

(2014) 05 DEL CK 0071

In the Delhi High Court

Case No : W.P. (C) 8639/2010 and C.M. Nos. 21979/2010, 1942 and 1943/2011

R.P. Tolani

APPELLANT

Vs

UOI and Others

RESPONDENT

Date of Decision : 23-05-2014

Acts Referred:

Constitution of India, 1950 — Article 226, 309

Citation : (2015) 1 AD 78 : (2014) 211 DLT 75 : (2014) 226 TAXMAN 437

Hon'ble Judges : S. Ravindra Bhat, J;Najmi Waziri, J

Bench : Division Bench

Advocate : M.S. Singhvi, Sr. Advocate, Sh. K.K.L. Gautam, Sh. Suresh. P. Tolani, Advocates in W.P. (C) 8639/2010 and C.M. Nos. 21979/2010, 1942 and 1943/2011, Sh. Vinay Kumar Garg, Sh. Vivek Sharma and Sh. Neeraj Kumar Sharma, Advocates in W.P. (C) 8650/2010 and C.M. Nos. 710 and 5427/2013, Advocate for the Appellant; B.V. Niren, Sh. P. Jain, Advocates for Resp. Nos. 1 to 3, Ms. Rekha Palli and Sh. Hemant Gupta, Advocates for Resp. Nos. 4 to 7, Advocate for the Respondent

Final Decision : Dismissed

Judgement

S. Ravindra Bhat, J.—The present judgment disposes two writ petitions which impugn the order of the Central Administrative Tribunal ("CAT") dated 28.10.2010, dismissing OA No. 2839/2009 and OA No. 526/2010. The challenge in both the Original Applications stems from the selection process for three posts of the Vice-President of the Income Tax Appellate Tribunal ("ITAT"), in which both Petitioners were not selected.

2. Briefly, the facts in this case are that the petitioner in WP(C) 8369/2010, (referred to as "Tolani") was selected as a Judicial Member of the ITAT on 9.2.1998 and Mr. S.K. Yadav (hereafter "Yadav") was selected on 21.3.1998 (after undergoing a two years probationary period from 21.3.1996). The grievance in both cases arises from an order of the Central Government, dated 23.11.2009 appointing four members of the ITAT as Vice-Presidents, allegedly overlooking the two petitioners. Those appointed were K.L. Karwa, Judicial

Member (Lucknow), O.K. Narayanan, Accountant Member (Ahmedabad), Bhartvaja Shankar (Chandigarh) and G.C. Gupta, Judicial Member (Hyderabad)-all referred to hereafter collectively as "the private respondents". Subsequently, after receiving the minutes of the meetings of the Selection Committee on 5.9.2009 and 9.9.2009, and in view of the proposal to appoint Shri D.K. Tyagi as a Vice-President of the ITAT, the grievance was again made by the petitioners.

3. The conditions of service and rules applicable to ITAT members are prescribed by the income tax Appellate Tribunal Members (Recruitment and Conditions of Service Rules), 1963 (hereinafter "the Service Rules"), made by the President under the proviso to Article 309 of the Constitution. Rule 8 classifies the post of a Vice-President as a Group "A" Gazetted Post. The Rules prescribe four types of members: Members (either Judicial or Accountant), Vice-Presidents, Senior Vice-President and President.

4. The claims made before the CAT were, first, that appointment of the Vice-President from amongst members was by way of direct recruitment, rather than promotion, and, therefore, the obligation to reserve posts in favour of the Other Backward Castes ("OBC") group was violated; secondly, and in the alternative, it was claimed that in view of the equality of pay scales of Members and Vice-Presidents after the recommendations of the sixth Central Pay Commission (hereinafter "the sixth CPC") were enforced, appointment to the post of Vice-President would be a designation which would go by seniority, and in any case, seniority-cum-merit. It was argued that in either of these cases, the petitioners were senior to four of the five members appointed as Vice-Presidents, except K.L. Karwa, and have equally good, if not better, Annual Confidential Reports ("ACRs") in their favour. It was argued in this context that this crucial change in hierarchy of ITAT members brought about the Sixth CPC was not brought to the notice of the Selection Committee, and thus, the decision-making process was itself flawed and based on irrelevant considerations.

5. It was thirdly argued that the Selection Committee exceeded its jurisdiction by evolving its own procedure and terms as to the selection, which was not open to it. It was argued that in terms of Rule 13 of the Service Rules, the seniority-cum-merit method bound the Selection Committee, and as such, supersession was impermissible. Rule 13 provides that:

[t]he conditions of service of a member in respect of matters for which no provision is made in these rules shall be the same as may be for the time being applicable to other employees of the Govt. of India of a corresponding status

6. It was lastly argued that the Selection Committee did not prepare any chart of comparison between the various members being considered for the post of Vice-President, and as no other material was available before the Selection Committee except for the ACRs (which, the petitioners claim record their diligence and excellence in service), the decision-making process is liable to be interfered with.

7. The CAT rejected all three grounds. On the first ground, the CAT held that the

observations in its earlier decision, in *G.E. Veerabhadrappe v. Union of India*, OA No. 463/2009, to the effect that the appointment to the post of Vice-President was by way of direct recruitment was obiter, and thus, the question was considered afresh. Holding that the appointment of Vice-Presidents is not by direct recruitment, the decision of the CAT proceeded as follows:

From the reading of the relevant rules referred to above, what clearly emerges is that whereas everyone having the requisite qualifications as mentioned in rule 4 is entitled and has a right to be considered for appointment as Member, the selection of President, Senior Vice-President and Vice-President of the Tribunal Members. Once, President, Senior Vice-President and Vice President are to be appointed by way of selection by the selection committee so constituted under rule 7C from only amongst those who are already Members, it cannot be a case of direct recruitment. It would indeed be a case of promotion by way of selection. We have already mentioned that insofar as our observations in *Veerabhadrappe* (supra) as reproduced above are concerned, the same are obiter, so specifically stated on a clarificatory application moved on that behalf by the Government. If the said observations are not to be taken into consideration, the applicant may have nothing to state in support of the proposition that appointment of President, Senior Vice-President and Vice-President would be by way of direct recruitment. The provisions of the rules would leave no one in any manner of doubt that the appointments being made by the Central Government of President, Senior Vice-President and Vice President are by way of promotion where method of selection is merit to be considered by the selection committee headed by a Sitting Judge of the Supreme Court to be nominated by the Chief Justice of India.

