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In the Jammu And Kashmir High Court

Case No : Writ Petns. No's. 61, 87, 88, 126 and 127 of 1967

Lal Chand Pargal and Others — APPELLANT

Vs

Director NES and Others — RESPONDENT

Date of Decision : 24-04-1969

Acts Referred:
Jammu and Kashmir Houses and Shops Rent Control Act, 1966 — Section 15, 8, 8(1)

Citation : AIR 1970 J&K 57

Hon'ble Judges : S.M. Fazl Ali, C.J;J.N. Bhat, J;Anant Singh, J

Bench : Full Bench

Advocate : T.R. Bhasin, R.N. Bhalgotra, Joginder Singh and O.N. Tiku, for the Appellant; V.S. Malhotra, for the Respondent

Judgement

S.M. Fazl Ali, C.J.—These writ petitions arise out of various orders passed by the appointing authority against the petitioners regarding their

promotion to the next higher post. As these petitions involve substantial questions of law of far-reaching consequences, they have been referred to

us for an authoritative pronouncement. Unfortunately, however, no particular question has been framed by the Bench concerned. It has therefore

become necessary for us to frame questions involved in the light of the arguments of the parties, the principles Involved, and the facts common to

all the cases. The questions which we have formulated are as follows:

(1) The extent, scope and application of Rule 24, Rules 25(2) and 25(3) of the Jammu and Kashmir Civil Services (Classification, Control and

Appeal) Rules, 1956, as also the principles governing promotion of Government servants under these provisions.

(2) Whether or not the appointing authority is required to give reasons for making promotion and if so, to what extent?

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(3) Whether or not the Government servants have a legal right to promotion under the rules so as to make the act of promotion a judicial act

requiring an objective consideration?

(4) Whether or not the appointing authority is to follow the principles of natural justice by giving a reasonable opportunity to the Government

servants of being heard before promotion is decided upon?

(5) Whether in granting promotion to one Government servant and not to the other rights of equality under Article 16 of the Constitution of India

are infringed?

(6) The principle governing inter se seniority of Government servants as contained in the rules.

1-A. We would take up the points formulated on us ad seriatim.

Question 1. The extent, scope and application of Rule 24, Rules 25(2) and 25(3) of the Jammu & Kashmir Civil Services (Classification, Control

and Appeal) Rules, 1956, as also the principles governing promotion of Government servants under these provisions.

2. In the State of Jammu & Kashmir the service conditions of most of the Government servants are determined by the Jammu & Kashmir Civil

Services (Classification, Control and Appeal) Rules 1956 (hereinafter to be referred to as the Rules). These rules were published in the

Government Gazette by Government Order No. 952-C of 1956 dated 14-6-1956. The rules deal with a variety of subjects regarding the

conditions of service of Government servants beginning from their appointment right upto the punishment or penalties that may be Imposed upon

them, and the mode prescribed therefore. We might state here that these rules are not only statutory in character but have also the authority of the

Constitution because under the proviso to Section 124 of the State Constitution these rules have been directed to be continued to be effective

subject to the provisions of any law made by the legislature after the coming into force of the Constitution. Since on the points involved in this case

no such law has so far been made by the State legislature, it follows therefore that these rules would be deemed to be effective under the

provisions of the Constitution referred to above.

3. In order to understand the scope and the ambit of Rule 25 of the Rules it will be necessary to analyse the real import of the various terms

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defined in the Rules. Rule 2(a) defines cadre as the sanctioned strength of class, category or grade. Rule 2(b) defines category as the posts borne

on the cadre of a service or class, but imposes two conditions before the posts can be said to fall within the same category. These conditions are:

(i) That the duties of the posts must be of the same character and importance.

(ii) That they must be known by the same designation and the scales of pay should also be the same. In other words, category Is a sub-division of

a particular post borne on the cadre of a service, carrying the same emoluments and known by the same designation. Class has been defined thus:

Class means the posts borne on the cadre of a service between which and the other posts borne on the cadre of the same service promotions and

transfers are not ordinarily admissible.

In order, therefore, to satisfy the definition of a class two attributes must be fulfilled. In the first place the posts of the same class must belong to the

same service; secondly promotions and transfers between these posts forming a class are not ordinarily admissible.

4. Promotion has been defined thus:

Promotion means the appointment of a member of service or class of a service, in any category or grade to a higher category or grade of such

service or class."" It would thus appear that under the Rules promotion tantamounts to the appointment of a member of a service or a class of

service to a higher category, grade or class of the same service. The words 'such service' clearly indicate that promotion contemplates appointment

to a higher' post of the same service.

5. Rule 2 (j) which defines recruitment by transfer runs thus:

A candidate is said to be recruited by transfer to a service when at the time of Ms first appointment thereto he is either a member or a probationer

in Anr. service.

6. Service is defined as a group of posts declared by Government to be a service.

7. We have taken pains to give detailed definition of some of the terms because there appears to be serious divergence between the argument of

the counsel for the parties with respect to the import and connotation of these terms. We shall now take up Rule 25(2) and (3) which run thus:

All promotions shall be made by the appointing authority.

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(2) Promotions to a service or class or to a selection category or grade in such service or class shall be made on grounds of merit and ability and

shall be subject to the passing of any tests that Government may prescribe in this behalf, seniority being considered only where the merit and ability

are approximately equal.

(3) All other promotions shall be made in accordance with seniority and subject to any test or special qualifications prescribed by Government

unless--

(a) the promotion of a member has been withheld as a penalty or

(b) a member is given special promotion for conspicuous merit and ability."" The learned Counsel for the petitioners submitted that sub-rule (3) is

the general rule of promotion, whereas Sub-rule (2) of Rule, 25 is a rule which applies to exceptional cases covered by or mentioned in sub-rule

(2). The Addl. Advocate General on the other hand submitted that sub-rule (2) is the general rule under which promotions have to be made,

whereas sub-rule (3) is the residuary rule which will cover cases not falling within the ambit of Sub-rule (2) of Rule 25. The Addl. Advocate

General initially submitted that the word 'promotion' as used in Rule 25(2) is wide enough to cover and include promotion from one service to Anr.

