
(2010) 08 GAU CK 0035

In the Gauhati High Court

Case No : W.A. No"s. 39 (K) and 40 (K) of 2005 in W.A. No. 39 (K) of 2005

N. Hangsing, N.C.S. and Others

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

Date of Decision : 13-08-2010

Acts Referred:

Conduct of Departmental Examination Rules, 1970 — Rule 19, 20
Constitution of India, 1950 — Article 309

Citation : (2011) 6 GLR 648

Hon'ble Judges : Brojendra Prasad Katakey, J;B.D. Agarwal, J

Bench : Division Bench

Advocate : B.N. Sarma, Mr. T. Koza and Mr. A. Zho, for the Appellant; Y. Longkumar, R. Iralu, K.L. Solo and Mr. L. Belho, for the Respondent

Final Decision : Allowed

Judgement

B.P. Katakey, J.—These appeals by the respondent Nos. 3 to 6 in WP(C) Nos. 83(K)/2003 and 70(K)/2004 are directed against the common judgment and order dated 23rd august, 2005 passed by the learned Single Judge allowing the writ petitions by setting aside the orders of officiating promotion of the appellants given with effect from a date when they had not cleared the departmental examination in higher standard as stipulated in the Office Memorandum dated 16th August, 1990 issued by the Secretary to the Government of Nagaland, Department of Personnel and Administrative Reforms. Since both the appeals arise out of a common judgment and order, they are taken up together for hearing and disposal.

2. The facts relevant for the purpose of disposal of both the appeals, which are not in dispute, may be noticed as under :

The appellants, and the writ petitioners were selected by the Nagaland Public Service Commissioner ("the Commission") for appointment in Class-II post, and accordingly they were appointed as Circle Officer in the year 1982, initially on probation under rule 14 of the Nagaland Civil Service (Class-II) Rules 1967 ("the

Class-II Service Rules") which requires a probationer to undergo training that may be prescribed from time-to-time by the Governor and to pass the departmental examination conducted by the Commission. In the merit list prepared by the Commission for appointment as Circle Officers, the names of the appellants were placed above the writ petitioners. While the appellants and the writ petitioners, namely, Smt. Scahopra Vero, Sri Mikha Lomi passed the required departmental examination in lower standard completely on 20th July, 1983 the writ petitioner namely Smt. Angau Ehietung) (Smt. Angau I Thou) cleared such examination on 25th January, 1984. The appellants were thereafter confirmed in Nagaland Civil Service (Class-II) with effect from 8th January, 1984, so also the writ petitioners namely Smt. Sachopra Vero and Sri Mikha Lomi. The other writ petitioner Smt. Angau I Thou, however, was confirmed in the said service with effect from 25th January, 1984. The dates of passing the departmental examination and the dates of their confirmation in the service are reflected in the tentative seniority list of the NCS Class-II officers as on 1st June, 1984 published by the Joint Secretary to the Government of Nagaland, Department of Personnel and Administrative Reforms vide office memorandum dated 8th June, 1984. Such confirmation was made, as required under rule 16 of the Class-II Service Rules. Sometime in the year 1985-86, a decision was taken by the Government of Nagaland to merge the NCS Class-II service with the NSC Class-I service, and accordingly the Chief Secretary issued the order dated 18th March, 1986 upgrading all the existing posts of Circle Officer, which is NCS Class-II Gazetted post, to Extra Assistant Commissioner, which is a Class-I Junior Grade post, with effect from 18th December, 1985. Consequent upon such decision, the Class-II Service Rules was repealed. An office memorandum dated 16th August, 1990 was, thereafter, issued by the Secretary to the Government of Nagaland, Department of Personnel and Administrative Reforms to the effect that the officers who are already confirmed in Class-I Junior Grade after passing the departmental examination in lower standard but have not yet passed the departmental examination in higher standard would not be considered for promotion to the higher grade, or for regularisation of their officiating promotion to unless they pass the departmental examination in higher standard. By the order dated 18th February, 1993 the appellant Nos. 1 and 2 were given the Junior Grade (Higher Scale) with effect from (1st October, 1990). By another order dated 21st March, 1991 the appellant Nos. 3 and 4, as well as the writ petitioners were given the Junior Grade (Higher Scale) with effect from (15th March, 1991). The appellants were regularised in Junior Grade (Higher Scale) vide order dated 18th February 1993. After the upgradation to Class-I service in Junior Grade, the writ petitioners passed the departmental examination in higher standard in November 1990 and July 1991. The appellants passed the said departmental examination on 31st July, 1997. The writ petitioners were, thereafter, given the officiating promotion to the Senior Grade vide Notification dated 31st January, 1997 issued by the Chief Secretary, with effect; from 13th January, 1997. By the Notification dated 20th October, 1997 issued by the Chief Secretary, the appellants were given the officiating promotion to the Senior

Grade with effect from 4th October, 1997, which, however, was subsequently modified by another Notification dated 16th March, 1998 issued by the Secretary to the Government of Nagaland in the Personnel and Administrative Reforms Department, giving effect of such promotion from 13th January, 1997, that is the date when the writ petitioners were given the officiating promotion. By the order dated 14th March, 2003, the appellant No. 1 was promoted to Selection Grade on officiating basis with effect from 3rd March, 2003. The appellant Nos. 2 and 3 were promoted to the said Grade on officiating basis with effect from 16th December, 2003 vide order dated 2nd January, 2004 and the appellant No. 4 and the writ petitioners by the order dated 2nd January, 2004 were promoted on officiating basis to the said grade with effect from 1st January, 2004.