8. On the second ground, the CAT noted:

We find absolutely no merit in the aforesaid contention of the learned counsel. We are of the firm view that mere mention of the pre-revised scale of the post of Vice-President in the note dated 4.8.2009 would be of no meaning and consequence. Even if the selection committee was to be apprised of the new pay scale of Vice-President, ITAT, which may be equivalent or bracketed with that of Member, ITAT, the same would have made no difference. It could not have been considered by the selection committee that since the pay scale of Member and that of Vice-President is to be the same, there would be no need to make selection from amongst those who are eligible and in the zone of consideration and that only seniority would matter. Even if the selection committee was to note that the pay scales of Members and Vice-President, ITAT have been bracketed and for that purpose necessary amendment in the rules had been carried out, the same also would have made no difference in the matter of selection of those who were under consideration. It would be seen that Accountant Member, Judicial Member, Vice-President and President have been separately defined under rule 2 of the Rules of 1963. The eligibility criteria for appointment on the post of Member Judicial or Accountant, is separately prescribed under rule 3.

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The mere fact that the pay scale of Member and Vice-President has been bracketed would not make the post of Member equivalent to that of Vice-President and there would be no question in teeth of the rules as mentioned above for a senior Member to be automatically appointed as Vice-President. Even the senior most Member has to go through a process of selection as envisaged under rule 7C. It is in consideration of the provisions of the rules that we have said herein before that the mere fact that the selection committee was not informed of the pay scale of Member and that of Vice-President to be the same as per recommendations of the 6 CPC and non-amendment of the rules or non-information of the amendment in the rules in that regard would be of no meaning and consequence. Further, in view of DR-22(III) promotion in the same pay scale can be made.

9. On the third ground, relying on the decisions of the Supreme Court in N. Suresh Nathan and Others, Vs. Union of India (UOI) and Others, etc. etc., ; General Manager, Uttaranchal Jal Sansthan Vs. Laxmi Devi and Others, , as also a decision of CAT, Chennai, in Uttam Bir Singh Bedi v. Union of India, (OA No. 1001/2009, decided on 12.3.2010), the CAT rejected the contentions in the following terms:

The conditions of service can be such as the method of calculating pension, various perks or facilities that a Member may be entitled to but the conditions of service as mentioned above, cannot include the mode, method and procedure of recruitment/selection. We find the first argument of the learned counsel, as noted above, to be also equally devoid of merit. It may not have been specifically said in rule 7C, as has been said in rule 4A, that the selection board shall evolve its own procedure, but that would not mean that the procedure to be adopted by the selection committee would be as envisaged under OMs dated 8.2.2002 and 18.2.2008. Once the method of recruitment on the post of Vice-President is by way of selection, the selection committee would be well within its power and jurisdiction to evolve its own procedure, whether so said in the rules or not, It may be recalled that prior to issuance of OMs dated 8.2.2002 and 18.2.2008, wherein the element of supersession in case an employee may have the requisite benchmark was not involved, the instructions issued by the Government as regards the method of appointment or promotion by selection clearly stipulated that concerned DPC would have a right to evolve their own procedure of making selection. Once, the field is governed by rule 7C, the instructions contained in OMs dated 8.2.2002 and 18.2.2008 would have no role to play. In the process of selection, supersession is possible, as the concerned committees or DPCs have to find out the best person suited for the job irrespective of his seniority. Seniority at the most, would to be considered if he may come within the zone of consideration but not an automatic right of selection or promotion, as the case may be.

10. Finally, on the last ground, the CAT relied on the decision of the Supreme Court in National Institute of Mental Health and Neuro Sciences Vs. Dr. K.

Kalyana Raman and others, , to the effect that

the function of the Selection Committee is neither judicial nor adjudicatory. It is purely administrative ... There is no rule or regulation brought to our notice requiring the Selection Committee to record reasons.

and held that:

...the mere fact that the selection committee did not prepare any chart or sheet of comparison regarding performance of Members would not mean that comparative merit was not considered by the selection committee. It is absolutely inherent in the method of selection that the respective merit of all the Members would have been considered. There was no requirement at all to make a mention of the respective merits of the Members under consideration for appointment on the post of Vice-President, Mention of comparative merit may: not have been made, and it appears to us was rightly not made, as that would be rather counter-productive. To illustrate, if a particular Member was not found meritorious enough to be appointed as Vice-President because of some of his attributes which may be adverse, an argument would surface that unless such an attribute was to be put to the concerned Member, the same could not be taken into consideration. Making mention of such attributes would also result into bitterness. We are of the firm view that when selection by a high powered committee and there are not even allegations of any bias or favouritism, lest there being any material for the same, the selection made by such committee would need no interference by the courts or tribunals. A citizen must have faith in the system rather than crying foul when he has not been made to make it on merits.

Petitioners' contentions

11. Impugning the CAT's decision, learned counsel for the petitioners argued that the failure to notify the new pay scales, after the merger of pay scales of the member and Vice-President, and the failure of the President to notify the Selection Committee of this development, vitiated the decision-making process. Since both the posts had an identical pay scale, and further, that a member on becoming a Vice-President is not absolved of his or her responsibilities as a member, the conclusion that the two posts are not horizontally equal, is incorrect. In this regard, it was argued that parity of pay scales was a material fact, without the knowledge of which any decision arrived at by the Selection Committee stood negated.

12. Learned counsel next argued that Rule 13 of the Service Rules incorporates, by reference the conditions in the Office Memoranda of the Department of Personnel and Training as regards the procedure and manner in which suitability for a particular post is to be judged. It was argued that the interpretation of Rule 13 by the CAT was restrictive and narrow, as the procedure for promotion (assuming the finding in Veerabhadrapa is incorrect) is part and parcel of the "conditions of service" mentioned in that rule. In support of this contention,

learned counsel places reliance on the decisions of the Supreme Court in *S.B. Bhattacharjee Vs. S.D. Majumdar and Others*, , and *Union of India (UOI) and Another Vs. Hemraj Singh Chauhan and Others*, . Even otherwise, it is argued, the Selection Committee does not have an unfettered power to evolve its own rules by ignoring the recruitment rules possessing a statutory flavour.

