

RAJASTHAN HIGH COURT

Guman Singh

Vs.

State of Rajasthan

Civil Writ Petn. No. 79 of 1967

(Kan Singh, J.)

07.11.1968

ORDER

Kan Singh, J.

1. By this writ petition under Article 226 of the Constitution petitioner Guman Singh seeks to have declared Rule 28-B and Rule 32 of the Rajasthan Administrative Service Rules, 1954, hereinafter referred to as the 'Rules', and also a circular issued by the Chief Secretary on 27-8-66 as null and void. He further seeks to have declared the appointments made by the Government in the senior scale of Rajasthan Administrative Service in respect of respondents Rajeshwar Dayal Mathur, Surendra Chandra Pagoria, Mannalal Goyal and Prithvi Singh who were members of the Rajasthan Administrative Service as null and void. He has also prayed for an appropriate writ, direction or order against the State Government. The relevant facts are briefly these :-

2. The petitioner was an Arts Graduate having taken his degree in the year 1947. He graduated in Law in the year 1961 and was placed in the first division. He joined the service of the former Jaipur State as Inspector of Customs and Excise in the year 1948. On the formation of Rajasthan he came to be appointed in the service of the State as Inspector, Customs and Excise, but in the year 1957 as a result of the competitive examination held by the Rajasthan Public Service Commission, he was appointed as a member of the Rajasthan Administrative Service. Petitioner proceeds to say that respondents Rajeshwar Dayal Mathur, Surendra Chandra Pagoria, Mannalal Goyal and Prithvi Singh, who were also appointed in the Rajasthan Administrative Service, were placed junior to him. The petitioner had worked on various posts after

his appointment as a member of the Rajasthan Administrative Service.

3. The Rajasthan Administrative Service consists of three grades. The ordinary time-scale is Rs. 285 - 25 - 560 - E.B. - 30 - 800. Then there is a senior scale which is Rupees 500 - 30 - 820 - E. B. - 30 - 850 - 50- 1100 and it carries the minimum pay of Rs. 640. Then there is a selection scale which carries the grade of Rs. 900 - 50 - 1500 with a minimum salary of Rs. 1050. Petitioner Guman Singh and respondents Rajeshwar Dayal Mathur, Surendra Chand Pagoria, Mannalal Goyal and Prithvi Singh were officers in the ordinary time-scale. The service conditions of Rajasthan Administrative Service Officers including the promotion of officers from ordinary time-scale to the senior scale and from senior scale to the selection scale were governed by the Rajasthan Administrative Service Rules. Here it will be convenient to refer to the relevant rules so that the petitioner's case be properly stated.

4. The Rules were made by the Rajpramukh of the Rajasthan State in the year 1954. Rule 6 provided for the strength of the service and the nature of posts therein. They were as provided in the schedule to the Rules. Rule 7 provided for sources of recruitment and broadly recruitment to the Rajasthan Administrative Service was to be (i) by a competitive examination; (ii) by promotion of Administrative subordinates; (iii) by selection from among certain specified categories of Extension Officers, such as, Agricultural Extension Officers, Cooperative Extension Officers etc.; (iv) by special selection from among persons other than the Administrative Subordinates serving in connection with the affairs of the State including such Extension Officers who subsequent to the appointments as such had held an equivalent or higher posts in the several departments. I need not notice the details of the procedure for recruitment amongst the four sources mentioned above. It is sufficient to say that the selection by competitive examination was to be held by the Public Service Commission and for recruitment from other three sources different procedure has been provided. Here in this writ petition I am concerned with the procedure for promotion as the petitioner is in the ordinary time-scale of the Rajasthan Administrative Service and he is questioning the selection by promotion made to the senior scale. There are the provisions regarding academic qualifications, physical fitness and the like which need not be referred to. Part IV lays down the procedure for direct recruitment and that too need not be examined. Part V lays down the procedure for recruitment by promotion. I may read Rule 27 as it stood prior to 13-12-65 :-

"Rule 27. Criterion for selection: (1) For purposes of recruitment by promotion/selection/special selection, selection shall be made on the basis of "seniority-cum-merit" from among all the administrative subordinates/Extension Officers and others who are eligible for promotion, selection and special selection respectively under the provisions of the Rules.

(2) In selecting the candidates for promotion regard shall be had to their -

- (a) personality and character;
- (b) tact and energy (including ability to undertake extensive tours);
- (c) intelligence and ability to express themselves in English and Hindi clearly;
- (d) court and other work;
- (e) integrity; and
- (f) previous record of service."