, though the two services may be of different kind altogether. Subsequently the Addl. Advocate General changed his stand and argued that

promotion means an appointment to a higher category of either the same service or an allied service. In our opinion the altered stand taken by the

Addl. Advocate General is absolutely correct. We have pointed out from the definition of the word 'promotion' that promotion conceives

appointment from a lower category to a higher category of the same service or an allied service because the words 'such service' mentioned in Rule

2(h) clearly denote that service must be the same.

In fact if we accept the argument of the petitioners that Rule 25(3) is wide enough to cover promotion from one service to Anr. , even if the two

services are absolutely different, then such a conclusion would lead to most anomalous results. For instance it may so happen that the appointing

authority of one service and that of the other are not the same and the two may not agree in which case the promotion will not be possible at all.

Furthermore where there is service of a technical kind, for instance, the

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Engineering service, it will be absurd to expect chat an Overseer or an

Asstt. Engineer would be promoted to Anr. service, say the judicial service and be appointed a Sub-Judge or a District Judge. In our opinion such

a state of affairs was never contemplated by the rules and that is why Rule 2(j) clearly defines recruitment by transfer. The definition of this term

signifies that a member of one service may be transferred to Anr. service.

It is obvious therefore that a member of one service is transferred to Anr. service only if the transfer is possible and not otherwise. For these

reasons therefore Sub-rules 25(2) and (3) deal with the promotion of Government servants in their own service and has no application when there

is a transfer of a member of one service to Anr. . Even if by such transfer the Government servant gets into a higher category it will be really an

appointment by transfer rather than a promotion in the service.

8. Reliance was however, placed by the Addl. Advocate General as also by the counsel for the petitioners on an order of the Government

classifying various gazetted services where a number of services have been mentioned, enumerating the class or the category. This classification

was made on 19-10-55 that is to say long before the rules came into force. Furthermore this classification has been made in order to describe the

status of a Government servant, the emoluments to which he is entitled, and the T.A. that he is entitled to draw. This classification has nothing to do

with the interpretation of the rules. In fact clause 4 of the preface to the rules makes this position absolutely clear by providing as follows:

Nothing however, in this classification should be taken to convey any change in the conditions of service of a post or a group of posts in regard to

their permanent or temporary nature of their being pensionable or non-pensionable. Such conditions will be determined by the general or special

rules pertaining to a service or its class or category or the sanction under which a particular post has been created.

It is therefore manifest that we cannot interpret the terms mentioned In the rules with reference to the classification of gazetted services made by the

Government which has been done for a very different purpose. Furthermore this classification has now become out of date because it is conceded

by the Addl. Advocate General that a number of additional costs have come into being which do not (sic) place in the said classification and some

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of the posts mentioned in the classification have ceased to exist. For all these reasons therefore we are not in a position to take the aforesaid

classification as a guide or a basis for the interpretation of the rules.

9. We would now take up the first question, namely the scope and the (sic) of Rules 25(2) and (3). In our opinion very Government is guided by

the sole consideration of improving the efficiency, integrity and stability of the services and (sic) order to promote these qualities in services, it is

only necessary that in the matter of promotions, merit and ability should be given topmost preference. This should be the first consideration present

in the mind of the. appointing authority (sic) efficiency is to be brought about in the services. This is the anxiety not only of the Government but of

any master regarding the servants which he employs. The relationship between the Government and its servants is similar to that of (sic) ordinary

master and servant with the difference that the conditions of service of Government servants are governed by statutory rules or constitutional

safeguards contained in the Constitution. Excepting this prominent feature the other incidents are the same. In our opinion, therefore, Rule 25(2)

merely incorporates the general desire of the employer to pro-note efficiency and integrity in the services so that a real impetus is given to

meritorious persons in the matter of promotion.

The words used in Sub-rule (2) are of a very wide amplitude. and cover almost very category of service so that the general rule contained herein is

that promotion should be made on the basis of merit and ability alone, seniority to be considered only where merit and ability are approximately

equal. Thus this rule contains what is known as the merit cum seniority formula. To begin with, the words ""promotion to a service"" includes also

promotion to all groups of posts declared by Government to be a service and thus it includes every category of the post borne on the cadre of a

service. Such an interpretation is in consonance with the definition, of the word 'service' as given in Rule 2(k) referred to above. The word 'class'

includes not only promotion from one class to Anr. but also promotion between classes inter se, that is to say even if there are posts belonging to

the same class but carrying different scales of pay and one class is superior to Anr. in the matter of status and emoluments, then promotion even

between the same class would be governed by Rule 25(2).

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10. The learned Counsel for the petitioners, however, submitted that the word 'class' used in Sub-rule (2) of Rule 25 postulates promotion from

one class to Anr. and not promotions within the same class. We do not find any warrant for this view because no such distinction has been laid

down in the rules for delimiting the scope of the word 'class'. Furthermore such an interpretation does not appear to be consistent with the

definition of the word 'class' in Rule 2(d). According to the definition class means the posts borne on the cadre of a service between which and the

other posts borne on the same service promotions and transfers are not ordinarily admissible. For instance in the classification of gazetted services

produced by the Addl. Advocate General, the Chief Secretary and the Commissioner have been placed within same class but they carry different

emoluments. It is obvious that promotions between these two members of the class are neither admissible nor can a member of one category in the

class be transferred to Anr. . In other words it cannot be said that a Commissioner can be transferred as Chief Secretary and a Chief Secretary as

Commissioner.

Similarly in the Kashmir judicial Service Sub-Judges and Munsiffs are shown as belonging to the same class, but it cannot be urged with any show

of force that Munsiffs can be transferred as Sub-Judges and Sub-Judges as Munsiffs. Such transfers cannot be done until the Munsiffs are

promoted to the rank of Sub-Judges. The emoluments of these two posts and the scales of their pay are also different. It is therefore clear that the

word 'class' used in Rule 25(2) is wide enough not only to include promotion from one class to Anr. but also promotions within the same class.