3. The writ petitioners, namely, Smt. Sachopra Vero and Sri Mikha Lomi filed WP(C) No. 83(K)/2003 challenging the Notification dated 21st March, 1991 issued by the Chief Secretary giving the appellant Nos. 3 and 4 higher scale in Junior Grade; the Notification dated 18th February, 1993 regularising the appellants in Junior Grade (Higher Scale) with effect from 1st October, 1990 and 15th March, 1991 respectively; and the Notification dated 16th March, 1998 issued by the Secretary to the Government of Nagaland in the Personnel and Administrative Reforms Department whereby and where under the officiating promotion of the appellants to the Senior Grade was given with effect from 13th January, 1997 by modifying the earlier Notification dated 20th October, 1997. In WHO No. 70(K)/2004, the writ petitioner Smt. Angau I Thou, apart from the aforesaid Notifications, also challenged the Notification dated 14th March, 2003 issued by the Chief Secretary giving officiating promotion to the appellant No. 1 from Senior Grade to Selection Grade with effect from 3rd March, 2003, and also the Notification dated 2nd January, 2004 issued by the said authority promoting the appellant Nos. 2 and 3 from Senior Grade to Selection Grade with effect from 16th December, 2003, and of the event date, giving officiating promotion to the appellant No. 4 to Selection Grade with effect from 1st January, 2004.

4. The learned Single Judge, upon hearing the learned counsel for the parties and on perusal of the materials made available, by the judgment and order dated 23rd August, 2005 while refusing to interfere with the promotion of the present appellants to Junior Grade (Higher Scale) made vide order dated 18th February, 1993 with effect from 1st October, 1990, insofar as the appellant Nos. 1 and 2 are concerned, and made vide order dated 21st March, 1991 with effect from 15th March, 1991, insofar as the appellant Nos. 3 and 4 are concerned, as well as their regularisation in Junior Scale (Higher Scale) made vide order dated 18th February, 1983, has, however, interfered with the order dated 16th March, 1998 passed by the Secretary to the Government of Nagaland in the Personnel and Administrative Reforms Department, whereby and where under the appellants were promoted on officiating basis to Senior Grade with effect from 13th January, 1997, by holding that passing of the departmental examination in higher standard being the condition for such promotion, they cannot be given promotion with effect from a date when they had not cleared such departmental

examination, thereby restoring the Notification dated 20th October, 2007 issued by the Chief Secretary giving the officiating promotion to the appellants with effect from 4th October, 1997. The learned Single Judge further directed the State respondents to constitute the departmental promotion committee for the purpose of consideration for regular promotion of the appellants, the writ petitioners and others to the Senior Grade, as, such promotions were given on officiating basis and to make regular promotion thereafter. Hence, the present appeals.

5. We have heard Mr. B.N. Sarma, learned senior counsel for the appellants; Mr I. Iralu, learned senior counsel for the writ petitioners/respondents in the appeals; and Ms. Y. Longkumer, learned state counsel, appearing for the official respondents.

6. It has been submitted by the learned counsel for the appellants that they were confirmed under the Class-II Service Rules, and after their confirmation they were upgraded to Class-I Service with effect from 18th December, 1985, after the abolition of Class-II Service and as such, they were substantively appointed in Class-I Service in view of rule 16(1) of the Nagaland Civil Service (Class-I) Rules, 1967 ("the Class-I Service Rules"), which provides that the Nagaland Civil Service Class-II officers recruited to Class-I Service and who have successfully undergone such training and passed all the departmental examinations as prescribed for service would be substantively appointed to the service. The learned counsel submits that since the appellants, who were in Class-II service had undergone the required training and passed the departmental examination, as required under rule 20 of the Rules for Conduct of Departmental Examination, 1970, as amended in 1977 ("1970 Rules") while in Class-II service, they were appointed to Class-I service on their up-gradation, and, hence, the provision contained in rule 18 of the Class-I Service Rules relating to the confirmation in Class-I service does not apply, which according the learned counsel, applies to a probationer appointed under the Class-I Service Rules, and not the appellants, they having been substantially appointed to Class-I service. The learned counsel, therefore, submits that they were entitled to be considered for promotion to the Senior Grade under Rule 25 of the Class-I Service Rules, without there being any requirement of passing the higher standard of departmental examination as is required under rule 19 of the 1970 Rules, the appellants having already been confirmed in Class-I Junior Grade.

7. It has further been submitted by the learned counsel that even assuming that the departmental examination in higher standard is required to be passed by the appellants, who having passed the said departmental examination subsequent to the writ petitioners, their seniority in Class-I service would be restored in view of sub-rule (3) of rule 19 of the Class-I Service Rules, which provides that the original seniority position would be restored on the officers' confirmation subsequently in the same grade. According to the learned counsel, at the time of passing the higher standard of departmental examination, the appellants as well

as the work petitioners were in the same grade, that is, Class-I Junior Grade and the upgradation to the Junior Grade (Higher Scale) being not the promotion as stipulated under the Class-I Service Rules, the appellants' seniority over the petitioners would be restored, as all of them at the time of parsing the departmental examination were in Class-I Junior Grade. According to the learned counsel, in any case, since the 1970 Rules is not a statutory rules, it cannot override the provisions of Class-I Service Rules framed in exercise of the powers conferred by the proviso to article 309 of the Constitution of India, which does not require passing of departmental examination in higher standard for the purpose of promotion. It has further been submitted that since the regularisation of the appellants in Class-I Junior Grade has not been interfered with by the learned Single Judge, against which no appeal has been preferred by the writ petitioners, they became entitle for promotion to the Senior Grade under the Class-I Service Rules, and the requirement of passing the departmental examination in higher standard cannot be imposed on the appellants in the matter of promotion from Junior Grade to Senior Grade. The learned counsel, therefore, submits that no illegality has been committed by the authority in giving the officiating promotion to the appellants in Senior Grade with effect from the date when such promotion was given to the writ petitioners. It has further been submitted that the appellants as well as the writ petitioners were given the officiating promotion to Senior Grade and thereafter to Higher Selection Grade on regular basis during pendency of the writ appeals, and hence now their seniority has to be determined on the basis of their promotion to Higher Selection Grade.