What is noteworthy is that the procedure for promotion was based on the principle of seniority-cum-merit. In December, 1965, the Governor of Rajasthan made certain amendments in the various service rules by a notification issued in exercise of his powers under the proviso to Article 309 of the Constitution. In other words, by the Rajasthan Various Services (Amendment) Rules, 1965, he drafted a rule in the various service rules. Rule 28-B thus came to be inserted in the Rajasthan Administrative Service Rules, 1965. Rule 28-B reads as follows :-

"R. 28-B. Promotion by selection on basis of merit. - (a) Appointment by promotion to posts in the service shall be made by selection strictly on the basis of merit and on the basis of seniority-cum-merit in proportion of 1 : 2.

Provided that if the appointing authority is satisfied that suitable persons are not available for appointment by promotion strictly on the basis of merit in a particular year, appointment by promotion on the basis of seniority-cum-merit may be made in the same manner as specified in these rules.

(2) Selection strictly on the basis of merit shall be made from amongst persons who are otherwise eligible for promotion under these rules; the number of eligible candidates to be considered for the purpose shall be ten times the total number of vacancies to be filled in on the basis of merit and seniority-cum-merit provided such number is available; where the number of eligible candidate exceeds ten times the number of vacancies the requisite number of seniormost persons shall be considered for the purposes:

Provided that for the first promotion in the same cadre (from a lesser grade to a

higher grade) against the merit quota only such of the persons shall, unless a higher period is prescribed elsewhere to these rules, be eligible who have put in not less than six years service in the lower grade of the cadre.

(3) Except as otherwise expressly provided in this rule the procedure prescribed for selection to the post on the basis of seniority-cum-merit shall, so far as may be followed in making selection strictly on the basis of merit.

(4) The Committee shall prepare a separate list of candidates selected by it on the basis of merit and shall arrange their names in order of preference.

(5) Where consultation with the Commission is necessary the list prepared by the Committee shall be forwarded to the Commission by the appointing authority along with the personal files and confidential rolls of all persons whose names have been considered by the Committee.

(6) The Commission shall consider the lists prepared by the Committee along with other documents received from the appointing authority and, unless any change is considered necessary, shall approve the lists and if the Commission consider it necessary to make any change in the lists received from the appointing authority the Commission shall inform the appointing authority of the changes proposed and the appointing authority after taking into account the comments, if any, may approve the lists finally with such modifications, as may, in his opinion, be just and proper.

(7) Appointment shall be made by the appointing authority taking persons out of the list finally approved under the preceding sub-rule in the order in which they have been placed in the list.

(8) Among persons appointed in the same class, category or grade of posts during the same year, persons appointed on the basis of seniority-cum-merit shall rank senior to those appointed by promotion on the basis of merit, the seniority inter se of persons appointed in the same class, category or grade of posts by promotion strictly on merit shall, without regard to the order of preference be determined as if such persons had been appointed by promotion on the seniority-cum-merit.

(9) The provisions of this rule shall have effect notwithstanding anything to the contrary contained in any other provisions of these rules.

Explanation. - For the purpose of determining the number of vacancies to be filled on either basis under sub-rule (1), the following cyclic order shall be followed from year to years :-

"The first by merit. The next two by seniority-cum-merit. The next one by

merit.

The next two by seniority-cum-merit. The cycle to be repeated"; and

(b) the enactments mentioned against each of the Rules (except that specified at serial No. 30 and 31) in column No. 4; of the said Schedule shall be deleted.

3. The rules specified in the schedule are hereby amended to the extent and in the manner mentioned in the third column thereof."

5. It will be noticed from a perusal of this rule that the principle of promotion based on merit was introduced in the Rules. I will come back to this rule in the course of discussion that follows.

6. To continue the narration the selections have to be made by a committee in accordance with this rule. For appointment to senior posts in the Rajasthan Administrative Service appointments have to be made by the Government from amongst members of the service on the basis of merit and seniority-cum-merit in the ratio of 1 : 2 on the recommendation of a Committee which shall consist of (1) Chairman, Rajasthan Public Service Commission or a member nominated by him. He will be the Chairman of the Selection Committee; (2) Chairman, Board of Revenue who will be a member of the Committee; (3) Commissioner, Development Department will also be a member of the Committee and (4) Special Secretary to the Government, Appointments Department who is a member Secretary. Since the validity of this rule has also been questioned, I may reproduce Rule 32 as well for facility of reference :-

"R. 32. Appointments to Senior posts :- Appointments to senior scale and selection grade posts shall be made by the Government from amongst members of the Service on the basis of merit and seniority-cum-merit in the ratio of 1 : 2 on the recommendation of a committee which shall consist of the following officer :-

(a) Chairman, Rajasthan Public Service Commission or a Member nominated by him. - Chairman.