11. The third contingency contemplated by Sub-rule (2) is that promotions should be made to a selection category which is defined in Rule 2(c) as

a category declared to be a selection category by the appointing authority. Thus analysing the provisions of this rule it would appear that the rule

governs all cases of promotion to a service, that is to say (1) between the posts belonging to a particular service (2) to posts contained either in the

same class or to posts from one class to Anr. ; and (3) to posts which are declared by the appointing authority to be a selection category. In the

case of all these promotions, the rules lay down that the primary consideration for promotion should be merit and ability and such tests as may be

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prescribed, seniority to be considered only when merit and ability are equal. In other words the rule clearly contemplates that where a junior

member of the service is superior in merit and ability to his senior, he is entitled to be promoted in preference to the senior on the grounds of merit

and ability. The senior member has no right to promotion unless he can show that he is equal in merit and ability to the junior member. If this

criterion is adopted, it will improve the efficiency and integrity of the services and give an impetus to the members of the services to improve their

quality.

Sub-rule (3) would apply only to such cases which are not covered by Sub-rule (2) and it is the residuary rule which would apply if a residue is

left, otherwise not. The question which arises for our serious consideration is as to what cases would be covered by Sub-rule (3) if we hold Sub-

rule (2) to be the general rule. There is however no difficulty in finding an answer to this question. Sub-rule (3) would apply to such cases where

there is promotion from one grade to Anr. , though the posts may be of the same nature or character though with slightly different emoluments. For

instance in the State we have two grades of clerks (Junior Assistants), Rs. 65-130 and Rs. 75-150. Assistants working in both the grades bear the

same designation. Thus if there is promotion from one grade to Anr. , it may be covered by sub-rule (3) and would have to be governed by

seniority alone, until and unless promotion is withheld by way of penalty or when some other member is given promotion for extraordinary merit

and ability. We might mention here that the Supreme Court in case of Ghulam Nabi Shora v. the State of Jammu & Kashmir, Writ Petition No.

175 of 1966, D/- 3-3-1967 (SO appears to have gone into this question and interpreted the language of Rules 25(2) and 25(3).

In this case their Lordships were considering the promotion of Munsiffs to the rank of Sub-Judges and their Lordships clearly held that such a

promotion was covered by Rule 25(2) and not by Rule 25(3). Their Lordships observed as follows:

It is common ground that in the matter of promotion Munsiffs are governed by the J. & K. Civil Services (Classification, Control and Appeal)

Rules 1956..... Under Clause (2) of Rule 25 promotion is to be made strictly on merit and ability and the petitioners cannot claim as of right to her

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promoted merely on the ground that they were placed higher in rank in the list of appointees to the posts of Government Prosecutors than

respondents 4 to 9....It was somewhat faintly suggested on behalf of the petitioners that Clause (3) of Rule 25 which is the residuary rule applies to

the case of the petitioners.... Prima facie it appears that in appointing Munsiffs to the post of Subordinate Judges the State promotes them to a

selection category of in any case to a class within the meaning of Rule 25(2). The expression 'class' is defined in Rule 2(d) as meaning the posts

borne on the cadre of a service between which and the other posts borne on the cadre of the same service, promotions and transfers are not

ordinarily admissible. It is not suggested that Munsiffs and the Subordinate Judges are borne on the cadre of the same service and promotions and

transfers are not ordinarily admissible.

These observations of their Lordships fully fortify the view taken by us that Rule 25(2) is the general rule which governs all promotions and Rule

25(3) is the residuary rule which governs only those cases which are not covered by Rule 25(2).

12. It was however contended on behalf of the petitioners that if promotions are made by and large on the basis of merit and ability ignoring

seniority, it would lead to demoralization in the State services. We are, however, unable to agree with this argument. Once a person enters a

Government service, he has no right to be appointed to a higher post only on the basis of his seniority if he does not possess any merit. Indeed if

promotions are made on the basis of seniority alone then it will be difficult to promote efficiency in the services and there will be no tendency for

any person to improve his quality because the Government servant would know that he would be promoted when his turn comes whether he

deserves it or not; whether he improves his quality or not. He would get into the higher post merely by virtue of his seniority. Such a method of

promotion is not consistent with the notions of a civilized society such as ours. For these reasons we answer the first question accordingly.

13. Question No. 2:-- Whether or not the appointing authority is required to give reasons for making promotion, and if so, to what extent?

13-A. It was urged by the counsel for the petitioners that the language of Sub-rules (2) and (3) of Rule 25 makes it incumbent on the appointing

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authority to give reasons for the promotion of a Government servant indicating the grounds on which the promotion is made. The Addi Advocate

General however contended that the subsides nowhere expressly lay down the requirements of giving any reasons for the promotions to be made

but only mention the considerations that should govern the appointing authority in making promotions. In support of his submission the learned

Addl. Advocate General relied upon a decision of the Punjab and Haryana High Court in Union of India and Others Vs. P.C. Bahl and Others, ,

and drew our attention to the following observations made In that case:

It is patent that regulation 5(3) does not require any reason to be recorded for holding any person to be of exceptional merit and suitability.... In

any case when once the committee has arrived at an opinion to the said effect regarding a candidate's exceptional merit and suitability the statute in

its wisdom has thought it expedient to respect that opinion.... It would therefore be treating a dangerous ground to go behind the clear expression

of subjective satisfaction and the expression of opinion following thereto which had been expressly averred to in the written statement on behalf of

the Committee.

It is true that Rule 25(2) does not in so many words express any reasons to be recorded for promotion to be granted to a member of the service,

but the language of this rule is essentially different from that of the Indian Administrative Service Rules which was being considered by the Punjab

and Haryana High Court. To begin with it would appear from the judgment in the case (Supra), that Rule 5(5) of the Indian Administrative Service

Rules expressly required reasons to be recorded in writing whereas Rule 5(3) which almost immediately preceded the said rule did not mention

anything about reasons being given. In view of this strange placing of the language of the statute their Lordships rightly held that the previous

provision namely Rule 5(3) did not requite any reasons to be recorded. Furthermore the language of Rule 5(3) in that case was as follows:

The names of the officers included in the list shall be arranged in order of seniority in the State Civil Service.