8. Mr. Iralu, learned senior counsel for the writ petitioners, per contra, supporting the judgment and order passed by the learned Single Judge, has submitted that since rule 19(iii) of the 1970 Rules provides that an officer will not be eligible for confirmation until he/she passes all departmental examinations as required under sub-rule (i), which stipulates that the officers of Class-I Service are compulsorily required to pass the Law Part-I and Part-II in both lower and higher standard, the appellants cannot be treated as confirmed in Class-I Junior Grade and as such, they cannot be considered for promotion to the Senior Grade, as rule 25 of the Class-I Service Rules requires consideration of the confirmed members of the Junior Grade only for such promotion. According to the learned counsel, it is an admitted position of fact that while the writ petitioners passed the higher standard of departmental examination between November 1990 and July 1991, the appellants passed such examination on 31st July, 1997 and, therefore, they cannot be promoted to the Senior Grade with effect from 13th January, 1997, on which date they were not qualified for consideration for such promotion, having not cleared the higher standard of departmental examination. Learned counsel further submits that the provision contained in sub-rule (3) of rule 19 of the Class-I Service Rules relating to restoration of seniority on confirmation subsequent to the passing of the departmental examination in the same grade is not applicable in the instant cases as the appellants as well as the writ petitioners were promoted from Junior Grade to Junior Grade (Higher Scale)

between 1991 and 1993 and the appellants had not cleared the required departmental examination in higher standard prior to such promotion to the Junior Grade (Higher Scale). To buttress his argument that the appellants having not passed the departmental examination in higher standard on 13th January, 1997, as is required under the 1970 Rules, which they have passed on 31st July, 1997, they were not qualified to be considered for promotion to the Senior Grade under rule 25 of the Class-I Service Rules on that date and as such, the order dated 16th March, 1998 passed by the Secretary to the Government of Nagaland in the Personnel and Administrative Reforms Department giving retrospective promotion to the appellants from a date when they were not qualified, is illegal and contrary to the Class-I Service Rules, the learned counsel has placed reliance on a decision of the Apex Court in *Puran Das Vs. Union of India (UOI) and Others*, .

9. Ms. Y. Longkumer, learned State counsel, appearing for the official respondents, has submitted that in view of sub-rule (3) of rule 19 of the Class-I Service Rules, the appellants' seniority in Class-I Junior Grade would be restored, as soon as they cleared the required departmental examination. In the cases at hand, according to the learned State counsel, though the appellants passed the departmental examination in higher standard on 31st July, 1997 and the writ petitioners between November 1990 and July 1991, their seniority in Class-I Junior Grade would be restored. According to the learned state counsel, the date of up-gradation of the appellants as well as the writ petitioners to Class-I Junior Grade being the same, that is, 18th December, 1985, their seniority in the said grade shall have to be determined in accordance with the Class-II Service Rules which provides for determination of such seniority on the basis of the position in the merit list prepared by the Commission for the purpose of recruitment to Class-II Service. The learned State counsel further submits that as the appellants had been placed above the writ petitioners in the merit list, they would be senior to the writ petitioners in Class-I Junior Grade, as soon as the appellants have cleared the required departmental examination and as such the Government had rightly promoted the appellants to the Senior Grade on officiating basis with effect from the date when such officiating promotion was given to the writ petitioners.

10. We have considered the submissions of the learned counsel for the parties and also perused the pleadings, including the impugned judgment and order passed by the learned Single Judge. As noticed above, the learned Single Judge has refused to interfere with the regularisation of the appellants in Class-I Junior Grade though such regularisation was under challenge on the ground that they have not passed the departmental examination in higher standard as is required under the 1970 Rules.

11. Before adverting to the rival contentions of the parties, we may notice some of the relevant provisions of Class-II Service Rules, Class-I Service Rules, and the 1970 Rules.

12. The Class-II Service Rules, which has been repealed with effect from 18th December, 1985, on abolition of Class-II Service, and up-gradation of all the Class-II Officers to Class-I under Class-I Service Rules vide order dated 18th March 1986, provides, amongst others, for recruitment in the Class-II Service, as well as confirmation in service and also the determination of seniority. Rule 5 of Class-II Service Rules provides for recruitment by competitive examinations. Rule 13 provides that all appointments to the service shall be made by the Governor and in the order the names appear in the merit list prepared and forwarded by the Commission. Rule 14 provides that a person recruited directly to the service shall be on probation for a period of 2 years which can, however, be extended for a further period of not exceeding 2 years. It also provides that every probationer shall, during the period of probation, successfully undergo such training as the Governor may from time-to-time prescribe, and shall appear and pass departmental examination conducted by the Commission. Rule 16 provides for confirmation of the probationer in service, and it stipulates that where the probationer has completed the period of probation to the satisfaction of the Governor and if he passed the departmental examination completely and has successfully undergone such prescribed training, and also considered otherwise fit for confirmation by the Governor, such officer shall be confirmed in service. Rule 17 stipulates how the seniority in Class-II Service is to be determined. Sub-rule (1) thereof provides that in case of direct recruit, the seniority of the members of the service shall be determined according to their position in the merit list prepared by the Commission, provided the members joined their service within 30 days from the date of issuance of the appointment order. Such joining, however, can be extended by the Governor for a reasonable period of time depending on the circumstances and in the interest of public service and on the grounds stipulated in the proviso thereto.

13. Class-I Service Rules has been framed in exercise of the powers conferred by the proviso to article 309 of the Constitution of India regulating recruitment and the condition of service of the persons appointed in the NCS Class-I Service. Rule 3 of the said Rules provides various designations in Junior Grade, Senior Grade, Higher Selection Grade, and Special Selection Grade. Rule 4 provides the different sources of recruitment to Class-I Service, which includes recruitment by promotion of confirmed members of the NCS Class-II Service. Rule 8 requires preparation of a combined list for recruitment by promotion and by selection. Rule 9 stipulates the strength of service. Rule 15 provides for appointment to the service. Rule 16 provides for such appointment on probation for a period of 2 years, however, with the exception that the members of the NCS Class-II recruited to Class-I Service, who have already successfully undergone the required training and passed all the departmental examinations as prescribed for the service shall be substantively appointed to the service. The term "service" has been defined in clause (h) of rule 2 as the Nagaland Civil Service Class-I. Rule 18 provides for confirmation in service. Rule 19 provides how the seniority in the service is to be determined. Rule 25 provides for promotion to the higher

grade. The strength of service and the nature of post in Class-I Service are given in Schedule-I to the said Rules.