(b) Chairman, Board of Revenue. - Member.

(c) Commissioner, Development Department. - Member.

(d) Special Secretary to the Government in the Appointments Department. - Member Secretary.

(2) Except as provided in this rule, the procedure and principles for selection by Merit shall in so far as it may apply be the same as provided in Rule 28-B. For selection the Committee shall consider the cases of the persons eligible for promotion by examining their confidential rolls and personal files, interviewing such of them as they deem candidates equal to the number of vacancies likely to be filled by promotion by seniority-cum-merit."

Provided, that Government may fill a vacancy in the senior scale or selection grade posts temporarily by appointing thereto for a period not exceeding six months in an officiating capacity any member of the Service who is eligible for such appointment under these Rules."

7. There was also a circular issued by the Chief Secretary to the Government; copy of that circular has been placed on record as Annexure 2. This circular provides that promotion to posts by selection strictly on the basis of merit and on the basis of seniority-cum-merit may be made in the ratio of 1:2 and as for the first promotion in a cadre against the merit quota, only such of the persons who had put in six years of service shall be eligible. This circular was issued sometime before the amendment of the Rules became effective. It was further laid down therein that the administrative instructions and the statutory service rules should together be taken as a complete code on the subject. The circular further lays down the marking system on the basis of which merit of an officer for promotion to higher post has to be assessed. As the contentions of the petitioner are based on the language of the circular, I may reproduce the relevant provisions of the circular.

8. Para. 3 of the circular embodies what is characterised as the merit formula and it runs as follows :-

"3 (a). "Merit formula" means that out of 75 marks (marking system has been defined in paragraph 5), a person should get a minimum of 65 marks for consideration of his case for promotion among those who have secured 65 or more marks; the persons who get highest marks will be the first to be promoted, and the person who comes next in the range of marks will be the second to be promoted, and so on. The inter se seniority of persons appointed in the same class, category or grade of posts by promotion strictly on merit shall, without regard to the order of preference, be determined as if such persons had been appointed by promotion on the basis of seniority-cum-merit. This is illustrated

by the following example :-

Name of the officer	No. of marks	Seniority in the next below grade.
'A'	75	8
'B'	73	9
'C'	70	4
'D'	69	3
'E'	65	1

That if there are 5 vacant posts to be filled by promotion on the basis of "merit" formula the inter se seniority of these 5 selected persons will be the same as in the next below grade, but if only 3 posts are to be filled then those who have secured 75, 73 and 70 marks respectively will be selected and the remaining left out. The inter se seniority amongst these selected shall be the same as in the next below grade.

(b) The eligible candidates for promotion on the basis of 'merit' formula shall be 10 times the total number of vacancies to be filled by way of promotion provided such number is available and they should be holding the post in the next below cadre in substantive capacity. As for example, if there are twelve posts to be filled by way of promotion on the basis of both the formulae (viz., four posts for merit and eight posts for seniority-cum-merit), the total number of eligible candidates for promotion on the basis of merit formula shall be 12, if available. If an officer could not secure 65 marks continuously for 5 years, he will not be included in this list of eligible candidates.

(c) Notwithstanding anything contained in sub-para (b) above, for first promotion by merit, only such of the candidates shall be eligible who put in six years' service in the cadre on the date of selection."

Para 5 of the circular lays down what is seniority-cum-merit formula. Since in this writ petition there is no controversy about the applicability of seniority-cum-merit formula, I need not refer to the provisions relating to that formula. It is sufficient to say that due weight has to be given first to seniority and then to the merit. The marking system which is applicable both to the selection based on merit as well as to the selection based on seniority-cum-merit is contained in para 5 of the circular. That para reads as

follows :

"Para 5. - The marking system will be as follows :-

(a) Confidential Rolls for the 5 calendar years immediately preceding the date of selection will be examined, 5 marks will be earmarked for each year's confidential roll, and the marking will be : Excellent report - 5 marks; Very Good report - 4 marks; Good report - 3 marks; Satisfactory report - 2 marks; Unsatisfactory report - 2 marks; Adverse report - 1½ marks; and adverse report with punishment - 1 mark. If a person has been awarded either "Merit Pay" or "Cash awarded by the Government, then the Committee may award him up to 5 marks more in addition to the marks already obtained by him. These additional marks will not be taken into consideration at the time of the next selection.