Provided that any junior officer who in the opinion of the committee is of exceptional merit and suitability may be assigned a place in the list higher

than that of officers senior to him.

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14. It is therefore clear that Rule 5(3) (Supra) merely requires a list to be prepared in order of seniority, whereas the proviso mentions that a junior

officer could be considered in view of his exceptional ability. The language of Rule 25(2) in the present case is quite different. The words 'shall be

made on the ground of merit and ability' clearly postulate that the order of the appointing authority must show ex facie that the considerations

mentioned in the rule were present in the mind of the appointing authority at the time of making promotions and the word 'ground' implies that these

considerations should be stated in the order so that anybody reading the order may know that action has been taken under Rule 25(2) of the

Rules. In other words while we fully agree with the principle that the Question of promotion depends largely on the subjective satisfaction of the

appointing authority and that the assessment of the appointing authority regarding the work and the performance of the Government servant cannot

be questioned, yet we cannot help feeling that the statutory rules do require that the considerations which had weighed with the appointing authority

must find place in the order of promotion and then alone it would be a compliance with the provisions of Rule 25(2).

15. There is yet Anr. circumstance that lends support to this view. Under Rule 30(3) withholding of promotion amounts to a punishment and it can

be resorted to only after giving a notice to the delinquent servant and giving him an opportunity of defending himself. There may be cases where an

appointing authority in the garb of promoting a junior man acts under Sub-rule (2), whereas his real intention is to act under Rule 30(3) by

withholding promotion. But in order to deprive the delinquent servant of an opportunity of being heard a junior is promoted under the cover of

merit and ability so that the delinquent servant is not in a position to know whether he has been bypassed by a junior, because the junior possessed

superior merit and ability or because the appointing authority chose to withhold promotion of the senior member by way of penalty. Where the

order of promotion specifies the grounds mentioned in Rule 25(2), there can be no confusion on this account and the order of promotion being a

speaking order would apprise the Government servant of the actual situation. This is yet Anr. reason why we think that the rule-makers intended

that the appointing authority must give at least the grounds on the basis on which promotion is made under Sub-rule (2).

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By laying stress on the appointing authority to give reasons we do not mean to suggest that in every case the appointing authority should write a

detailed order dealing with the merits and demerits of the promotion of a Government servant but what is contemplated by Sub-rule (2) is a bare

statement of the grounds on the basis of which promotion is made, that is to say, the appointing authority must say specifically in its order that a

person is being promoted because in its opinion he is superior in merit and ability to the other member of the service who is being superseded. In

other words what Rule 25(2) requires is only to record grounds by the appointing authority and no more. Such a requirement would serve two

purposes: it would guard the appointing authority against making promotions on the basis of favouritism or nepotism and secondly it would apprise

the person bypassed with the reasons why he has been denied promotion. The opinion of the appointing authority, however, would be completely

subjective and cannot be questioned in a court of law unless it is shown to be mala fide. The reason for this is that it is for the appointing authority

to assess the work of its servants, and to know the performance of their work, the quality of their standard, their output and the like and it is not for

the court to sit in appeal over the opinion of the appointing authority unless such an opinion is shown to be tainted by a mala fide or colourable

intention.

Our attention was drawn to a Full Bench (Division Bench?) decision of this court in Gopi Nath Kaul v. State of J & K AIR 1957 J&K 31 where it

was held that the question of promotion depends purely on the subjective satisfaction of the appointing authority, which was not bound to give

reasons for its decision. In this case their Lordships observed as follows:

...it is the appointing authority which is the judge of merit and ability and this court cannot substitute its judgment for that of the appointing authority

..... Under these circumstances it is not possible to hold that any statutory rule was violated by the respondents in the case of the petitioner. We,

however, consider it necessary to emphasize that it would have been proper if the appointing authority had assigned these reasons in the different

orders by which the petitioner was superseded. If these reasons had then been vouchsafed, it would have not been necessary for the respondents

to explain these supersessions by filing affidavits.

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The same view was taken in a previous Full Bench case in Mohd. Aslam v. V.L. Vishin AIR 1957 J & K 8, where also their Lordships pointed

out that it was desirable that the appointing authority should mention in its order the grounds of merit and ability which had been taken into

consideration while making promotion of a member of service to a higher class. It is true that these decisions do not hold that it is imperative for the

appointing authority to give reasons for promotion, although it is desirable to do so.

16-17. With great respect to these authorities we might like to mention that they do not appear to have approached the question from the various

aspects which we have discussed above, nor have they considered the special language of Rule 25(2), particularly the word 'grounds' which by

necessary intendment requires reasons to be given by the appointing authority showing that the conditions mentioned in Rule 25(2) have been

fulfilled. While, therefore, we fully agree with the first part .of the decision of the Full Bench namely, that the question of promotion depends on the

subjective satisfaction of the appointing authority, we do not agree with the other part of the judgment that the statute does not require reasons to

be given. As pointed out above, the only irresistible inference that can be drawn from the circumstances mentioned above and the peculiar

language of Rule 25(2) is that the rule-makers intended not expressly but impliedly that the appointing authority must give reasons for giving

promotion to a member of a service in order to show that the conditions mentioned in the rule have been complied with. The answer to question 2

is therefore given in the affirmative. Question 3.

Whether or not the Government servants have a legal right to promotion under the rules so as to make the act of promotion a judicial act requiring

an objective consideration?

Question 4

Whether or not the appointing authority is to follow the principles of natural justice by giving a reasonable opportunity to the Government servants

of being heard before a promotion is decided upon?

These two questions are Inter-connected and will be taken up together.

18. The main argument of Mr. Bhasin appearing for the petitioners was that in view of the statutory rules providing for conditions of service of

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Government servants every Government servant has a right to be promoted in accordance with the provisions of the rules and that such a right has

to be exercised objectively after conforming to the rules of natural justice. In other words the argument was that the act of promotion being a

judicial act, the Government servant is entitled to be heard before any action is taken against him -- otherwise the power of granting promotion

may be used arbitrarily so as to cause serious injustice.. In our opinion the argument is based on a wrong premise namely that a Government

servant has a legal right to be promoted. We have already pointed out above that the relationship between the Government and its servants is just

like the relationship of any other master and servant with the difference that in the case of Government servants some of the service conditions are

regulated by statutory rules and constitutional safeguards. The Government has the power to change or alter rules even unilaterally without

obtaining the consent of the Government servant and such an altered rule will be binding on the Government servant. In Roshan Lal Tandon Vs.