14. The Class-I Service Rules has undergone a number of amendments from time-to-time. The relevant Rules as stood on the date of the promotion of the appellants to the Senior Grade are reproduced below : -

3. Designation :

3(a) The members of the Nagaland Civil Service (Class-I) while holding the post in the Junior Grade shall be designated as Extra Assistant Commissioner, Block Development Officer, in-charge of Tribal Block, Sub-Divisional Officer, Under Secretary to the Government and such other designation which Governor will decide from time-to-time of the posts, which shall be included in the Nagaland Civil Service (Class-I) Junior Grade.

(b) The members of the Nagaland Civil Service (Class-I) while holding the post of the Senior Grade, shall be designated as Additional Deputy Commissioner, Deputy Secretary to the Government and such other designation which the Governor will decide from time-to-time as the case may be.

(c) The members of the Nagaland Civil Service (Class-I) while holding the post in the Selection Grade shall be designated as Joint Secretary to the Government and such other designation which the Governor will decide from time-to-time as the case may be.

(d) The member of the Nagaland Civil Service (Glass-I) while holding the posts in the Higher Selection Grade be designated as Additional Secretary to the Government and such other designation which the Governor will decide from time-to-time as the case may be.

(e) The members of the Nagaland Civil Service (Class-I) while holding the posts in the Special Selection Grade shall be designated as Secretary to the Government.

4. Recruitment : Recruitment to the service after the commencement of these Rules shall be by the following methods, namely :

(a) By a competitive examination conducted by the Commission. In allotting such vacancies, Government may reserve a certain percentage of thereof to local tribal candidates as may be specified before the holding of examination.

(b) By promotion of confirmed members of the Nagaland Civil Service (Class-II), and

(c) By selection in special cases from among persons other than members of the Nagaland Civil Service (Class-II) serving under the Government of Nagaland:

Provided that the number of persons recruited under clause (a) shall not exceed 40% of the total number of vacancies to be filled in a year and that the persons recruited under clause (b) shall not exceed 50% of the total number of vacancies

to be filled in a year and persons recruited under clause (c) shall not exceed 10% of the total number of vacancies to be filled a year.

8 Preparation of a combined list for recruitment by promotion and by selection :

(1) The committee shall consolidate the list prepared under sub-rule (d) of rule 6 and under sub-rule (2) of rule 7 in order of preference.

(2) On receipt of the list as aforesaid, the Governor shall forward the same to the Commission together with the character rolls and other relevant papers.

(3) The Commission shall consider the list prepared by the Committee along with the other documents received from the Governor or on receipt of other documents as may be called for by the commission, and unless it considers any change necessary, approve the list.

(4) If the Commission considers it necessary to make any change in the list received from the Governor, the Commission shall inform, the Governor of the changes proposed and after taking into account the comments, if any, of the Governor, may approve the list finally with such modifications, if any, as may in its opinion, be just and proper.

(5) The list as finally approved by the Commission shall be forwarded to the Governor along with all the papers received under sub-rule (2) and sub-rule (3) if any.

9. Strength of the service. - (1) The strength of the service and nature of posts therein shall be as determined by the Governor from time-to-time.

(2) On the commencement of these Rules, the strength of the service and the nature of posts therein shall be as given in Schedule I.

15. Appointment to the Service. - (1) All appointment to the service shall be made by the Governor and shall be notified in the Official Gazette.

(2) A person shall join within 30 days from the date of issue of the order of appointment in case of direct recruit failing which and unless the Governor extends the period, which shall not exceed two months, the appointment shall be cancelled.

(3) Subject to the provisions of sub-rule (c) and (d) of rule 5, appointment under clause (a) of rule 4 shall be made in the order, the names appear in the list prepared and forwarded by the Commission.

(4) Appointment under clause (b) and (c) of rule 4 shall be made in the order the names appear in the list prepared by the Committee under Rule 8 and approved by the Commission.

16. Probation. - (1) All persons recruited direct to the service shall be on probation for a period of two years provided that a member of the Nagaland Civil Service (Class-II) so recruited and who has already successfully undergone such

training and passed all the departmental examination as prescribed for the service shall be substantively appointed to the service :

Provided that a member of the Nagaland Civil Service (Class-II) recruited to the service who has not passed the departmental examinations completely and successfully and such training prescribed for the service shall be on probation up to the date of his passing of departmental examination completely and successfully undergoing the said training for two years, whichever is earlier :

Provided further that all persons recruited to the Service by Selection in accordance with clause (e) of rule 4 of the said rules shall be on probation for a period of one year.

(2) Every probationer shall during the period of probation successfully undergo such other training as the Governor may from time-to-time prescribe and shall appear at and pass the departmental examinations conducted by the Commission.

18. Confirmation. - Where a probationer has completed his period of probation to the satisfaction of the Governor he shall be confirmed in the service if-

(a) He has passed the departmental examination completely and has successfully undergone the prescribed training.

(b) He is considered otherwise fit for confirmation by the Governor :

Provided that where a probationer is not given opportunity for undergoing the prescribed training during the period of probation, his confirmation shall not be held up for reasons of not successfully undergoing the training; but such a probation shall, when called upon by the Governor and opportunity given, successfully undergo the said training failing which he shall be liable to removal from service unless the Governor allows him other chances.

(c) A member of the Nagaland Civil Service (Class-I) who has rendered 15 completed years of continuous service in the Nagaland Civil Service (Class-II) and (Class-I) cadres or continuous gazetted post in other service of the Senior Grade time scale, of the service before these Rules came into force, shall be deemed to have been confirmed against such Senior Grade in the cadre.