13. Learned counsels argued that the decision of the CAT that there was no requirement to mention the reasons for not choosing the petitioners herein was erroneous, because even though the Selection Committee is an administrative body, it is bound by the rule of law and thus, must provide justification for its decisions. Further, learned counsels argue that the limited consideration of the ACRs, and no other material, is an extremely selective and restricted manner of taking decisions. Relying on the decisions of the Supreme Court in *Guman Singh and Others Vs. State of Rajasthan and Others*, , and *N. Suresh Nathan and Others, Vs. Union of India (UOI) and Others*, etc. etc., , learned counsels argued that merit constitutes the sum total of various qualities and attributes, including past performance and other relevant factors, which cannot all lie within the limited content of the ACRs placed before the Selection Committee. Moreover, it was argued that even in a selection based on merit, the Selection Committee is nonetheless obligated to consider seniority of the candidates, which remains an important factor in such decisions.

14. Further, learned counsels argued that the findings of CAT are inconsistent, because if the decision that the selection process is regulated by the Service Rules and not by the Office Memoranda of the Department of Personnel and Training is accepted, Rule 7 clearly states that selection is to be by merit. Concededly, in the absence of any comparison charts as regards the comparative merit of the candidates, or any other material placed before the Selection Committee, the decision of the committee is liable to be set aside. For this, reliance is placed on the decision of the Supreme Court in *Union of India (UOI) and Another Vs. S.K. Goel and Others*, , to say that although the Court refused to interfere with the selection process in that case, it was only after satisfying itself of the comparative merit of the eligible officers examined by the committee in that case. Thus, in the present case as well, argued learned counsel, such an approach should have been adopted by the CAT.

Respondents contentions

15. The learned Additional Solicitor General (ASG) Shri Rajeeve Mehra, argued that the findings of the CAT are reasonable, presenting no reason for this Court to interfere with that decision. The learned ASG argued that being an administrative body, as opposed to a judicial or quasi-judicial body, the Selection Committee was not obliged to provide any reasons for its decision, much less reasons for not choosing a particular candidate. It was argued, by placing reliance on the decisions of the Supreme Court in *Union of India (UOI) and Another Vs. Samar Singh and Others*, , and *Major General I.P.S. Dewan Vs. Union of India (UOI) and Others*, , that administrative orders affecting the rights

of citizens in matters of selection need not provide reasons. In this context, the learned ASG argued that absent any allegation or proof of mala fides or arbitrariness in the Selection Committee's functioning, or the decision-making process, judicial review by this Court under Article 226 of the Constitution is extremely limited, and any interference in this case would cross the bounds of that limited inquiry that is considered proper in such cases.

16. It was argued that seniority is not the criterion for selection and appointment to the post of Vice President. In this context, the ASG argued that the Office Memorandum relied on by the petitioners was inapplicable, since it was in respect of Central Government officers in its service. However, in respect of matters of procedure such as the number of officers to be considered for selection, the silence in the Rules meant that by reason of Rule 13, the Office Memorandum, to the extent it provided for the zone of consideration from amongst those to be considered, was applicable.

17. It was argued that the Selection Committee had the right to decide what ought to be the criteria to judge merit. Though the committee had the benefit of the ACRs, the experience of the Chairman, a sitting Supreme Court judge, with knowledge of taxation laws and rulings of courts throughout the country, as well as the knowledge and input provided by the President, who had occasion to interact with the candidates routinely and therefore in a position to assess whoever was most suitable to be appointed. The ASG emphasised that since the position or post involved was essentially judicial, the collective experience of the Chairman and the President, ITAT was sufficient in the circumstances. It was emphasized that the petitioners could only claim a right to be considered and not an overriding entitlement, solely based on their ACR grading to be appointed to the post of Vice President. No allegations of mala fides, legal or personal had been levelled or proved; there was no violation of statute or binding norms. In the absence of these, the Committee, which had fairly considered the candidature of all the officers, could not be faulted for having recommended the selected officers, for appointment.

Analysis and Findings

18. Before entering the various questions that arise in this case, an understanding of the selection process, service rules and hierarchy amongst the members of the ITAT is relevant.

19. As noted above, the Service Rules outline four different categories of posts, i.e. Member, ITAT (either judicial or accountant), Vice-President, Senior-Vice President and President. The rules concerning the appointment of the Vice-Presidents are crucial to this case, and are extracted below:

7A. The Central-Government may appoint from among the Members one or more persons as Vice-President or, as the case may-be Vice-Presidents of the Tribunal to assist the President in the discharge of his functions.

7B. The Senior Vice-President: The Central Govt. may appoint one of the Vice-Presidents of the Appellate Tribunal appointed under rule 7A, to be the Senior Vice-President thereof.

7C Selection Committee to select President, etc.:—The Selection Committee consisting of a sitting Supreme Court Judge, to be nominated by the Chief Justice of India, the President and the Secretary, Ministry of Law and Justice (Department of Legal Affairs), based on merit, shall recommend persons for appointment as President, Senior Vice-President and Vice-Presidents.

20. There can be no doubt that appointment of Members to the ITAT is undoubtedly by way of direct recruitment, and the method of recruitment is provided in Rule 4 of the ITAT Service Rules. There is no similar-or at least an express-provision as regards the method of appointment of Vice-Presidents. Instead, Rule 7C, as extracted above, is the sole guiding provision in this matter. There exists, however, a residual clause-Rule 13-which falls back upon the method of appointment and selection of other employees of the Government of India of a comparable grade in the case of absence of guidelines in the Service Rules. That clause states:

The conditions of service of a member in respect of matters for which no provision is made in these rules shall be same as may for the time being be applicable to other employees of the Govt. of India of a responding status.