Union of India (UOI), their Lordships of Supreme Court defined the exact relationship of Government and its servants and adverting to their

incidents observed as follows:

It is true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or

office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or

statutory rules which may be framed and altered unilaterally by the Government. In other words, the legal position of a Government servant is more

one of status than of contract. The hall-mark of status is the attachment to a legal relationship of rights and duties imposed by the public law and

not by mere agreement of the parties. The emoluments of the Government servant and his terms of service are governed by statute or statutory rule

which may be unilaterally altered by the Government without the consent of the employee.

19. Reliance was, however, placed by Mr. Bhasin on the leading case of Ridge v. Baldwin (1963) 2 All E R 66. where their Lordships held that in

exercising, the power of dismissal conferred by the Municipal Corporations Act the watch committee were bound to observe the principles of

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natural justice by giving a proper opportunity to the accused of being heard. In our opinion this principle applies where an authority whether

administrative or quasi-judicial is dealing with the rights of citizens in which case the rules of natural justice are at once attracted even though there

may be no provisions for hearing the person condemned.

20. In Shri Bhagwan and Another Vs. Ram Chand and Another, , their Lordships of the Supreme Court pointed out that the observations in the

Ridge's case, 1963-2 All ER 66, referred to above were to be applied and called into aid only when an authority is dealing with the rights of

citizens. Their Lordships observed as follows:

If it appears that the authority or body has been given power to determine questions affecting the rights of citizens, the very nature of the power

would inevitably impose the limitation that the power should be exercised in conformity with the principles of natural justice.... This question has

been considered by this Court on several occasions.... and it has been held adopting the view expressed by the House of Lords in Ridge v.

Baldwin 1964 AC 40, that the extent of the area where the principles of natural justice have to be followed and judicial approach has to be

adopted must depend primarily on the nature of the jurisdiction and the power conferred on any authority or body by statutory provisions to deal

with the questions affecting the rights of citizens.

In view of this clear pronouncement of the Supreme Court it is manifest that the rule in Ridge's case 1963-2 All ER 66, cannot apply to promotions

in services which are purely administrative in character and depend upon the subjective satisfaction of the appointing authority concerned.

Unless the rule itself requires notice to be given to the Government servant, the principles of natural justice cannot be imported into administrative

actions concerning Government servants. Indeed if we accept the argument of the learned Counsel for the petitioners and insist on the appointing

authority to follow the dilatory procedure of hearing the Government servants concerned at every stage of their promotion or selection, we would

be placing insurmountable obstacles in the smooth running and the scientific functioning of the services of the State and would introduce an element

of inordinate delay making confusion worse confounded. We might mention here that the rules do provide a full opportunity to the Government

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servants whose promotion is withheld by way of penalty or where other penalties are imposed on the Government servants. The rule-makers have,

therefore, incorporated the principle of natural justice where they thought that an opportunity to be given to the Government servant concerned to

be heard was necessary.

21. Similarly reliance was placed on S.G. Jaisinghani Vs. Union of India (UOI) and Others, wherein it was pointed out that the absence of

arbitrary power was the first essential of the rule of law on which our Constitution is based. In that case their Lordships were dealing with the

conditions of service of an Income Tax officer and the rules were silent on certain important matters regarding the conditions of service of Income

Tax employees. In the instant case since the discretion to grant promotion is clearly governed by Rule 25(2), the question of applying the dictum

laid down by the! Supreme Court does not arise. The rules regarding promotion provide sufficient guarantee against any arbitrary exercise of

power inasmuch as they lay down, as held by us, that reasons for promotion must be given and secondly where promotion is withheld by way of

penalty, a reasonable opportunity to the Government servant concerned of being heard in the matter is also provided for. For these reasons

therefore this case does not appear to be of any assistance to the learned Counsel for the petitioners.

22. Reliance was then placed on S.K. Ghosh and Another Vs. Union of India (UOI) and Others, . This case also does not apply, because in the

case before their Lordships there was a clear finding by the Court that seniority was disturbed in contravention of a specific provision of the rule by

an arbitrary exercise of power. It is not disputed that if the appointing authority acts contrary to the express provisions of Rule 25(2) or if its action

is tainted with malice in law, the petitioners can always approach the court for striking down the order impugned.

23. Similarly reliance was placed on The Collector of Monghyr and Others Vs. Keshav Prasad Goenka and Others, , where their Lordships were

dealing with the statutory provisions of the Bihar Private Irrigation Works Act. This case also can be distinguished on the ground that there their

Lordships were dealing with a section of the statute which dealt with the rights of citizens and therefore the rule of natural justice would naturally

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apply.

24. Our attention was also drawn to High Court of The High Court, Calcutta Vs. Amal Kumar Roy, . This case far from helping the petitioners

fortifies the view taken by us in the present case. In that case the action of the High Court in denying promotion to a judicial officer was challenged

by a suit which ultimately came up to the Supreme Court. Their Lordships of the Supreme Court justified the action of the High Court and held that

the High Court was the sole administrative authority to determine the question of promotion of Munsiffs to Sub-Judges' grade and this exercise of

power could not be interfered with, because it depended upon the subjective satisfaction of the High Court. Reliance in that case was placed on

Rule 49(a) under which the judicial officer was entitled to a notice if promotion was withheld as a penalty and their Lordships held that that was a

clear distinction between withholding promotion as a penalty and granting promotion to a junior man on the basis of merit and ability. In this

connection their Lordships observed as follows:

Rule 49 on which reliance was placed by the plaintiff to make out his right to be considered for promotion as a subordinate judge is in the first

instance, not a right but only a safeguard to a public servant that punishment by withholding of promotion shall not be imposed upon him unless he

has been given adequate opportunity of showing cause against the action proposed to be taken. It is also clear that Rule 49 comes into play only

when proceedings are taken by way of disciplinary action against a public servant. In such disciplinary proceedings, the Government servant

proceeded against has a right to insist upon the procedure being strictly followed.

