to 4 made vide order No. 414PW of 1992 dated 16.12.1992 and also a direction to the

respondentState to promote him to the post of Chief Engineer with all consequential benefits from the date respondents 2 to 4 were so promoted.

2. The petitioner's service graph shows that he was appointed as Assistant. Engineer in 1959; promoted as Executive Engineer in 1970 and was

further promoted to the post of Superintending Engineer with effect from

31.12.1986. He was appointed as MemberSecretary of the J&K

Pollution Control Board in the payscale of Rs. 1,8502,300 by Govt. Order No. 452GD of 1986 dated 29.9.1986 wherein he was also declared

to be the exofficio Addl. Secretary to Govt. (Technical), Housing and Urban Development Deptt. He was subsequently transferred to the

newlycreated department of Environment, Ecology, UEE and was posted as MemberSecretary of the Pollution Control Board vide Govt. Order

No. 962GD of 1986 dated 8.12.1986. While the petitioner continued to be the MemberSecretary of the Pollution Control Board, the Govt.

issued the final seniority list of Superintending Engineers vide Govt. Order No. 253PW of 1992 dated 21.7.1992 wherein he was placed at S.No.

8 while respondents 2, 3 and 4 figured at S. Nos. 5, 9 and 10 respectively. He claims that he has challenged the placement of respondent No. 2 in

this seniority list and his representation in this regard is still pending and on that basis asserts that he was the seniormost Superintending Engineer

eligible for promotion. But that is besides the point.

3. The petitioner's downhill journey seems to have started when he received a communication from his Chief Engineer dated 10.9.1992 asking him

to expedite his APRs with the concerned initiating authorities under whom he had worked for the last three years. Pursuant thereto he approached

the Commissioner/Secretary, Environment and Forests Deptt., who by his letter addressed to the Commissioner/Secretary, Public Works Deptt.

dated 22.9.1992 reported that his APRs for 1986 to 1992 had not been written by his superior officers though from the record his performance

was found to be good. This was followed by the impugned order promoting respondents 2 to 4 which is the bone of contention in this petition.

4. Before adverting to the grounds of challenge it would be appropriate to briefly refer to Govt. Order No. 1605GD of 1971 and Govt. Order

No. 1586GD of 1983 which constituted the selection committee for promotion to the post of Chief Engineer. Similarly Govt. Order No. 2055GD

of 1978 dated 19.9.1978 lays down the criteria to be followed by the selection committee for making selection to selection grades/posts borne on

the cadre of various services. It provides :

``The selection committee should classify the officers eligibility for promotion to the selection posts/grades as ``outstanding", ``very good" and

``good" or ``unfit" as the case may be on an overall relative assessment of their service records."

In reply to the petitioner's case the respondentState has filed two sets of objections on 11.5.1993 and 4.6.1993. Both sets are supported by the

affidavits sworn by one Shri R. N. Raina, Addl. Secretary to Govt., PWD on the basis of his information and available record. In the first set the

stand taken is that the select committee considered all eligible candidates on the basis of their merit, suitability and overall assessment of the record

available and placed the petitioner at S.No. 5 in the panel. ``The committee placed the eligible officers in the following order :

- (i) Shri Abdul Rashid,
- (ii) Shri Saffar Ahmed,
- (iii) Shri Abdul Khaliq,
- (iv) Shri K. K. Mattoo and
- (v) Shri C. L. Mattoo."

It is, however, submitted that the State Administrative Council approved promotions of respondents 2 and 3 and accorded sanction to the

deputation of respondent No. 4 as Managing Director of the J&K Housing Board.