(d) The Officers appointed to the Nagaland Civil Service (Class-I) before those Rules came into force shall be confirmed on crossing the first stage of the efficiency bar in their respective grades; but they will be required to appear in such prescribed departmental examinations and training before they are allowed to cross the second stage of the efficiency bar in the same grade. This departmental examination shall not apply to those officers promoted to the Senior Grade of the Nagaland Civil Service (Class-I).

(e) No member of the service other than those Governor by clauses (c) and (d) of rule 18 shall be confirmed in any grade of the service unless the member successfully pass such departmental examination conducted in any of the Naga

languages approved by the Government for this purpose. The member of the service shall not be entitled to his usual increment in time scale of pay of his grade vide rule 23(3) if he fails to pass in the departmental examination conducted in any of the Naga languages approved for this purpose except under Rule 23(1).

19. Seniority. - (1) Seniority of members of the service shall be determined according to the order of merit in the lists prepared under sub-rule (c) of rule 5 in the case of direct recruits or approved under rule 8, if the member joint their appointment within 30 days from the date of issue of the order of appointment. Thereafter, their seniority shall be determined in accordance with the date of joining irrespective of merit list:

Provided that in case of serving member under the Government of Nagaland is prevented from joining within the said period of 30 days by circumstances of public nature of reasons beyond his control, the Governor may extend it for a reasonable period of time depending on the circumstances of public service.

(2) Members of the service recruited in a year under clause (b) of rule 4 shall be senior to members recruited in the same year and in the same batch under clause (a), (b), (c) of rule 4.

(3) If the confirmation of a member of the service is delayed beyond two years of probation on account of his failure to qualify for such confirmation, he shall lose his position in the order of seniority vis-s-vis such of his juniors as may be confirmed earlier than he.

25. Promotion to senior grade time scale. - (1) A member of the service in the Junior Grade time scale shall be eligible for promotion to the Senior Grade time scale. But no member of the service shall be promoted unless he has served in the Junior Grade time scale for a minimum period of 3 years and Governor is satisfied with his ability, integrity and character. Selection to the Senior Grade time scale shall be made only from the confirmed members the Junior Grade of the same service.

(2) The appointment to the Senior Grade time scale shall be made by the Governor from a list of suitable members of the service, as prepared from time-to-time and reviewed as and when necessary, by the selection Board consisting of the following namely : -

(a) Chairman, Nagaland Public Service Commission, Member of the Nagaland Public Service Commission. - Chairman or

(b) Chief Secretary to the Government - Member

(c) The Commissioner, Nagaland - Member

(d) The Secretary/Joint Secretary, - Member Personnel and Administrative Reforms Department.

3. The appointment to the Selection Grade time scale shall be made by the Governor on the recommendation of the Selection Board as mentioned in the sub-rule (2) from a list of suitable members of the Service of the Senior Grade time scale who have served in the Senior Grade for a minimum period of five years and are confirmed in the Nagaland Civil Service (Class-I) on the basis of merit cum-seniority.

4. The appointment to the Higher Selection Grade shall be made by the Governor on the recommendation of the Selection Board as mentioned in sub-rule (2) from a list of suitable members of the Service in the Selection Grade and who have served in the Selection Grade for a minimum period of 3 years and are confirmed in the NCS (Class-I) on the basis merit-cum-seniority.

5. The appointment to the Special Selection Grade shall be made by the Governor on the recommendation of the Selection Board as mentioned in sub-rule (2) from a list of suitable members of the service of the Higher Selection Grade who have served in the Higher Selection Grade for a minimum period of 2 years and are confirmed in the NCS (Class-I) on the basis of merit-cum-seniority.

15. Schedule-I to the Class-I Service Rules, as amended by the Nagaland Civil Service (13th Amendment) Rules 1983, and as stood on the date when the appellants and the writ petitioner were given the Junior Grade (Higher Scale) is reproduced below : -

SCHEDULE I RULE 9(2)

1.

Special Selection Grade Post (Secretary to the Government)

1

2.

Higher Selection Grade Posts (Addl Secretary to the Government)

2

3.

Selection Grade

8

(a) Joint Secretary to the Government

5

(b) Director of Land Records

1

(c) Joint Director, Administrative Training Institute

1

(d) Controller of Printing and Stationery

1

4.

Senior Grade Posts

18

(a) Addl Deputy Commissioner

10

(b) Deputy Secretary

8

5.

Junior Grade posts

58

(a) Sub-Divisional Officer

18

(b) Under Secretary

8

(c) Extra Assistant Commissioner

8

6.

Deputation Reserve at 10%

8

7.

Leave Reserve at 10%

8

8.

Training Reserve at 10%

8

Total

111.

The said Schedule-I was further amended by the Nagaland Civil Service (17th Amendment) Rules 1996, which came into force with effect from the date of its Notification dated 12th November 1996. The amended Schedule-I is reproduced below :

SCHEDULE I RULE 9(2)

1.

Special Selection Grade

3

(i) Secretary to the Government.

3

2.

Higher Selection Grade

7

(i) Additional secretary to the Government

6

(ii) Director of Printing and Stationery

1

3.

Selection Grade

16+7

Vide PAE/NCS pt. dated 12.11.1996.

(i) Joint Secretary to the Government

10

(ii) Director of Youth Resources and Sports

1

(iii) Joint Chief Electoral Officer

1

(iv) Director of Lotteries

1

(v) Commissioner of Labour

1

(vi) Director of Land Records and Revenue

1

(vii) Additional Director of A.T.I.

1

4.

Senior Grade

41

(i) Deputy Secretary to the Government

16

(ii) Additional Deputy Commissioner

22

(iii) D.R.Cs Calcutta, Delhi, Guwahati

3

5.