In the instant cases also Rule 30 is the exact replica of Rule 49 and the observations made by their Lordships apply, mutatis mutandis, to these

cases also. Thus the position is that no Government servant has a right to promotion which is to be made according to the provisions of the rules. A

promotion by-passing the senior servant may take place in either of the following two ways:

(1) A junior person may be appointed on the basis of merit and ability superseding the senior man. In such a case the senior man has no right at all

because merit prevails over seniority.

(2) A junior man may be promoted to a higher post by superseding a .senior

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man because the senior man though equal in merit to the junior

servant is guilty of negligence or other laches as a result of which his promotion is withheld. In such a case the appointing authority under Rule 30 is

bound to hear the Government servant before withholding his promotion.

25. Thus, in any case, it cannot be said that a Government servant has a legal right to promotion.

26. In Arun Kumar Bhattacharjee and Others Vs. State of West Bengal and Others, , it was clearly held that promotion cannot be claimed as a

matter of right. To the same effect is Anr. decision in L. Balakrishnan Vs. The Deputy Inspector-General of Police, Southern Range, Madurai and

Another, .

27. In State of Mysore and Another Vs. Syed Mahmood and Others, at p. 1115 their Lordships were discussing a similar rule regarding

promotion based on seniority-cum-merit. Their Lordships observed as follows:

Where the promotion is based on seniority-cum-merit, the officer cannot claim promotion as a matter of right by virtue of his seniority alone. If he

is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted.

28-29. In view of the authorities discussed above, it is manifest that under Rule 25(2) of the Rules promotion cannot be claimed as of right and

therefore the argument that a Government servant has a legal right to promotion must be rejected. For the reasons that we have already given in

holding that the principles of natural justice cannot be applied to matters of promotion which are purely administrative in nature and do not deal

with the right of citizens, it follows that there was no question of giving a reasonable opportunity to the Government servant concerned of being

heard before promotion is refused to him unless the appointing authority withholds promotion by way of penalty. For these reasons, therefore, the

answers to questions 3 and 4 are given in the negative.

Question 5:

Whether in granting promotion under Rule 25(2) and (3) to one Government servant and not to the other rights of equality under Article 16 of the

Constitution of India are infringed?

29-A. It is well settled that the concept of equality contained in Article 16 of the

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Constitution of India cannot be attracted where a promotion of

Government servant is made on the basis of merit. Before this Article would apply, it must be established that the Government servants are

similarly circumstanced and have been selected for hostile discrimination. Where the rule provides for promotion to be made on the basis of merit

and ability alone if the person who seeks promotion does not possess the requisite merit and ability and when he is not similarly circumstanced with

his junior who is of a superior merit, then in the event of the junior being promoted, the senior cannot take shelter under the infraction of Article 16

of the Constitution of India. This point was fully discussed by the Supreme Court in The General Manager, Southern Railway Vs. Rangachari,

where their Lordships observed as follows:

This equality of opportunity need not be confused with absolute equality as such. What is guaranteed Is equality of opportunity and nothing more.

Article 16(1) or (2) does not prohibit the prescription of reasonable rules for selection to any employment or appointment to any office. Any

provision as to the qualifications for the employment or the appointment to office reasonably fixed and applicable to all citizens would certainly be

consistent with the doctrine of the equality of opportunity; but in regard to employment, like other terms and conditions associated with and

incidental to it, the promotion to a selection post is also included in the matters relating to employment, and even in regard to such a promotion to a

selection post all that Article 16(1) guarantees is equality of opportunity to all citizens who enter service.

30. This principle was further reiterated in a recent judgment of the Supreme Court in Unikat Sankunni Menon Vs. The State of Rajasthan, at p.

84 where their Lordships observed as under:

It is entirely wrong to think that every one, appointed to the same post, is entitled to claim that he must be paid identical emoluments as any other

person appointed to the same post, disregarding the method of recruitment, or the source from which the officer is drawn for appointment to that

post. No such equality is required either by Article 14 or Article 16 of the Constitution.

31. Similar observations were made by their Lordships in the leading case of All India Station Masters' and Assistant Station Masters' Association,

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Delhi and Others Vs. General Manager, Central Railway and Others, where their Lordships observed as follows:

....There is in our opinion, no escape from the conclusion that equality of opportunity in matters of promotion must mean equality as between

members of the same class of employees, and not equality between members of separate independent classes.

32. For these reasons we hold that in granting promotion to a Government servant in accordance with the conditions prescribed in Rules 25(2) and

25(3), Article 16 of the Constitution of India is not infringed in any way. Indeed, if the appointing authority acts contrary to the rules or where its

action is mala fide amounting to an arbitrary or colourable exercise of jurisdiction, the aggrieved Government servant can always approach the

Court for an appropriate remedy. For the reasons given above, the answer to question 5 is given in the negative.

Question 6:

The principle governing inter se seniority of Government servants as contained in the rules.

33-33-A. The rules lay down a very scientific system of regulating inter se seniority between various Government servants who have been divided

into various classes. Rule 24 of the Rules (which is the pertinent rule) runs as follows:

The seniority of a person who is subject to these rules has reference to the service, class, category or grade with reference to which the question

has arisen. Such seniority shall be determined by, the date of his first appointment to such service, class, category or grade as the case may be.

Note 1:-- The rule in this clause will not affect the seniority on the date on which these rules come into force of a member of any service, class,

category or grade as fixed in accordance with the rules and orders in force before the date on which these rules come into force.

Interpretation: The words 'date of first appointment' occurring in the above rule will mean the date of first substantive appointment, meaning thereby

the date of permanent appointment or the date of first appointment on probation on a clear vacancy, confirmation in the latter case being subject to

good work and conduct and/or passing of any examination or examinations and/ or tests.