(b) The record of service, which means service book, personal file, and confidential rolls other than the confidential rolls of the 5 years immediately preceding the selection maintained after the formation of Rajasthan will be allotted 50 marks, and the marking will be, (a) average or satisfactory record - 50 marks and (b) deduction up to 2 marks for each punishment according to gravity may be made (no deduction will be made for mere warning but, where warning has been recorded in a Confidential Roll, it should be considered as punishment and marks should be deducted), 'Recorded warning' means censure given by way of punishment under the C.C.A. Rules. If some marks have been deducted for any punishment out of the 50 marks in any year of selection, then that deduction should not be repeated or counted in the next selection. Also, if some marks have been deducted from the Confidential Roll of a particular year, then that deduction should not be repeated or counted next time. That Confidential Roll should be considered satisfactory and marks awarded accordingly. With a view to ensure implementation of this, it would be necessary for the promotion committee to keep a record of such deductions and additional marks as the case may be.

(c) On the basis of above marking only such persons who have secured a minimum of 62½ marks out of the total 75 marks will be considered for promotion on the basis of "seniority-cum-merit formula. Thus, as has been mentioned earlier, even if a junior person secures more than 62½ marks, the senior will not be superseded, if he has secured 62½ marks. Under the 'Merit' formula those who have secured 65 marks or more will only be considered for promotions."

9. Para 6 lays down when a person should be called for interview. It is provided therein that a person who has secured less than 62½ marks but not less than 61 marks should not be called for interview.

10. As regards the Confidential Rolls, it is laid down that those persons whose Confidential Rolls were missing or those whose Confidential Rolls could not be prepared in their absence for study or training outside India may also be called for interview.

11. Para 7 of the circular lays down that adverse remarks recorded in the Confidential Rolls should be communicated to the persons concerned in time, so that he may get an opportunity to represent his case to the authority concerned. However, if by chance adverse remarks have not been communicated to him, or if the adverse remarks have been communicated but his representation has not been decided by the appropriate authority, in that event the person concerned should be called for interview by the selection or the promotion committee and before he is asked to appear for interview, adverse remarks should be communicated to him so that he would come prepared with what he has to say in the matter. It was left open to the selection or promotion committee to treat the adverse remarks as expunged and award marks for such entries, if it felt that the adverse remarks were not justified. It was clearly emphasized that normally efforts should be made to communicate the adverse remarks and to decide the representations before the selection committee meets.

12. In para 9 of the circular it was pointed out to all selection committees and appointing authorities that the assessment of confidential rolls and the awarding of marks therein should be rational, judiciously liberal and objective, the reason being that at times a confidential roll might have been written with a greater sense of responsibility and at other times it might not have been given due care. It was also observed by way of illustration that one officer might be liberal in the assessment of his subordinate while another may be a bit miserly or strict or sometimes vindictive. It was, therefore, impressed on the selection committees that in order to have the balanced approach in the matter, it might at times be worthwhile for the selection committees as also for the appointing authority to reconsider whether the reporting officers themselves enjoyed reputation for efficiency, impartiality and integrity.

13. Lastly, it was pointed out in the circular that the instructions contained therein should be strictly kept in view while persons were considered for promotions; the reason being that evaluation and assessment of confidential rolls make or mar service prospects of Government employees. It was further enjoined on the reporting officers that they should, while drawing up confidential rolls, adhere to the instructions issued by the Chief Secretary on 28-7-1959.

14. In challenging the validity of Rules 28B and 32 of the Rules as also the circular aforesaid, it was contended by the petitioners (1) that rules 28B and 32 of the Rules were bad because no criterion for judging the comparative merits of the various candidates was laid down therein. It was urged that in the absence of any criterion to guide the exercise of discretion by the selection committee, the rules were hit by Article 14 of the Constitution; (2) in the alternative it was urged that assuming these rules to be valid the discretion was conferred on the selection committee alone for judging the merits of the officers for promotion and the impugned circular was calculated to fetter the exercise of discretion by the selection committee and was consequently bad; (3) that the issuing of the circular as well as making of amendment in the rules was mala fide. The rules were amended with a view to take power so that by this process the Government might be able to show favor to certain persons in the matter of promotions; (4) the circular does not serve the purposes of the Rules, but goes contrary to the rules; (5) the petitioner's confidential report for the year 1965-66 was prepared by one Sri Pratap Singh, Deputy Commissioner of Excise, under whom the petitioner was working during the relevant year. It is alleged that Sri Pratap Singh had prepared the confidential report of the petitioner absolutely maliciously and in clear contravention of his expressed opinion contained in a letter issued by Sri Pratap Singh to the petitioner wherein he eulogized his services in collecting the excise revenues beyond the target fixed for his area. It was further urged in connection with this Confidential report that this was prepared in September 1966 at the time the selection committee was to meet for the selection and no opportunity was afforded to the petitioner to have his say against the adverse remarks given by Shri Pratap Singh in his confidential report concerning the petitioner. It is pointed out that such remarks contained in the confidential report were conveyed to the petitioner for the first time on 11-5-67, though the selection committee had already met in September, 1966, and made its recommendations for promotion.