21. The Service Rules apart, pay scales of ITAT members underwent a change since the coming in force of the Rules. At the time the two petitioners were appointed as judicial members, the existing pay scale was 22,400-26,000. The post of Vice-President at the time was in the pay scale of 24,050-26,000 and thus, hierarchically superior to that of accountant and judicial members. Subsequently, after the recommendation of the 6th CPC, the Government of India abolished the difference between the pay scales of members and Vice-Presidents, by merging both the scales in the new pay band/scale of 75,000-with annual increment of 3%-i.e. 80,000. Thus, after the implementation of the recommendations of the 6th CPC, there is pay parity as between the post of member and Vice-President.

22. The question that arises before the Court, therefore, is whether the manner of selection, including the decision-making process adopted by the Selection Committee, is consistent with the terms of the Service Rules, or whether it is perverse and thus liable to be set aside.

23. In *Lalit Mohan Deb and Ors. v. Union of India and Ors.*, [1963] 3 SCC 862 and *Dayaram Asanand Gursahani Vs. State of Maharashtra and Others*, Union of India (UOI) and Another Vs. S.S. Ranade, the Supreme Court held that appointment to the selection grade having regard to the position of the rules in those cases did not constitute promotion. These decisions were considered and explained in *State of Rajasthan Vs. Fateh Chand Soni*, where it was observed that where the rules require a process of selection, either on the basis of

seniority-cum-merit, or merit based, the recruitment is a promotion:

The position in the present case is, however, different. Here the Selection Scale is a separate scale and is not an extension of the Senior Scale. Moreover appointment to the Selection Scale is made by selection on the basis of merit and seniority-cum-merit in accordance with Rule 28(A) of the Rules.

It must, therefore, be concluded that appointment to the Selection Scale of an officer in the Senior Scale in the Service constitutes promotion....

24. In the present case, the revision of pay through the sixth pay Commission might have brought about parity in pay and emoluments between Members and Vice Presidents of ITAT; yet the separate mention of these two categories in the Rules, which have not been changed, and the fact that Vice Presidents are to be selected on the basis of merit, from amongst members sets at rest any idea that the pay parity did away with the distinction; the post of Vice President is clearly a higher post in the hierarchy of judicial offices in the ITAT.

25. A total of five posts of Vice-President of the ITAT were to be filled for the year 2009-10, which are in question today. The selection process began with the screening of 14 members of the ITAT eligible to hold the post of Vice-President, i.e. the "zone of consideration". In accordance with the Department of Personnel and Training Office Memorandum (22011/1/90-Estt. (D), dated 12.10.1990 and 22.4.1992), concerning the procedure to be observed by Departmental Promotion Committees ("DPCs"), the zone of consideration (twice the number of vacancies plus four, i.e. 14 candidates for 5 vacancies, in terms of the seniority of the officers) was prepared. Subsequently, such list of candidates was placed before the Selection Committee, which comprised-as per Rule 7C-a sitting Supreme Court judge nominated by the Chief Justice of India (Justice S.H. Kapadia), the President of the ITAT (Mr. Vimal Gandhi), and the Secretary, Ministry of Law and Justice (Department of Legal Affairs) (Mr. T.K. Vishwanathan). The Selection Committee met on 7.2.2009, 5.9.2009 and 9.9.2009, for considering appointment to the post of Vice-President, and indicated the selection of five members. Amongst the 14 members, Mr. SK Yadav was at Serial No. 5, and Mr. R.P. Tolani at Sr. No. 6, in terms of the seniority. 4 of the 5 members chosen for the post of Vice-President were ranked below in the seniority list, at Serial Nos. 8, 10, 12 and 14).

26. It is important at this stage, to consider the minutes of the Selection Committee meeting, which provide an insight into the decision-making process. On 9.9.2009, the operative meeting of the Selection Committee, the minutes recorded as follows:

... The Committee examined the character rolls of the following members of the Tribunal ...

The above Officers have been reported to be free from Vigilance angle by the Department of Legal Affairs.

On the basis of available character rolls, knowledge and suitability, the Committee recommends the following for the post(s) mentioned below ...

27. Later, a confidential memorandum from the Ministry of Law and Justice, Department of Legal Affairs, on 17.9.2009, to the Appointments Committee of the Cabinet, indicated that the selection process had been completed, with the proposal of appointing the five members chosen by the Selection Committee having received the approval of the concerned Minister. Finally, on receiving this approval (communicated to the President, ITAT, by a confidential letter dated 20.11.2009), on 23.11.2009, the President (by Notification No. F. 46-Ad(AT)/2009) issued the order for the appointment of the Vice-Presidents.

28. It is crucial, at this juncture, to note certain other details concerning the decision-making process of the Selection Committee, revealed in responses under the Right to Information Act, 2005, on 12.1.2010 (F. No. 21 (799)/2009-IC) on the basis of a request filed by Mr. R.P. Tolani. The response indicates that:

[n]o such information viz. criteria framed for assessing Merits of candidates for the post of VPs are available on record. Hence, the information may be treated as "nil".

Further,

[n]o such information viz. copy of chart or notes for comparison of merits of all the Members considered for the appointment to the five posts of VPs in panel for 2009-10 are available on record. Hence, the information may be treated as "nil".

Next, the response states that "[n]o separate consideration zone panels were drawn by this Department.

29. The first question that arises for consideration in this case is whether the decision of the Selection Committee, and more generally, the manner in which the five candidates were selected to the post of Vice-President (to the exclusion of the present two writ petitioners) is reasonable and consistent with law.

30. Promotion can be broadly categorized into three modes depending on whether it purely by merit, purely by seniority or whether it is a mixture of the two, i.e. a) Departmental Examination; b) Seniority-cum-fitness (seniority subject to unfitness); and c) Selection (merit-cum-seniority). The difference between the various modes of promotion was explained in the following extract, by the Supreme Court in its decision reported as B.V. Sivaiah and Others etc. Vs. K. Addankl Babu and Others etc., :

The principle of "merit-cum-seniority" lays greater emphasis on merit and ability and seniority plays a less significant role. Seniority is to be given weight only when merit and ability are approximately equal. In the context of Rule 5(2) of the Indian Administrative Service/Indian Police Service (Appointment by promotion) Regulations, 1955 which prescribed that "selection for inclusion in such list shall be based on merit and suitability in all respects with due regard to

seniority" Mathew. J. in Union of India (UOI) Vs. Mohan Lal Capoor and Others, , has said:-".... for inclusion in the list, merit and suitability in all respects should be the governing consideration and that seniority should play a secondary role. It is only when merit and suitability are roughly equal that seniority will be a determining factor, or if it is not fairly possible to make an assessment inter se of the merit and suitability of two eligible candidates and come to a firm conclusion, seniority would tilt the scale.