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Provided that the inter se seniority of two or more persons appointed to the same service, class, category or grade simultaneously will,

notwithstanding the fact that they may assume the duties of their appointments on different dates by reason of their being posted to different

stations, be determined;

(a) in the case of those promoted by their relative seniority in the lower service, class, category or grade.

(b) in the case of those recruited direct except those who do not join their duties when vacancies are offered to them according to the positions

attained by and assigned to them in order of merit at the time of competitive examination or on the basis of merit, ability and physical fitness etc. in

case no such examination is held for the purpose of making selections;

(c) as between those promoted and recruited direct by the order in which appointments have to be allocated for promotion and direct recruitment

as prescribed by the rules.

Note 2-- Any substantive appointments or permanent promotions made in any department prior to 15th May 1958, will not be disturbed if

otherwise in order unless such appointments or promotions are already the subject of any appeal, review or revision or otherwise pending decision.

(2) A member of a service, class, category or grade unless he is reduced in seniority as a punishment shall retain seniority in such service or grade

as determined by sub-rule (1) notwithstanding any delay in the completion of his probation or his appointment as a member of such service class,

category or grade,

(3) where a member of any service, class, category or grade is reduced to a lower service, class, category or grade he shall be placed at the top of

the latter unless the authority ordering such reduction directs that he shall rank in such lower service, class, category or grade next below any

specified member thereof.

This rule provides, to begin with, that seniority is to be governed with reference to service, class, category or grade which is held by the

Government servant and has to be determined by the date of his first appointment to such service, class, category or grade. The words 'first

appointment' have been further defined as relating to the date of the first substantive appointment, that is to say, the date of the permanent

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appointment against a clear vacancy. So far the question presents no difficulty. For instance if A is appointed to a lower class such as a Mun-siff

and B is appointed also to that class, then the person out of these who has been appointed first in point of time would be deemed to be senior

provided the appointment has been made against a clear vacancy. In case this is not so, then the date on which one of these persons has been

confirmed or rather has secured the permanent appointment would be the date from which his seniority would run. Proviso to Rule 24

contemplates a situation where inter se seniority of two or more persons is to be determined when they have been appointed to a post on the same

date.

This is indeed a vexed question and has presented a lot of difficulty to the courts as also to the appointing authorities, but on a careful perusal of the

rule it is not difficult to find an easy solution to this problem. The proviso lays down that in cases where persons have been appointed on the same

date, their inter se seniority would be determined in the following manner:

(1) In the case of those promoted by their relative seniority in the lower service, class, category or grade from which they have been promoted.

Thus, for instance, A, B and C are Tehsildars who have been promoted simultaneously as Assistant Commissioners, but A was appointed

Tehsildar before the Ors. . In such cases therefore A will be deemed to be senior to the Ors. , although all the three have been promoted at one

and the same time. But their seniority would be governed by Clause (a) of the proviso which refers to the date of their permanent or substantive

appointment.

(2) In the case of employees recruited direct, their seniority will be governed according to the positions attained by them or assigned to them in the

competitive examination or on the basis of merit, ability etc. In such cases there is no difficulty in determining the seniority of the Government

servant.

(3) As between some persons promoted and Ors. recruited direct their seniority will be governed by the order in which appointments have to be

allocated for promotion and direct recruitment as prescribed by the rules. The difficulty may arise: what would happen where the rules do not

prescribe the date of allocation, in which case it is obvious that the principles

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governing Clause (a) would naturally apply and the promotee will be

deemed to be senior to the direct recruit unless there is a rule to the contrary.

Sub-rules (2) and (3) of Rule 24 deal with circumstances where a person loses or retains his seniority and is not germane for our purposes. For

these reasons answer to question No. 6 is given accordingly.

34. Since the Benches concerned have not heard the writ petitions on merits, we have refrained from making any observations regarding the merits

of each of the writ petitions. The writ petitions will now go back to the Bench concerned for hearing on merits in the light of the opinion expressed

by us.

Anant Singh, J.

35. I fully agree with C.J.

Bhat, J.

36. I have had the privilege is going through the lucid and learned judgment of my Lord, the Hon'ble Chief Justice in this case. Some of these cases

were originally placed before me and. at that time, according to the petitions, the only dispute was with respect to the interpretation of Rule 25 of

the J & K Civil Services (Classification, Control and Appeal) Rules, 1956, (hereinafter referred to as 'the Rules' in this judgment). As such

questions arise frequently in this Court, I thought that the interpretation of this Rule should be considered by a Full Bench and therefore, made a

reference to the Full Bench. No proposition of law other than the interpretation of Rule 25 was argued before me; therefore, there was no

occasion for me to formulate any questions. The different propositions which form the subject matter of the Hon'ble Chief Justice's order were for

the first time propounded before the Full Bench by the learned Counsel for the petitioners. Anyhow after going through the lucid and learned

judgment of my Lord the Hon'ble Chief Justice I slightly differ from his Lordship's interpretation of Sub-rules (2) and (3) of Rule 25. I would add a

few words to indicate how I understand this Rule 25. On other matters I am in general agreement with the conclusions arrived at by his Lordship.

37. Rule 2 of the Rules defines the various terms used in this Rule 25. The words that occur in this Rule 25 are 'service, class, selection, category

and grade'. ""Service"" has been defined in Rule 2(e) as 'a member of a service

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means a person holding or appointed to a whole time pensionable

post'. ""Class"" as defined in Rule 2 (d) means the posts borne on the cadre of a service between which and the other posts borne on the cadre of

the same service, promotions and transfers are not ordinarily admissible. ""Selection category"" has been defined in Rule 2(c) as a category declared

to be Selection category. ""Promotion"" has been defined in Rule 2(h) meaning the appointment of a member of service or class of a service, in any

category or grade to a higher category, or grade of such service or class.

38. The Government of Jammu and Kashmir on 19-10-1955 prepared a classification of Gazetted Services which was sanctioned by the Cabinet

order No. 1630-C of 1955 dated 1-10-1955. In this classification 21 services have been mentioned; under each service, class and categories

have been enumerated which means that first there is a service, then there is a class in that service and in the class there are different categories. It

is not material for the purpose in hand how far with the change of times the classifications mentioned therein are applicable in their entirety. The

point is only about the scheme of this classification and its application to the Rules because the Rules which were issued by the Cabinet by means

of an order No. 962-C of 1956 dated 14-6-1956 seem to be based on this classification.