5. After filing the first set of objections, it seems, that respondentState filed C.M.P. No. 2007 of 1993 on 4.6.1993 seeking amendment in the first

set of objections filed, on the ground that the some inadvertment and bona fide mistake has crept in. This application was allowed by Court order

dated 16.7.1993 despite objections raised by the petitioner. In the new objections filed the respondentState has reversed its stand in a complete

turn about and has stated that the selection committee considered the petitioner for promotion but found him unfit on the basis of merit, suitability

and overall assessment of the available record. A copy of the minutes of meeting of the selection committee has also been filed in support. This

naturally invited a rejoinder from the petitioner submitting that the reversal of the stand by the State showed that he was not considered as required

by law and that the record has been tampered with in order to keep him out of the post of Chief Engineer. It is also submitted that the basis on

which he has been found unfit, as disclosed in the minutes of the meeting of the selection committee, is totally irrelevant and cannot pose any

impediment in his promotion.

6. Since the minutes of the selection committee meeting, said to have been held on 30.11.1992, assume crucial importance for the just decision of

this case, it will be appropriate to extract the relevant portion thereof for proper appreciation of the rival contentions, as below :

`` Shri C. L. Mattoo:

In the APR for the year 198485 the officer has been graded as competent officer by the Initiating Officer. His APRs for the subsequent period

upto 1990 are not available. However, a certificate recorded by Shri Vijay Bakaya, was placed before the committee wherein he has certified that

the officer to be competent. The Committee was informed that the certificate recorded by Shri Bakaya who was holding the charge of the

Department of Forest and Environment for less than one month should not be taken into consideration. As per the procedural form at prescribed

for writing of APRs provides that an officer, whose APRs are to be written by the Initiating Officer, must have worked under him atleast for a

period of three months so that the Initiating Officer is able to make a fair assessment of the work of the said officer. In this case since Shri Bakaya

was merely holding the charge of the Commissioner/Secretary, Forest and Environment Department and that too for less than one month, the

certificate so recorded by him for the covering period from 198586 to 199192 are not relevant and as such were ignored by the committee.

The examination of the personal record of Shri Mattoo reveals that he was unfit to hold the post of Member Secretary of Pollution Control Board

as revealed in the record note of the meeting held on 19.10.1989 regarding remote sensing under the chairmanship of Addl. Chief

Secretary/Planning Commissioner.

In the APRs for the year 1992 the initiating officer has recorded the integrity of the officer as `` doubtful and attributes moral turpitude to his

conduct". These remarks have been duly conveyed to the officer.

The Committee was informed that a Special Committee has been appointed by the Government to enquire into financial irregularities, allegation of

fraud, tampering and overstepping of powers by Shri Mattoo. Shri Mattoo has filed a writ petition and obtained an interim order stipulating that the

factum of the proposed enquiry against Shri Mattoo be not read against him and

should not be construed as an impediment against the petitioner at the time of his consideration for promotion to the next higher post if he is otherwise eligible for the same. The Committee observed that the enquiry report will not be taken in account as per the Court directive. However, after having due regard to the APRs for the period available and overall assessment of the officer, the Committee did not find Shri Mattoo's performance upto the mark. He was not found suitable for promotion."

Mr. Thakur, learned counsel for the petitioner has based his whole case on the text and context of the minutes of the meeting which, according to him, substantiated the petitioner's claim that he was not considered for promotion to the post of Chief Engineer as required under law and was kept out on grounds which could not constitute any basis for depriving him of his promotion. He formulated his challenge as under :

(i) That the selection committee did not adopt any rational, reasonable or nondiscriminatory tests, criteria or standard for the purpose of grading

candidates as 'outstanding', 'very good', 'good' and 'unfit' as prescribed by Govt. Order No. 2055GD of 1978 and proceeded to select and

reject the candidates arbitrarily, discriminately and whimsically ;

(ii) That the petitioner's rejection was not supported by any valid reason and the reasons given in the minutes of the meeting are either irrelevant or

inadmissible on the basis of which he could not have been denied promotion. Elucidating he submitted that the reasons given, viz : (a) that the

petitioner had been found unfit to hold the post of MemberSecretary of the Pollution Control Board as revealed in the record note of the meeting

held on 19.10.1989; (b) that in APRs of 1992 the initiating officer had recorded petitioner's integrity as doubtful and attributed moral turpitude to

his conduct; and (c) nonavailability of the petitioner's APRs from 1986 to 1992 and nonreliance on the certificate of Commissioner/Secretary,

Forest and Environment Deptt., were either nonexistant or irrelevant or inadmissible;

(iii) That the petitioner had a preferential right to be promoted on the basis of his seniority, merit and suitability as he was admittedly graded as

'competent officer' in 1984⁸⁵ and no record was available thereafter to show him in black colours so as to deprive him of promotion.