Similarly, Beg J. (as the learned Chief Justice then was) has said:-

Thus, we think that the correct view, in conformity with the plain meaning of words used in the relevant rules, is that the "entrance" or "inclusion" test for a place on the select list, is competitive and comparative applied to all eligible candidates and not minimal like pass marks at an examination. The Selection Committee has an unrestricted choice of the best available talent, from amongst eligible candidates, determined by reference to reasonable criteria applied in assessing the facts revealed by service records of all eligible candidates so that merit and not mere seniority is the governing factor.

On the other hand, as between the two principles of seniority and merit, the criterion of "seniority-cum-merit" lays greater emphasis on seniority. In State of Mysore and Another Vs. Syed Mahmood and Others, , while considering Rule 493) (b) of the Mysore State Civil Services General Recruitment Rules, 1957 which required promotion to be made by selection on the basis of seniority-cum-merit, this Court has observed that the rule required promotion to be made by selection on the basis of "seniority subject to the fitness of the candidate to discharge the duties of the post from among persons eligible for promotion". It was pointed out that 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 and 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.

31. The expression "zone of consideration" is one where a particular number of vacancies in the promotional grade is present, all the eligible candidates in the feeder grade will not be considered for the post, but only those who fall within the zone will be considered for promotion. This, therefore, is a known method of narrowing the pool of candidates, so as to present the responsible committee in that case with a list of eligible candidates amongst whom the choice can be made. Equally, it is imperative that the zone of consideration be broad enough, especially in instances of selection by merit, so as to ensure that the more suitable candidates emerge from the competitive process. In this case, the generally accepted formula of twice the number of vacancies plus four was utilized by the Selection Committee, and this aspect of the decision-making process is not disputed in this case, nor can it be questioned.

32. It is also undisputed-as a matter of fact-that the Selection Committee did not conduct interviews or meet the candidates at any point in the selection process,

nor were orders written by the candidates in their capacity as members of the ITAT placed before the Selection Committee. The only material before the Selection Committee was the Annual Confidential Reports ("ACRs") of the candidates. It is on this basis that the selection of five candidates was made, as the minutes of the Selection Committee records, on the basis of "available character rolls, knowledge and suitability."

33. Considering, first, the argument of the petitioners that the decision of the Selection Committee disregarded the inter se seniority of the candidates, by selecting 4 candidates who were below the petitioners in the seniority list admitted by both parties. The argument here is that amongst those graded "fit", by the relevant benchmark, in their ACRs, no supersession is permissible. For this, the petitioners" argue that since Rule 7C of the Service Rules is silent on the procedure, or more accurately, the criterion for selection, the rules in Department of Personnel and Training Office Memorandum F. No. 35034/7/97-Estt(D), dated 8th February, 2002 are to be considered applicable by virtue of Rule 13 of the Service Rules which states that "[t]he conditions of service of a member in respect of matters for which no provision is made in these rules shall be the same as may be for the time being applicable to other employees of the Govt. of India of a corresponding status". Further, the Office Memorandum also delineates the precise manner of selection, in the following terms: Clause 3.1 provides the framework within which promotion by merit is to be judged and states that

[i]n the case of "selection" (merit) promotion, the hitherto existing distinction in the nomenclature ("selection by merit" "selection-cum-seniority") is dispensed with and the mode of promotion in all such cases is rechristened as "selection" only. The element of selectivity (higher or lower) shall be determined with reference to the relevant bench-mark ("Very Good" or "Good") prescribed for promotion.

34. Clause 3.2 then indicates how merit is to be judged by the DPCs, in the following terms:

The DPC shall determine the merit of those being assessed for promotion with reference to the prescribed bench-mark and accordingly grade the officers as fit" or "unfit" only. Only those who are graded fit (i.e. who meet the prescribed bench-mark) by the DPC shall be included and arranged in the select panel in order to their inter se seniority in the feeder grade. Those officers who are graded "unfit"(in terms of the prescribed bench-mark) by the DPC shall not be included in the select panel. Thus, there shall be no supersession in promotion among those who are graded fit" (in terms of the prescribed benchmark) by the DPC.

3.2.1 Although among those who meet the prescribed bench-mark inter se seniority of the feeder grade shall remain intact, eligibility for promotion will no doubt be subject to fulfilment of all the conditions laid down in the relevant

Recruitment Service Rules, including the conditions that one should be the holder of the relevant feeder post on regular basis and that he should have rendered the prescribed eligibility service in the feeder post.

35. The CAT had rejected this argument, holding that the manner of appointment does not fall within the phrase "conditions of service", and thus, no reference to that Office Memorandum is mandated.

36. In considering this issue, while the Court must remain conscious that the Office Memorandum in question marks a departure from the previous nomenclature, and prescribes a clear procedure for "selection", as grading followed by seniority, it is important first and foremost to note the terms of Rule 7C, which is the primary rule applicable in this case. Rule 7C notes that the:

Selection Committee ... based on merit, shall recommend persons for appointment as ... Vice-Presidents.

(emphasis supplied)

37. Thus, Rule 7C itself gives specific guidance on the criterion on which the Selection Committee is to base its decision, leaving little scope for either the Selection Committee to devise its own criterion (as the order of the CAT indicates) or incorporate the Office Memorandum dated 8th February, 2002 (as the petitioner argues). While, concededly, the Selection Committee may decide in its discretion what constitutes "merit" for the purposes of appointing an individual to the post of Vice-President, the fact that the criterion is merit, and merit alone, is prescribed within Rule 7C, which is mandatory and cannot be departed from.

38. It is true, as the Supreme Court noted in *Indra Sawhney etc. etc Vs. Union of India and others, etc. etc.*, that

[p]romotion by selection, though based on merits, is ultimately governed by seniority, for the concerned rules generally provide that, where merits are equal, officers will be ranked according to their seniority.