39. The contention of the petitioners has been that Rule 25(2) is an exception and Rule 25(3) is the general rule. On the other hand it is argued on

behalf of the State--though the learned Addl. Advocate General changed his stand about the interpretation of these sub-rules (2) and (3) as

pointed out by his Lordship, the Hon. Chief Justice, is that Sub-rule (2) is the general rule and Sub-rule (3) is the residuary Rule. I should not

hesitate to mention that the Rule is not very happily worded but when we read this Rule in conjunction with the definitions, in my opinion the sphere

and ambit of the two sub-rules is more or less clearly demarcated. As already remarked in a service there can be different classes and under the

classes there can be categories. In the categories themselves there are different grades. We have to keep in view that promotion means the

appointment of a member of service or class of a service, in any category or grade to a higher category or grade of such service or class.

Therefore promotion can be given to an employee in a particular service from

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one grade to Anr. , from one category to Anr. , or from one class to

Anr. in that service. There can be selection grades, selection categories or selection posts also. Promotion from one service to Anr. is not covered

by these Rules. Sub-rule (2) of Rule 25 according to me applies to cases where an employee is promoted from one class to Anr. or to a Selection

category or grade in any particular class or service. It is significant to note that the words 'grade' and 'category' simpliciter are not mentioned in this

sub-rule. Therefore, in my opinion, when there is a promotion from one grade to Anr. or from one category to Anr. , or from one post to Anr.

(which are not selection posts, selection categories or grades) Sub-rule (3) applies. The analysis would be therefore like this:

Merit and ability will be the guiding principles seniority coming in only to tilt the balance in favour of an employee when merit and ability are

otherwise equal in the following cases i.e. when promotions are:

(i) from one class of service to Anr. class in that service:

(ii) to a Selection post or Selection category or grade in any class or in any service: These promotions are further subject to the passing of any tests

that the Government may require, which means that even on the ground of merit and ability, an employee cannot be promoted to such posts unless

the person to be promoted possesses the qualifications prescribed for that job by the Government:

(iii) from one grade to Anr. , from one category to Anr. in the same class or service, have to be made on the basis of seniority. In such cases also

there are two riders (a) the promotion of an employee may be withheld as a penalty; (b) an employee may be given special promotion for his

conspicuous merit and ability.

This (in short) is how I understand and interpret these two sub-rules, which have a clear and separate ambit of application.

40. The next important point to be considered is how should merit and ability be assessed and whether the appointment made on the basis of merit

and ability ignoring seniority should be expressed and in what particular form or manner. There are authorities of this Court namely AIR 1957 J&K

8 and AIR 1957 J&K 31, wherein it has been held that the determination of merit and ability is the exclusive jurisdiction of the appointing authority.

In the first place the words 'merit and ability' are elusive concepts and the so-

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called selection by the appointing authority on this basis can be

arbitray, capricious and even mala fide. This point has been discussed at length by my Lord the Chief Justice. I have only to add that it is ho doubt

true that it is for the appointing authority to determine the merit and ability of his subordinates, and his assessment would be final. That assessment

cannot be disturbed by the Court as if sitting in appeal but what is required under the Rules is, as I would put it, that this subjective satisfaction

should be objectively expressed which in other words means that such an order should be self-speaking.

It cannot be laid down in any detail how the order should express itself as the circumstances of different cases may be entirely different; but

whatever the nature of the order it must indicate that the appointing authority has applied its mind to all aspects of the case while promoting a junior

over the head of a senior on the basis of merit and ability. About Sub-rule (2) the two conditions when seniority can be ignored are where the

promotion of an employee is withheld by way of punishment or anybody is given special promotion for his conspicuous merit and ability. In very

many cases, as I conceive, this should be the obverse and the reverse of the same proposition. If 'A' is promoted on the ground of conspicuous

merit and ability, it presumes that 'B' has been denied this right because there was something wrong about him and therefore, his promotion has

been withheld, withholding of a promotion under Rule 30(iii) is a punishment and under Rule 35 no such punishment can be inflicted upon a person

unless he is given an adequate opportunity of making a representation against such withholding. This matter also is difficult and no hard and fast

rules can be laid down in the abstract. Each case will depend upon its own merits. If the appointing authority has promoted somebody capriciously

or arbitrarily, characterising him a person of conspicuous merit and ability, and it is proved that the order was passed mala fide, it can be quashed

in proper proceedings in a Court of law.

41. The next point on which I wish to record a few words is the application of Article 16(1) of the Constitution of India, as applied to the State, to

matters of promotion. His Lordship, the Hon'ble Chief Justice has discussed this matter in detail but I think it requires a little further clarification.

Under Article 16(1):

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there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

It postulates equality of opportunity to all citizens in respect of any appointment of matters relating to employment which means that not only to the

initial appointment has every citizen an equal right, but, when one is appointed, in matters which relate to his employment he is not to be

discriminated against and he has to enjoy equality of opportunity. The words 'matters relating to employment' are very wide. It has been clearly laid

down in The General Manager, Southern Railway Vs. Rangachari, and reiterated in S.G. Jaisinghani Vs. Union of India (UOI) and Others, that this

Article covers even the case of promotion as the matter of promotion is as much a matter relating to employment as other matters such as salary,

periodical increments, leave, gratuity, pension, age of superannuation etc., etc. Therefore, I need not quote the authorities as that has been done by

my Lord, the Hon'ble Chief Justice in this behalf. The conclusion I would draw from these authorities is that if the employees are similarly situated

they cannot be discriminated against in the matter of promotion also. But where the jobs are such as are covered by Sub-rule (2) of Rule 25 or

where the promotion of a particular employee is withheld as a matter of punishment or Anr. person is given promotion for his conspicuous merit

and ability, there can be no infringement of his right of equality to promotion. In such cases the person by-passed can make no grievance against a

promotion on the ground of mere seniority if the above conditions are fulfilled.

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