7. Dwelling on the reasons given by the selection committee for petitioner's

rejection, Mr. Thakur submitted that the committee was totally in error in taking in regard the record note of the meeting of the Pollution Control Board dated 19.10.1989 to show that the petitioner was unfit to hold the post of MemberSecretary of the Board. He read out from the relevant note and said that no such imputation could be read in this note by any stretch of imagination. Similarly the committee could not have taken in consideration the petitioners APRs for 1992 which had been initiated by an incompetent officer and which formed the subject matter of a pending representation made before the Competent Authority and as such could not have been acted upon to deny him his due. He contended that the petitioner was undoubtedly given the rank of the Addl. Secretary to Govt. for good or bad reason as is apparent from Govt. Order No. 452GD of 1986 and his APRs could have been initiated only by the Secretary in charge and reviewed by the Chief Secretary or the Minister in charge and accepted by the Chief Minister in terms of Govt. Order No. 2504GD of 1980 dated 18.12.1980 which provides procedure for writing and maintaining of the APRs and as such Chairman of the Pollution Control Board, who initiated the APRs of the petitioner for 1992 was not competent to do so. What is worse that the Chairman had initiated the APRs against the petitioner after he had admitted his office which was contrary to the rules. He submitted that even if the Chairman is to be regarded competent, the controversial APRs for 1992 could not have been acted upon as the same were admittedly subject to the representation made by the petitioner to the Competent Authority which had not been disposed of. In this regard he relied upon AIR 1989 SC 2219, AIR 1987 SC 948 and 1982(1) SLR 813, in support. According to him, the petitioner was not to be faulted for nonavailability of the APRs from 1986 to 1992 which was a lapse on the part of the initiating officers as per rules. Therefore, he had to be accorded consideration on the basis of the available record which admittedly projected him as a 'Competent Officer'. He concluded by pleading that rejection of the petitioner on this score only showed the unfairness of exercise conducted by the selection committee which was apparent on the face of the record.

8. Mr. Anand, learned Govt. Advocate, by and large, repeated what has been stated in the objections filed by the respondentState. He submitted

that the post of the Chief Engineer is a selection post against which the petitioner has only a right of consideration which was accorded to him. He

could not claim a preferential right on the basis of his seniority and on consideration of his merit and suitability he was found unfit by the selection

committee and as no mala fides had been alleged against any member of the selection committee it was not open for the Court to substitute its

satisfaction for that of the selection committee. He asserted that the then Chairman of the Pollution Control Board was competent to initiate the

APRs of the petitioner so long as he worked in the Board as Member Secretary. He, however, did not controvert that the crucial APRs were the

subject matter of representation which is still pending. He sought support from AIR 1973 SC 962 and 1988 KLJ 211.

9. Mr. Bhat, learned counsel for respondents 2 and 3 submitted that the petitioner had nowhere said that respondents 2 and 3 were not worthy of

selection. He prayed that their selection be saved as it would be inequitable to quash the same at this stage.

10. By court order dated 9.9.1993, the respondent State was directed to produce the relevant record including the record which was placed

before the selection committee for making selection. In compliance Mr. Anand has submitted three files. File No. 16 contains notings for seeking

approval of the State Administrative Council to appoint the selected candidates; File No. 41 contains inquiry proceedings against the petitioner

when he was Member Secretary of the Pollution Control Board. The third file contains APRs from 1989 to 1992 of respondents 3 and 4 and from

1985 to 1992 in respect of the petitioner. No record of the PWD (Secretariat) has been submitted to show the panel of candidates recommended

for consideration and their record, if any, which was placed before the selection committee for making selection. There is also no record available

about the proceedings of the selection committee to indicate as to what norms or standard the committee adopted to adjudge the merit and

suitability of the candidates. A copy of the minutes of the committee meeting is the only crucial document on which the fate of this petition hangs.