Junior Grade (Higher Scale)

48

(i) Under Secretary to the Government

20

(ii) Sub-Divisional Officer (Civil)

23

(iii) Border Magistrate

4

(iv) Revenue Officer, Kohima

1

6.

Junior Grade

99

(i) Extra Assistant Commissioner

99

7.

Total (1, 2, 3, 4, 5 and 6)

214

8.

Deputation Reserve (10% of 1, 2, 3 and 4)

13

9.

Leave and Training Reserve (10% of 7)

21

10.

Grand Total (7, 8 and 9)

248

16. The 1970 Rules for the conduct of departmental examination was framed by the Governor prescribing various departmental examinations for the officers of Indian Administrative Service, Nagaland Civil Service, both, Classes-I and II, which came into effect from the date of Notification dated 9th May, 1970. Section IV of the said Rules relates to the members of the Nagaland Civil Service Class-I and Class-II.

17. Rule 19(1) of the said Rules requires the officers of the Nagaland Civil Service Class-I to pass, amongst others, Law Part-I and Part-II both in lower and higher standard compulsorily. Sub-rule (iii) of the said Rule provides that an officer will not be eligible for confirmation until he/she passes all departmental examinations mentioned in sub-rule (i) and also obtains a certificate as stipulated in sub-rule (ii) if he had been deputed for training in survey and settlement either within the period of probation or before he/she passed the examination as mentioned in sub-rule (i). For better appreciation, Rule 19 is quoted below :

19. Special Rules framed affecting Members of the Nagaland Civil Service Class-I.

(i) Officers of the Nagaland Civil Service Class-I, are compulsorily liable to pass the following examinations : -

(a) Law Parts I and II by Lower and Higher Standard;

(b) Dialects examinations as prescribed in Title 10; and

(c) Accounts Examination.

(ii) They will also be required to undergo the training in Survey and Settlement as and when deputed to the course, pass the Examination that may be prescribed to test their proficiency in those subjects and obtain a certificate of

proficiency.

(iii) An officer will not be eligible for confirmation until he/she passed all Departmental examinations mentioned in sub-rule (i) and also obtains the certificate mentioned in sub-rule (ii) if he had been deputed to the training in Survey and Settlement either within the period of prohibition or before he/she passed the examinations mentioned in sub-rule (i). Provided that, where an officer has intimated in intention to appear in an examination and (i) he/she is unable to appear as he/she is not spared by the Government owing to any emergency or (ii) the entire examination is abandoned or postponed by more than three months, the benefit of confirmation shall be given to the officer retrospectively if he comes out completely successful in the next examination in all subjects in which he is unable to pass :

Provided that the Government may, by general or special orders, exempt an officer from passing any one or more of the examinations mentioned in sub-rule (i):

Provided further that Government may, by general or special order temporarily except an officer passing the Departmental Examinations prescribed in sub-rule (i) and confirm him in the service and allow him to draw his increments.

18. Rule 20 of 1970 Rules, which concerns the members of the Nagaland Civil Service Class-II, requires the officers of the NCS Class-II to pass, apart from others, Law Parts-I and II in lower standard. Sub-rule (iii) of the said Rule provides that an officer will not be eligible for confirmation until he/she passed all the departmental examinations mentioned in sub-rule (i) and also obtains a certificate mentioned in sub-rule (ii) if he/she had been deputed to the training in a survey and settlement either within the period of probation or before he/she passes the examination mentioned in sub-rule (i). Rule 20 of the said Rules is reproduced below : -

20-Special Rules affecting Members of the Nagaland Civil Service, Class-II.

(i) Officers of the Nagaland Civil Service Class-II are compulsorily liable to pass the following examinations : -

(a) Law parts I and II by Lower standard

(b) Dialects Examination as prescribed in rule 10 and

(c) Accounts Examination.

(ii) They will also be required to undergo training in Survey and Settlement as and when deputed to the course, pass the Examination that may be prescribed to test their proficiency in these subject and obtain a certificate of proficiency.

(iii) An officer will not be eligible for continuation until he/she passed all the departmental examinations mentioned in Sub-rule (i) and also obtain a certificate mentioned in Sub-rule (ii) if he/she has been deputed to the training

in Survey and Settlement either within the period of probation or before he/she passes the examination mentioned in sub-rule (i) :

Provided that, wherein officer has intimated his/her intention to appear in an examination and (i) he/she is unable to appear as he/she is not spared by the Government owing to any emergency or (ii) the entire examination is abandoned by more than three months, the benefit of confirmation shall be given to the officer retrospectively is if he/she comes out completely successful in the next examination in all the subjects in which he/she is liable to pass :

Provided Government may, by general or special orders, exempt an officer from passing any one or more of the examination mentioned in Sub-rule (i) :

Provided further that Government may, by general or special order, temporarily exempt an officer from passing the Departmental examination prescribed in sub-rule (i) and confirm him/her in the service and allow him to draw his increments.

19. As noticed above, it is not in dispute that the appellants and the writ petitioners were initially selected in a competitive examination conducted by the Commission for recruitment to Class-II Service by direct recruitment and in the merit list prepared for that purpose the appellants were placed above the writ petitioners. The seniority of the appellants" vis-a-vis the writ petitioners in the Class-II Service was, therefore, required to be determined in accordance with rule 17 of Class-II Service Rules. Both the appellants and the writ petitioners had undergone the prescribed training and also passed the departmental examination in lower standard, while they were in Class-II Service, and accordingly they were confirmed in Class-II Service, as required under rule 16 of the Class-II Service Rules. The appellants having been placed above the writ petitioners in the merit list prepared by the Commission for recruitment to Class-II Service, they are senior to the writ petitioners, in view of the provisions contained in sub-rule (1) of rule 17 of the Class-II Service Rules, all of them having joined within 30 days from the date of issuance of their orders of appointment.