39. Yet, the crucial issue is that while this may be the case generally under the concerned rules, the Court must construe the text of the rules before it in each case, which are the specific law applicable, rather than incorporating general principles to bypass those precise prescriptions. Indeed, the Supreme Court has recognized at various point, in cases concerning service rules, the Court must "read the Rules as they are", even more so when the rules are clear and explicit (*Ref, Nair Service Society Vs. Dr. T. Beermasthan and Others*,). In this case, Rule 7C states in no uncertain terms that the determining factor for the Selection Committee (while determining suitability of candidates for the post of Vice President of ITAT) is the merit of the candidates. Indeed, if it was the intention to include any other factors are determinative, or relevant, to the Selection Committee's consideration, they would have been included as such. In reading the general selection procedure under the Office Memorandum" dated 8th

February, 2002, for Government posts, into the specific rules for ITAT members, would not cohere with the text of the rules.

40. While various judgments of the Supreme Court have underlined the importance of balancing fairness in promotion (represented by the objective norm of seniority) with ensuring competition and merit, the final decision to balance these factors-being a policy decision-is left to the executive authorities. Indeed, the vires of Rule 7C is not challenged in this case, and the terms of that Rule must remain determinative. This point was echoed by the Supreme Court in *K. Samantaray Vs. National Insurance Co. Ltd.*, , holding that:

11. While laying down the promotion policy or rule, it is always open to the employer to specify area and parameter of weightage to be given in respect of merit and seniority separately so long as policy is not colourable exercise of power, or has the effect of violating of any statutorily scope of interference and other relatable ...It is for the employer to stipulate the criteria for promotion, the same pertaining really to the area of policy making It was, therefore, permissible for the respondent to have their own criteria for adjudging claims on the principle of seniority-cum-merit giving primacy to merit as well, depending upon the class, category and nature of posts in the hierarchy of administration and the requirements of efficiency for such posts.

41. In this case, seniority is not completely excluded from the selection process. The zone of consideration prepared as the first step in the process was on the basis of seniority, as the minutes of the Selection Committee clearly recorded. However, there is no independent requirement-either statutory or constitutional-to consider seniority. Even independently, given the array of responsibilities assumed by the Vice-President of the ITAT, the importance of merit cannot be downplayed in any manner. Indeed, a similar question came up before the Supreme Court in *R.S. Dass Ors. Vs. Union of India (UOI) and Others*, , where the Court noted as follows;

Indeed the amended provision Regulation 5 minimised the role of seniority in the process of selection and importance and primacy was given to merit. This indeed is a laudable object and helps in having the best for the country. It is also true that if selection is made on merit alone for promotion to higher service, selection of such an officer though junior in service in preference to his senior does not really amount to supersession. If promotion is made on merit alone, the senior officer per se has no legal right to promotion and if promotion is made on merit, it cannot be said that a senior officer has been superseded. It has been emphasised that the categorisation is done on the service record. This has also been emphasised that such categorisation is done on the service record including confidential character rolls as maintained by senior officers holding high positions.

(emphasis supplied)

42. The emphasis, thus, is not on introducing seniority into decision-making processes when merit alone is the clear criteria, but rather, to ensure that the

consideration of merit is done properly, keeping in mind the broadest array of relevant considerations, to ensure that the best or most suitable candidate is selected. Simply put, if the selection is to be determined by merit, then the consideration of merit should be on a comprehensive view of the service record. Equally, given the limited power of judicial review of the Courts in such matters, it is not for the Court to indicate the factors that may be relevant in judging merit-rather, that decision is left to the selection committee. The learned Additional Solicitor General has argued, relying on the decisions in Samar Singh (supra) and Major General IPS Dewan (supra), that the Selection Committee in this case did consider the merit of the candidates, and returned its decision. Thus, given that this is an administrative function, it is argued that the Committee is not bound to provide any reasons for not choosing a particular candidate. This proposition is undoubtedly correct. As the Supreme Court held in Dalpat Abasaheb Solunke and Others Vs. Dr. B.S. Mahajan and Others, :

it is not the function of the Court to hear appeals over the decisions of the Selection Committees and to scrutinize the relative merits of the candidates. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The Court has no such expertise. The decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc.

43. Similarly, and directly relevant to this case, the Supreme Court held in Major General I.P.S. Dewan Vs. Union of India (UOI) and Others, , that:

18. Sri Ramaswamy then relied upon the decision in The Manager, Government Branch Press and Another Vs. D.B. Belliappa, in support of his submission that administrative orders affecting the rights of citizens should contain reasons therefore. We are afraid, the said principle cannot be extended to matters of selection. Unless the rules so require, the Selection Committee/Selection Board is not obliged to record reasons why they are not selecting a particular person and/or why they are selecting a particular person, as the case may be.

44. The Court, in view of the above decisions, has to be cautious in ensuring that its inquiry does not translate into a "merit review" of the decision of the Selection Committee, but also that the Selection Committee cannot be faulted for failing to provide reasons for choosing particular candidates, and rejecting others. However, whilst the grounds for review are limited, the Court can-and must-insist that the decisions are based on relevant material. i.e. the various components of the service record of the individual, which includes the ACRs. In this case, the ACRs which were the only material before the Selection Committee. These ACRs provide for the basic inputs on the basis of which assessment of the Government servant is made for appointment to a higher post. Normally, they categorize a government servant into any among the following: a) Outstanding; b) Very Good; c) Good; d) Average; or e) not yet fit.

These remarks are then considered by the Selection Committee in reaching its conclusion. The importance of the grading is well established and has been recognized by the Supreme Court, for example, in *U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others*, , where the Court held that downgrading of the ACR can have serious adverse effect on an incumbent's chances of promotion where comparative merit of several candidates is considered, and in *Dev Dutt Vs. Union of India (UOI) and Others*, , where the Court noted:

In our opinion, every entry (and not merely a poor or adverse entry) relating to an employee under the State or an instrumentality of the State, whether in civil, judicial, police or other service (except the military) must be communicated to him, within a reasonable period, and it makes no difference whether there is a bench mark or not. Even if there is no bench mark, non-communication of an entry may adversely affect the employee's chances of promotion (or getting some other benefit), because when comparative merit is being considered for promotion (or some other benefit) a person having a "good" or "average" or "fair" entry certainly has less chances of being selected than a person having a "very good" or "outstanding" entry.