11. I have examined whatever record was placed before me and also heard learned counsel for the parties at length.

12. It is the common ground that the post of Chief Engineer is the selection post under the J&K Engineering (Gazetted) Service Recruitment Rules,

1978. That being so, the petitioner can neither claim promotion to this post as a matter of right nor on the strength of his seniority, even if it be accepted that he was the seniormost Superintending Engineer at the time impugned promotions were made. Seniority undoubtedly does constitute a consideration for promotion to the selection post but only where the merit and suitability of the contenders is equal added to this is the constraint imposed on the power of court to interfere in the matters of promotion to the selection posts. It is well settled that it is the prerogative of the Government to judge and determine the merit and suitability of a candidate to the selection post. The powers of the Court are limited and ordinarily wherever a promotion is made to the selection post, and all eligible candidates are accorded consideration, the assessment made by the selection committee is normally final. The court cannot substitute its opinion or satisfaction for that of the selection committee. But all this does not debar the court from stepping in where the selection made apparently appears unfair, perverse or where mala fides/bias is alleged against the members of the selection committee to ascertain whether all equals have received a proper and due consideration in the face of equality of opportunity guaranteed under Article 16 of the Constitution. It is true that Article 16 does not prevent the State employer to pick and choose but that must have a reasonable basis. It at the same time guarantees the most valuable right of consideration on merits to all employees similarly situated and the consideration contemplated is not an idle formality and empty or illusory consideration. It must be an effective, real, fair good and a valid consideration on merits. Article 16 would be violated where the due consideration is denied to a candidate on grounds which are irrelevant, inadmissible and nonexistent. The action in that case would be arbitrary, unjustified and unfair and that is where the court would not allow such an action to stand, duty bound as it is to strike at all executive arbitrariness.

13. Given regard to this position, the moot question that arises for determination is: whether the petitioner's case for promotion to the post of Chief Engineer, was duly considered on merits by the selection committee or whether he was denied promotion arbitrarily and unjustifiably on the basis of an illusory consideration ?

14. At the very outset it must be pointed out that the respondent State has failed

to discharge its obligation to show whether the selection committee had adopted any rational, reasonable and nondiscriminatory criteria or standard for grading the candidates in terms of the criteria laid down in Govt. Order No. 2055GD of 1978 which envisaged grading of officers as 'outstanding', 'very good', 'good' and 'unfit'. Though it has been stated in the counter that the selection was made on the basis of merit suitability and overall assessment of the record available, it is nowhere stated or shown as to what standard or norm was adopted by the committee to adjudge such merit and suitability. It is not disclosed whether the committee considered the total service record of the candidates or their APRs only for some specific period. Since the selection committee proceedings have been withheld from the Court, it has to be presumed in the circumstances that the committee proceeded to make the selection without any standard, norm or criteria not to speak of any rational or reasonable criteria, rendering the action arbitrary and unjustified.

15. Proceeding on the premise that the committee considered the APRs of the contenders for a particular period, the petitioner undoubtedly was placed in a disadvantageous position as his APRs from 1986 to 1992 had not been written by the concerned initiating officers for which he could not be faulted as according to the relevant rules relating to the writing and maintenance of APRs it was the duty of initiating/reviewing officer to record the same within a prescribed time. Rule 3 under the heading 'PERIODICITY AND FREQUENCY' provides that 'an officer (initiating/reviewing) who fails to record the report on the officer within the prescribed time will himself, come under adverse comment by the next superior at the time of writing of his APRs. Assuming that the committee considered the whole record of contenders, the petitioner's APRs till 1985 admittedly projected him as a 'competent officer' and as his APRs from 1986 to 1992 had not been written for no fault of his, there was no material to declare him unsuitable till 1992. Looked thus, a survey of the grounds relied upon by the committee becomes necessary.