20. Pursuant to the decision of the Government of Nagaland for abolition of the Class-II Service, all the 80 members of the Class-II Service, including the appellants and the writ petitioners, were upgraded to Class-I Service in the Junior Grade vide order dated 18th March, 1986 with effect from 18th December, 1985. By the said order, the Class-II Service Rules had also been repealed. The appellants as well as the writ petitioners, therefore, on and from 18th December, 1985 became the member of the Class-I Service in Junior Grade and as such, from that date they will be governed by the provisions of Class-I Service Rules.

21. Rule 4 of the Class-I Service Rules provides for recruitment to Class-I Service from 3 sources, namely - (i) by competitive examination, i.e., by direct recruitment; (ii) by promotion of confirmed members of the NCS Class-II; and (iii) by selection in special cases from amongst the persons, other than the members of the Class-II Service serving under the Government of Nagaland. The appellants as well as the writ petitioner were recruited in Class-I Service by

giving en-block promotion of all the members of the Class-II Service, though described as up-gradation, vide order dated 18th March, 1986, with effect from 18th December, 1985. Under rule 16 of Class-I Service Rules, the persons recruited to the Class-I Service shall be on probation for a period of 2 years. However, a relaxation has been given in respect of the members of the Class-II Service recruited to Class-I Service, who have successfully undergone such training and passed all the departmental examinations as prescribed in the service. Such members of the Class-II Service, subject to undergoing such training and passing of such departmental examination shall be appointed substantively to the Service. Under rule 16, a probationer is to be confirmed in Class-I Service subject to passing all the departmental examinations completely and subject also to successfully undergoing the prescribed training, apart from his fitness for confirmation.

22. Rule 19 of the 1970 Rules, as noticed above, requires the members of the Class-I Service to pass the Law Parts-I and II, both in lower and higher standard, and unless an officer passes such departmental examination, he or she shall not be eligible for confirmation. Rule 20 of the said Rules requires a member of the Class-II Service to pass Law Parts-I and II departmental examination of lower standard and only in that event such member shall be entitled for confirmation in Class-II Service.

23. Reading both the provisions in rule 16 of Class-I Service Rules and rule 19 of the 1970 Rules together, it transpires that the members of Class-II Service recruited to Class-I, who have passed the departmental examination in Law Parts-I and II in both the lower and higher standard shall be substantively appointed to the service, as the term "service" occurs in sub-rule (1) of rule 16 of the Class-I Service Rules has been defined in rule 2(h) of the said Rule as NCS Class-I service. The contention of the learned counsel for the appellants that as the appellants while in Class-II Service passed all the departmental examinations and the Law Parts-I and II in lower standard they were substantively appointed in Class-I Service, by virtue of rule 16(1) of the Class-I Service Rules cannot, therefore, be accepted. The appellants having admittedly not passed the departmental examination in Law Parts-I and II in higher standard, which is the requirement under the 1970 Rules in respect of the members of the Class-I Service, they cannot be treated as appointed substantively in Class-I Service on their up-gradation, and they are required to be considered for confirmation in Class-I service only after passing of such departmental examination in higher standard.

24. Sub-rule (2) of rule 16 of the Class-I Service Rules requires every probationer to successfully undergo such other training as the Governor may from time-to-time prescribe and making it incumbent on such probationer to appear at and to pass departmental examination conducted by the Commission during the period of probation. Since the Class-I Service Rules provides for passing of the departmental examination, as prescribed from time-to-time, for

the purpose of confirmation in Class-I Service, the contention of the learned counsel for the appellant that the 1970 Rules being not the rules framed under article 309 of the Constitution, any condition for passing the departmental examination in higher standard cannot be imposed for the purpose of confirmation, there being no requirement to that effect in the rules, cannot be accepted, as rule 16(2) of the Class-I Service Rules specifically empowers the Governor to prescribe such training and requires the probationer to pass the departmental examination, as prescribed from time-to-time. The 1970 Rules though is not a rule framed in exercise of the power conferred by proviso to article 309 of the Constitution of India, those rules are framed prescribing the departmental examinations required to be passed, in exercise of the powers enabling the Governor to prescribe for the departmental examination required to be passed by the officers.

25. Rule 19 of the Class-I Service Rules regulates the seniority of the members of the service and it stipulates how such seniority is to be determined. Sub-rule (I) of rule 19 provides that the members of Class-II Service who are appointed to Class-I Service, their inter se seniority is to be determined on the basis of their position in the merit list prepared for such recruitment and approved under rule 8 of the said Rules, provided such members join their services within 30 days from the date of issuance of the order of appointment. In the instant cases, the appellants as well as the writ petitioners were recruited by way of up-gradation to Class-I Service with effect from the same date, i.e., 18th December, 1985. No separate merit list was prepared for the purpose of such up-gradation from Class-II Service to Class-I Service and such upgradation was made on the basis of the decision of the Government of Nagaland for abolition of Class-II Service and up-gradation of all the members of the Class-II to Class-I Service. Therefore, their inter se seniority in Class-I Service has to be determined on the basis of their seniority in Class-II Service, i.e., on the basis of their position in the merit list prepared by the Commission for recruitment to Class-II Service. As noticed above, the appellants having been placed above the writ petitioners in such merit list prepared by the Commission for the purpose of recruitment to Class-II Service, they were senior to the writ petitioners in Class-II Service.

26. Sub-rule (3) of rule 19 of the Class-I Service Rules provides that if the confirmation of a member of the service is delayed beyond 2 years of probation on account of his failure to qualify for such confirmation he/she shall lose his position in seniority vis-a-vis such juniors as may be confirmed earlier than him. It, however, stipulates that the seniority of such persons shall be restored on his confirmation subsequently in the same grade. In the cases at hand admittedly the writ petitioners passed the departmental examination in higher standard between November 1990 and July 1991, while the appellants on 31st July, 1997. Although the appellants passed the departmental examination at a later point of time than the writ petitioners, their seniority in the same grade would be restored on their confirmation as required under rule 18 of the Class-I Service Rules after passing of the departmental examination in higher standard, in view

of the provisions contained in sub-rule (3) of rule 19 of the Class-I Service Rules, subject to passing of such examination while in Junior Grade.