(emphasis supplied)

45. In the present case, since there was no comparison chart prepared by the Selection Committee, nor was any material other than the ACRs before it, the ACRs-as it appears from the record-constituted the only basis on which the decision was made. Thus, in this case, the ACR grading was important. The ACR remarks for the five years preceding the selection process indicate that Mr. Tolani had five "Very Good" remarks, Mr. Yadav had one "Very Good" and four "Good" remarks. Amongst the candidates selected for the post, their grading was as follows: (1) five "Good", (2) four "Very Good" plus one "Outstanding", (3) two "Very Good" plus three "Good", (4) five "Very Good", and (5) One "Average" plus one "Good" plus three "Very Good".

46. Thus, on the basis of this grading-which was the only material that the Selection Committee had to assess merit-the conclusion that the two petitioners were not selected, whilst others, with a lower cumulative grading, were, appears to be anomalous. This is not to say that the two petitioners are more merited or qualified than those selected by the Selection Committee. That determination lies outside the domain of the Court. While the Selection Committee determines which candidate possesses greater merit, such a determination must be based on some objective fact which is capable of leading to that conclusion. Needless to say, a "Very Good" grade is better than a "Good" grade, and so on, in terms of consideration for promotion. Thus in this case, given the grading of the candidates in their ACRs, the conclusion that the two petitioners were less merited-on the basis of that material-seems illogical. An ACR evaluates the performance of the public officials, and based on certain objective bench-marks, provides a grading, which reflects the quality of the service rendered by that official. This grading thus is then used for determining comparative by DPCs.

These ACR gradings are in no manner conclusive; in *M.V. Thimmaiah and Others Vs. Union Public Service Commission and Others*, , the Court stated:

Therefore, in view of a catena of cases, courts normally do not sit as a court of appeal to assess ACRs and much less the Tribunal can be given this power to constitute an independent Selection Committee over the statutory Selection Committee. The guidelines have already been given by the Commission as to how ACRs to be assessed and how the marking has to be made. These guidelines take care of the proper scrutiny and not only by the Selection Committee but also the views of the State Government are obtained and ultimately the Commission after scrutiny prepares the final list which is sent to the Central Government for appointment. There also it is not binding on the Central Government to appoint all the persons as recommended and the Central Government can withhold the appointment of some persons so mentioned in the select list for reasons recorded. Therefore, if the assessment of ACRs in respect of Shri S. Daya Shankar and Shri R. Ramapriya should have been made as "outstanding" or "very good" it is within the domain of the Selection Committee and we cannot sit as a court of appeal to assess whether Shri R. Ramapriya has been rightly assessed or Shri Daya Shankar has been wrongly assessed. The overall assessment of ACRs of both the officers were taken; one was found to be "outstanding" and the second one was found to be "very good". This assessment cannot be made subject of court's or Tribunal's scrutiny unless actuated by mala fide.

47. Thus, the Selection Committee in this case was in no way bound by the ACR grading, and could have moved beyond them-or even disagreed with them-to reach an opinion afresh on the merit of the candidates, its determination ordinarily should be based on some independent material or input. Absent any external evidence of the merit of the candidates, it would seem unclear how the Selection Committee decided to select those with lower grading in their ACRs. Having decided not to consider any independent material, the reasonableness of the Selection Committee's conclusion contrary to the ACRs placed before has to be considered. The observations of the Supreme Court in *State Bank of India etc., Vs. Kashinath Kher and others, etc.,* , are extremely pertinent here, as the Court considers exactly how such a selection process can be fair and comprehensive without restricting the prerogative of the DPC to consider the merit. In that case, the Court considered the process adopted by the DPC in selecting individuals for promotion from the Middle Management Grade Scale II to Scale III in the Bhopal Circle of the State Bank of India, and in setting aside the decision of the DPC held:

16. It would also appear from the record that the confidential reports submitted were adopted in toto by the Committee considering promotion without any cross verification from the character rolls or the record and independent assessment of merit and ability. That would also be clearly illegal. Being a competent authority to consider the claim of the candidates, the Committee for promotion has to

independently assess the merit and ability of each candidate from the reports and the records etc. consistent with the weightage prescribed in the rules and then to determine the relative merit and ability of officers and then to arrange order of merit of the officers for promotion. Being selection posts, the selection record also must indicate reasons, however, brief they may be, so that when tested by judicial review, the Court would be better assisted by such record to reach correct decision in law. This exercise should also be done by the appellant. If the confidential reports written earlier are by superior officers, then the entire record could be secured by the controlling officers. They should be considered by the promotion Committee and each case must be examined in the light of the record of each officer. It would be desirable to prepare a columnar statement with all relevant columns. The C.Rs. and other relevant record should be preserved. The matters considered by the promotion committee should also be preserved.

48. In the present facts and circumstances too the Selection Committee was not bound by the ACRs; however, it adopted some other consideration in the absence of any material. The Selection Committee could have adopted the view that the petitioners were not merited, if it formed this opinion on the basis of other material present before it, as for example, sample judgments of the members, their disposal rates, cases turned on appeal etc. If such a course had been followed, the assessment of the Selection Committee would lie outside the Court's limited power of judicial review. Yet, since no material was before the Selection Committee which could testify as to those factors, and since none of the candidates were interviewed by the Selection Committee (which did not have any occasion to interact with them), the comparative merit as judged by the ACRs leads to a conclusion contrary to that returned by the Selection Committee.

49. Here, the Court recognizes that the Selection Committee-as an administrative body-does not have to give reasons for accepting the five candidates in question, and rejecting the two writ petitioners. The decisions in IPS Dewan (supra) and Samar Singh (supra), considered above, consider this proposition in detail. Being an administrative body, the Selection Committee is not obliged-as in a quasi-judicial setting-to provide reasons for its decision. Nevertheless, the decision-making process should be fair and reasonable, and ensure that promotions are made on the basis of the statutory criteria, and through a fair consideration of the relative merit of the candidates to the posts in question. Thus, if "inferences drawn (that) are such that no reasonable person can reach such conclusions" (Badrinath Vs. Government of Tamil Nadu and Others,), then the Court must exercise its jurisdiction under Article 226 to quash the decision-making process.