16. A perusal of the minutes of the committee meeting would show that the petitioner was primarily rejected on two grounds: viz. (i) that he was unfit to hold the post of Member Secretary, Pollution Control Board as per record note of the Board meeting held on 19.10.1989; and (ii) his

adverse confidential report for 1992 initiated by the Chairman of the aforesaid Board. The petitioner has appended a copy of the controversial

note dated 19.10.1989 with his rejoinder affidavit and a plain reading of the same does not suggest that he was found unfit to hold the post of

MemberSecretary of the Board. The relevant portion of this note reads thus :

``It was suggested that the Director, Environment should be the MemberSecretary of the J&K State Pollution Control Board as both the

organisations are interconnected. The Secretary, General Department was requested to make this change too."

The record further reveals that the Government issued a corrigendum to this record note of the meeting and directed the deletion of the last para

extracted hereinabove by order dated 16.12.1989. Even without the corrigendum it cannot be inferred from the record note dated 19.10.1989

that the petitioner was unfit to hold the post of MemberSecretary of the Board nor could any such imputation be read into it. In this view of the

matter, the first ground on which the petitioner was denied promotion, did not, in fact, exist.

17. The second ground also does not stand scrutiny. That is so far a variety of reasons to be adverted to later but before that a reference to the

relevant provisions of the Government Instructions contained in Govt. Order No. 2504GD of 1980 providing for writing, maintenance and custody

of APRs, would be worthwhile. Rule 4 under the heading ``Other Instructions" says that an officer or Minister after having retired or demitted the

office should not record his remarks in the APRs. Similarly Rule 3 under the head ``Representation against adverse entries" lays down that all

representations against adverse entries shall as far as possible be decided within three months from the date of submission of the representation.

Likewise, Annexure IV appended to this Govt. Order prescribes the authorities who can be initiating, reviewing and accepting authority. In case of

Special/Addl. Secretaries to the Govt. and other officers in Civil Secretariat of the equivalent rank, the initiating officer is shown to be the Secretary

in charge and the reviewing authority as Chief Secretary and the Minister in charge. The Chief Minister is the accepting authority.

18. The petitioner's case is that he was appointed and ranked as Addl. Secretary to Govt., by Govt. Order No. 452GD of 1986 dated 29.9.1986

and as such his APRs could be initiated only by the Secretary in charge and not the Chairman of the Pollution Control Board while he was on

deputation. His further case is that even if it be assumed that the Chairman of the Pollution Control Board was the competent initiating officer, his

APRs for 1992 could not be acted upon as he had represented against the same which representation is still pending and was to be accepted or

rejected by the accepting authority.

19. The petitioner must succeed on both counts. It cannot be disputed that he was ranked, if not appointed, as Addl. Secretary to Government by

the Government itself while being posted as Member Secretary of the Pollution Control Board. All subsequent Govt. orders designate him as Addl.

Secretary to Govt. Therefore, going by the relevant rules, it seems that the Chairman, Pollution Control Board was not a competent officer to

initiate his APRs for 1992 more so when he had demitted his office.

20. Similarly it is no more res integra that the adverse confidential report which is pending consideration for expunging through the representation

provided under rules, cannot be acted upon to deny promotion to an officer. The law is well settled on the point and even though it hardly needs

any reiteration, reference to some of the decisions of the Supreme Court reported in AIR 1989 SC 2219 and AIR 1987, would be in order. In

AIR 1989 SC 2219, it was held as under :

“It is not permissible to deny promotion to an employee on the basis of adverse entries, representation against which has not been considered and disposed of.”

Rationale for the principle laid down is contained in AIR 1987 SC 948 which reads as under :

“Where an adverse entry is awarded to a Government servant it must be communicated to him. The object and purpose underlying the

communication is to afford an opportunity to an employee to improve his work and conduct and make representation to the authority concerned

against those entries. If such representation is made it is imperative that the authority should consider the representation with a view to determine as

to whether the contents of adverse remarks are justified or not. Making of a representation is a valuable right and if representation is not

considered, adverse report in a confidential roll cannot be acted upon to deny

promotion opportunities."