27. It is the contention of the learned counsel for the writ petitioners that the appellants' seniority over the writ petitioners would not be restored, on their passing the required departmental examination, by virtue of sub-rule (3) of rule 19 of the Class-I Service Rules as, before passing such departmental examination by the appellants they were promoted from the Junior Grade to Junior Grade (Higher Scale) vide order dated 18th February, 1993, as under sub-rule (3) of rule 19, the appellant would be entitled to restoration of seniority only if he is in the same grade. The question, therefore, requires determination is whether granting of higher scale in Junior Grade is promotion from one grade to another, i.e., Junior Grade to Junior Grade (Higher Scale) under the Class-I Service Rules, as stood at the relevant point of time.

28. The appellant No. 1 was given the higher scale in Junior Grade vide order dated 18th February, 1993 with effect from 1st October, 1990, while the appellant Nos. 3 and 4 were given the said scale vide order dated 21st March, 1991 with effect from 15th March, 1991, from which date the writ petitioners were also given the higher scale in Junior Grade. Schedule I of the Class-I Service Rules, at the time of its original formulation, contained only 2 grades namely - Senior Grade and Junior Grade. The said Schedule was amended by the Nagaland Public Service (Class-I) (10th Amendment) Rules, 1978 with effect from 17th November, 1978. After such amendment, the Class-I Service consists of Selection Grade, Senior Grade, and Junior Grade. It was further amended by the Nagaland Civil Service (Class-I) (13th Amendment) Rules, 1983 with effect from 25th April, 1983. After the said amendment, the Class-I Service consists of Special Selection Grade, Higher Selection Grade, Selection Grade, Senior Grade and Junior Grade. The said position prevailed till the appellants and the writ petitioners were given the higher scale in Junior Grade. The posts in Junior Grade (Higher Scale) was introduced to the Schedule I by the Nagaland Public Service (17th Amendment) Rules, 1996, which came into effect from 12th November, 1996, i.e., after the appellants as well as the writ petitioners were given the higher scale in Junior Grade. Therefore, even assuming that the posts in Junior Grade (Higher Scale), after 12th November, 1996, became the promotional posts from Junior Grade, giving of the higher scale in the Junior Grade to the appellants and the writ petitioners cannot be treated as promotion, there being no amendment to the Schedule 1 to that effect at the time of giving such higher scale in the Junior Grade to the appellants and the writ petitioners. The said Rules provides for promotion from Junior Grade to the Senior Grade, then to the Selection Grade, then to the Higher Selection grade, and then the Special Selection Grade. As discussed above, the learned Single Judge also did not interfere with the orders dated 21st March, 1991 and 18th February, 1993 by which the appellant Nos. 3 and 4 and the appellant Nos 1 and 3, respectively, were given the Junior Grade (Higher Scale) with effect from 15th March, 1991 and 1st October, 1990 respectively. Hence, the appellants' up-gradation from

Junior Grade to Junior Grade (Higher Scale) being not the promotion and both the Junior Grade and the Junior Grade (Higher Scale) being in Junior Grade, their original seniority position would be restored on their confirmation after passing of the departmental examination, in view of sub-rule (3) of rule 19 of the Class-I Service Rules, and hence the appellants would be senior to the writ petitioners as soon as they passed the required departmental examination. Consequently, their officiating promotion to the Senior Grade with effect from 13th January, 1997, i.e., the date when the writ petitioners were given officiating promotion to the Senior Grade, cannot be faulted with. The order dated 16th March, 1998 passed by the Secretary giving effect to the order of promotion from 13th January, 1997 to the appellants, therefore, cannot be held to be illegal. The officiating promotion, in any case, would not give any advantage in favour of any one in the matter of promotion to the next grade under the Class-I Service Rules.

29. The decision of the Apex Court in *Puran Das* (supra), on which the learned counsel for the petitioner has placed reliance in support of his contention, is not applicable in the facts and circumstances of the instant cases. There is, however, no dispute to the proposition of law that a person who lacks basic qualification for promotion as stipulated in the rules cannot be promoted to a higher post till he acquires such qualification and as such, there cannot be any question of promoting such person from a date on which he did not acquire the basic qualification. In the cases at hand, the appellants and the writ petitioners were not given the regular promotion to the Selection Grade but were given only the officiating promotion. Rule 25 of the Class-I Service Rules, as discussed above, provides for regular promotion from one grade to another of the officers who are confirmed in service. Rule 18 of the said Rules stipulates that one of the conditions for confirmation is passing of the required departmental examination completely. Rule 19(3) of the said Rules, as discussed above, provides that the seniority of an officer, who has subsequently been confirmed after his juniors, shall be restored in the same grade, on his confirmation on passing of the required departmental examination and, hence, as held above, the seniority of the appellants over the writ petitioners stands restored in Class-I Junior Grade as soon as they cleared the required departmental examination, even though much after such clearance by the writ petitioners.

30. Before parting with the records, it may be noticed that the learned counsel for the appellant has submitted that after the impugned judgment and order was passed the appellants as well as the Respondents have been promoted from Selection Grade to Higher Selection Grade on regular basis and in terms of the provisions contained in rule 25 of the Class-I Service Rules their seniority in the Higher Selection Grade is to be determined. No record pertaining to such selection, however, has been placed before us, and hence we refrain ourselves from commenting anything in that regard except observing that the seniority in the promotional posts has to be determined in terms of the provisions contained in rule 25 of the Class-I Service Rules.

31. In view of the aforesaid discussions, the writ appeals are allowed. The impugned judgment and order dated 23rd August, 2005 passed by the learned Single Judge is set aside. The official respondents, however, are directed to conduct the selection for regular promotion to the Senior Grade inwards as per the Class-I Service Rules by considering the case of all the eligible officers who come within the zone of consideration, if such selection has already not been conducted. No costs.