50. Leaving the precise factors and material to be considered in making such appointments to the Selection Committee, it is important to note that in this case no attempt was made to conduct an independent assessment of the candidates. Only one source of information, the ACRs, was before the Committee, and no

additional material was sought or at any time brought on record. The Minutes of the meetings of the Selection Committee indicate that the decision was made on the basis of the "available character rolls, knowledge and suitability", this boiled down to only the ACRs. Drawing an analogy with the selection of individuals to judicial services, which is similar to the post of the Vice-President of that ITAT,

[t]he concept of merit in the case of appointment to a senior position ... embraces within its scope every aspect of the personality of the officer relating to his work and conduct. (D.K. Agarwal Vs. High Court of Judicature at Allahabad,)

51. A robust and comprehensive process that considers various factors that touch upon the merit of the candidates, thus, is crucial in such cases, especially given the high office to which they are to be selected. For example, in discussing the process of selection of members of the subordinate judiciary, the Supreme Court, in All India Judges Association and Others Vs. Union of India (UOI) and Others , held as follows:

While we agree with the Shetty Commission that the recruitment to the Higher Judicial Service i.e. the District Judge cadre from amongst the advocates should be 25 per cent and the process of recruitment is to be by a competitive examination, both written and viva voce, we are of the opinion that there should be an objective method of testing the suitability of the subordinate judicial officers for promotion to the Higher Judicial Service. Furthermore, there should also be an incentive amongst the relatively junior and other officers to improve and to compete with each other so as to excel and get quicker promotion. In this way, we expect that the calibre of the members of the Higher Judicial Service will further improve. In order to achieve this, while the ratio of 75 per cent appointment by promotion and 25 per cent by direct recruitment to the Higher Judicial Service is maintained, we are, however, of the opinion that there should be two methods as far as appointment by promotion is concerned: 50 per cent of the total posts in the Higher Judicial Service must be filled by promotion on the basis of principle of merit-cum-seniority. For this purpose, the High Courts should devise and evolve a test in order to ascertain and examine the legal knowledge of those candidates and to assess their continued efficiency with adequate knowledge of case-law. The remaining 25 per cent of the points in the service shall be filled by promotion strictly on the basis of merit through the limited departmental competitive examination for which the qualifying service as a Civil Judge (Senior Division) should be not less than five years. The High Courts will have to frame a rule in this regard.

(emphasis supplied)

52. Thus, while "it would not be possible or practical to measure the respective merits for the purpose of seniority with mathematical precision by a barometer and some formula doing largest good to the largest number had to be evolved" (Joginder Nath and Others Vs. Union of India (UOI) and Others,), Courts have-in analogous instances of promotion-identified various factors that

speak of a candidate's merit, and lead to a comprehensive consideration of the comparative merit of the candidates. This line of thought applies equally to high-posts such as that of ITAT, Vice President, where the screening of the candidates should be thorough and detailed. As noted above, this is not to dictate the precise factors relevant, or to indicate a preferred procedure for selection, to be adopted by the Selection Committee, but only to demonstrate the various ways in which the Supreme Court has previously considered merit to be judged-through written tests, interviews/meetings, examination of legal knowledge and case-law, analysis of judgments written, frequency of judgments having been overruled by appellate authorities etc.

53. During the proceedings, the Central Government's position was that even though materials other than the character rolls (ACRs) of the candidates was not considered while at the same time the ACR gradings were not conclusive, it was also contended that given the wide experience in income tax matters of the Chairman, i.e. Justice Kapadia (who later became the Chief Justice of India) and his having considered numerous orders of the ITAT, as well as the experience of the President of ITAT, in the given facts of the case, there was sufficient knowledge about the candidates merit, to warrant the selection. Furthermore, it was argued that there was no allegation of bias or mala fides nor was any proof of it forthcoming. In these circumstances, the appointment and selection should not be interfered with.

54. Whilst there is authority of a Constitution Bench in *Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others*, that conferring power or authority to do something upon a high official does not clothe the use of power with a layer of immunity, equally the fact that no mala fides were urged or proved against anyone in this case, or in respect of the process, is an important circumstance. Once that aspect is accepted, the further circumstance that the Chairman had vast experience in income tax matters, would have had occasion to consider some of the orders of the candidates was relevant. He was aided by the President of ITAT, who in turn would have provided inputs in respect of the functioning of each contender to the post. If these aspects are kept in mind, it cannot be said that there was any unfairness in the selection process or that the committee's decision is vitiated by non-application of mind, or that relevant material was withheld from consideration.

55. The above observations would be normally dispositive of these proceedings. However, this Court is of the opinion that to allay any future apprehensions, it would be necessary for the Central Government, in consultation with all concerned, including the President of ITAT, to evolve some guidelines applicable for future cases. This could be in the form of some minimum information about each candidate who applies for the post of Vice President, Senior Vice President and President, in regard to the last three years or five years' performance, such as the number of orders written or delivered, each year; the units/appeals disposed of; a certain number of orders, i.e. about five or ten (may be chosen in

advance by the Chairman of the Committee) to assess their quality, and personal interaction. The committee might, for its own assistance, in accordance with such guidelines, evolve an appropriate marking mechanism. This would lend objectivity and a greater degree of scrutiny of the quality of candidates and avoid the odium of arbitrary or unfair procedure.

56. This Court is of the opinion that members of tribunals such as the ITAT perform crucial judicial functions, which can have an adverse bearing on individuals, and at times, vast commercial and fiscal ramifications. In these circumstances, the Central Government should seriously consider continuous oversight through the concerned High Courts, given that High Courts exercise appellate (and supervisory writ) jurisdiction over the orders and proceedings of ITAT and its benches. Some reporting mechanism, preferably centralized, to oversee the quality of the orders of ITAT is essential because the President of ITAT's powers over members of ITAT and Vice President are not appellate, they are administrative. Creation of this mechanism would result in adding a new and possibly crucial dimension to ensure greater scrutiny of ITAT and its orders and also provide a link in the decision making process of selection to senior judicial positions within ITAT.

57. For the above reasons, these writ petitions cannot succeed. They are accordingly dismissed without any order as to costs.