The judgments cited by Mr. Anand (AIR 1973 SC 962 and 1988 KLJ 211) do not contain anything to the contrary. In the first judgment the court

upheld the suspension of the employee on the basis of an office memorandum which provided that an adverse entry in character roll of an

employee who took part in strike would be taken into consideration for promotion. Similarly the second decision also reaffirms the well established

legal position that mere seniority does not confer a right of promotion for a selection post. Therefore, both these judgments are of no avail to the

respondentState and do not in any way alter the settled legal position that the APRs expunging whereof is pending consideration cannot be taken

into account and acted upon for making promotion.

21. Another very intriguing aspect of this case is that the respondentState has filed two sets of objections taking contrary and conflicting stands in a

complete somersault. In one it is asserted that the petitioner was graded by the selection committee and placed at S.No. 5 in the select list and in

the other, it is averred that he was found unfit. Both sets of objections are supported by the affidavits sworn by the same officer, namely, Shri R.

N. Raina, Deputy Secretary to Govt., Public Works Department ``on the basis of his information and the record available in the office." While it is

difficult to determine the veracity of one of the two versions, it indeed makes the State's action suspect. Mr. Thakur says that selection committee

record has been tampered with to see the petitioner out, which according to him, is indicative from the fact that no member of the selection

committee had recorded the date while signing on the minutes of the meeting. As the State has not chosen to place the record of the committee

before the court, it only deepens the doubt in the matter and casts a cloud on the credibility of the State functionaries. But since this aspect has no

crucial bearing on the outcome of this petition, it becomes unnecessary to delve deep into it. A word of caution, however, requires to be

administered to deter the State functionaries from violating the sanctity of the official record. That makes me to examine the two affidavits filed by

Mr. Raina, a high ranking officer of the State to find out prima facie if he has given any false evidence or has fabricated any false evidence. The

stand taken by him in the two affidavits is poles apart from each other.

22. As already noticed he places the petitioner at S.No. 5 in the select list in the first affidavit sworn on 8.5.1993 and declares him unfit for

promotion in the second affidavit dated 1.6.1993. He has made both the affidavits on the basis of information and official record. How he made

this contradictory declaration, is not understandable. It certainly could not be out of any inadvertent mistake as is sought to be projected by the

State. A mistake is an unintentional act or omission which arises from ignorance, unconsciousness, forgetfulness or some misplaced confidence. But

a conscious stand taken on the basis of official record by a responsible officer cannot be termed or treated as a mistake, more so when it is the

refrain of the first set of objections that the petitioner was assigned 5th position in the merit list. After all Mr. Raina could not have taken this stand

out of his imagination and placed the petitioner at S.No. 5 in the select list. Even if his imagination had run riot, he could as well place petitioner at

No. 1 instead of No. 5.

23. All this is to bring out that the Deputy Secretary has exposed himself to the charge of giving false evidence or creating false evidence and of

dishonestly making a false declaration before the court to cause injury to the petitioner. Even as his first affidavit discards the other, it shall remain

to be seen which out of the two contains the truth. It may not be possible for this court to undertake this exercise in writ jurisdiction but it is not

powerless to order an appropriate action in the matter by directing the filing of a complaint against Mr. Raina to prosecute him before a competent

court. No notice of showcause requires to be given to him in this regard because the contents of the two affidavits tell their own story and pose no

difficulty in taking a prima facie view that he has created false evidence or has fabricated the false evidence by making a false declaration about

petitioner's grading by the selection committee for which he has exposed himself to a charge under Sections 193 and 209 Cr.P.C. Addl. Registrar

of this Court shall accordingly frame a complaint in terms of Section 195 Cr.P.C. based on the two affidavits made by Mr. Raina after satisfying

himself about the requirements of relevant provisions and forward it to the Chief Judicial Magistrate, Jammu for trial. The complaint may be

prosecuted by any senior prosecuting officer to be engaged and instructed by him.

24. The position that emerges is that the selection committee has not followed any reasonable and nondiscrimination criteria to adjudge the relative merit and suitability of candidates in terms of Govt. Order No. 2055GD of 1978 and has deprived the petitioner of promotion on untenable grounds and in an unfair exercise. He has been declared unsuitable on non-existent, irrelevant and inadmissible grounds. It needs hardly to be emphasised that he could not be stopped in his tracks on the basis of record note of Pollution Control Board meeting dated 19.10.1989 which note had nowhere declared him unfit to hold the post of Member Secretary of the Board. Likewise he could not be rejected on the basis of APRs for 1992, which APRs could not be acted upon being subject matter of a pending representation seeking its expunging. He could also not be penalised for nonavailability of his APRs for 1986 to 1992 which had to be initiated by his Initiating Officers.

25. The minutes of the committee meeting show that he was declared unsuitable ``after due regard was given to his APRs for the period available and his overall assessment''. His APRs were available only upto 1985 and if his overall assessment was based on these APRs, he could not have been declared unfit on the basis of these APRs which projected him as the ``competent officer''. It is not the State's case that some other factors were taken into consideration to make his overall assessment and on the basis of which he was found unsuitable. Viewed thus there was no material before the selection committee to warrant his rejection.

26. It, therefore, follows that the consideration accorded to the petitioner is no consideration in the eye of law and as contemplated by Article 16.

If at all it is regarded as any consideration, it is an eye wash an illusory consideration. A fair, valid and due consideration demands assessment of a candidate's merit and suitability on existing valid and relevant material and where it is based on nonexisting, inadmissible and irrelevant material, the action becomes arbitrary and unjustified and amounts to nonconsideration infringing the guarantee provided in Article 16. That is exactly the position in the present case. The petitioner has been denied promotion to the post of Chief Engineer on nonexistent and irrelevant grounds and on no valid material whatever. His right of consideration guaranteed under Article 16 stands violated with impunity.

27. Nonconsideration of the petitioner should have ordinarily vitiated the whole selection resulting in quashment of Govt. Order No. 414PW of

1992 promoting respondents 2 and 3 to the post of Chief Engineer and posting respondent No. 4 excadre to a post equivalent to that of the Chief

Engineer. But I do not propose to do so because merit and suitability of respondents 2 to 4 is not under question in this petition. Moreover, it

would be inequitable to do so when these respondents have worked on the posts for about one year. It may also result in administrative vacuum at

this stage. I am informed that there are as many posts available as there are candidates. If that be so, there should be no difficulty in

accommodating all. I also find from the record that one post of Chief Engineer has been ordered to be kept vacant by Court order dated

28.1.1993. Therefore, relief can be granted to the petitioner without disturbing the order of promotion.

28. Mr. Thakur submits that the petitioner is in the twilight of his career and is to retire by next March. He prays that State be directed to promote

him retrospectively from the date respondents 2 and 3 stand promoted forthwith so that he has the satisfaction of reaching the summit of his career

on the eve of his retirement. It would be inappropriate to direct consideration of petitioner's case retrospectively as other candidates are still

waiting in the wings for a substantive promotion. However, considering the submission made I partly allow this petition and command the State and

its concerned functionaries to take immediate steps to consider the petitioner for promotion to the post of Chief Engineer, PWD, (kept vacant

under Court order dated 28.1.1993) on the basis of available record within six weeks from the date of receipt of this judgment and pass

consequential orders in this regard. All concerned shall ensure implementation of this direction within the time frame prescribed. The Addl.

Registrar shall frame the complaint against the Deputy Secretary, Mr. Raina, and cause it to be filed before the Chief Judicial Magistrate, Jammu,

for trial as directed.

29. Record be returned to Mr. Anand.

30. This also disposes of C.M.Ps. No. 3226/92 and 3108/93 along with this petition in agreement with learned counsel for the parties.