15. The writ petition has been opposed on behalf of the State. The other respondents,

namely, Rajeshwar Dayal Mathur, Surendra Chandra Pagoria, Mannlal Goyal and Prithvi Singh have not chosen to appear or to file any reply to the writ petition. It is denied on behalf of the State that Rules 28B and 32 of the Rules were invalid on any of the grounds taken by the petitioner. It is further denied that the circular issued by the Chief Secretary was bad. It is maintained that merit could rightly be taken to be consideration for promotion to higher posts and the circular only provided a method for assessment of merit. It was urged that the marking system laid down in the circular for assessment of merit of an officer was calculated to ensure objectivity of approach on the part of the selection committee. It was stated that there were sets of as many as 35 such rules governing the various services under the State and the circular was designed to bring about uniformity in the procedure for assessment of merit and for making selection on the basis of seniority-cum-merit. According to the respondent, even if the method evolved is not so scientific in the opinion of the Court, that will be no ground to strike down the circular. There are some more writ petitions, raising identical questions, listed for hearing. However, learned counsel for the petitioner as well as the learned Advocate-General desired that this case should be taken up as a test case for determination of the questions of law and the other writ petitions may be taken up subsequently as in some of the writ petitions the State had not filed its reply. In the circumstances learned counsel who were appearing in the other writ petitions listed today were allowed to argue the law points in the present writ petition and Shri Mridul, who appears in Kaluram's writ petition, made his submissions regarding the validity of the rules as well as the circular.

16. I may now proceed to deal with the several points stated above one by one. Regarding No. 1 about the vires of Rules 28B and 32 of the Rules. - Shri Agarwal argued that the rule was bad inasmuch as the term 'merit' was not defined and how it was to be assessed had not been stated in the Rules. He pointed out that corresponding Rule 27(2) of the Rules, which was deleted, laid down some criteria for judging the merits. In the absence of such criteria for merit being laid down, Shri Agarwal argued, the rule had resulted in conferment of unbridled and unhampered powers on the selection committee and this was violative of Article 14 of the Constitution. Shri Agarwal placed reliance on a number of cases such as, *State of West Bengal v. Anwar Ali*,¹ *Dwarka Prasad v. State of U. P.*,² *Ram Krishna Dalmia v. Justice Tendolkar*,³ and *Jaisinghani v. Union of India*,⁴

17. It is true, a legislation which does not contain any provision which is directly

discriminatory may yet offend against the guarantee of equal protection, if it confers upon the executive or the administrative authority an unguided or uncontrolled discretionary powers in the matter of application of law and then such a provision may be taken to be violative of Article 14 of the Constitution. The question, however, is whether the impugned rules do not contain a policy to guide the exercise of discretion by the selection committee. If in a law a policy which inspired the making of such law is discernible, then the mere fact that the selective application of the law is left to the administrative body will not make the vesting of discretion in such body violative of Article 14 of the Constitution.

18. In AIR 1958 SC 538, cited by Shri Agarwal himself, previous cases including Anwar Ali's case and other cases were reviewed by the Supreme Court. Das C. J. had extracted the essentials of the previous decisions and put them in the form of rules. One such principle was that there is always a presumption in favor of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. Further it must be presumed that the legislature understands and correctly appreciated the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. Also in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.

19. Therefore, if in the present case the impugned rules can be held to contain the policy of the rule making authority and the discretion though wide cannot be said to be unguided, then the provisions cannot be held to be ultra vires the Article 14 of the Constitution. It is to be remembered that the principle of merit for making promotions to higher posts has been recognized on all hands. The Administrative Reforms Committee headed by late Sri H. C. Mathur had dealt with the question of promotions at page 106 of its report. The committee pointed out that merit should be given adequate weightage in the matter of promotions, especially for senior appointments, to ensure greater efficiency in Government functioning and also to provide adequate incentive to Government servants to give their best. Their Lordships of the Supreme Court too had referred to an important passage in a report "Introduction to the Study of Public

Administration" by Leonard D. White, with approval in *Sant Ram v. State of Rajasthan*,⁵ I am tempted to quote that passage in extenso :

"The principal object of a promotion system is to secure the best possible incumbents for the higher positions, while maintaining the morale of the whole organization. The main interest to be served is the public interest, not the personal interest of members or the official group concerned. The public interest is best secured when reasonable opportunities for promotion exist for all qualified employees, when really superior civil servants are enabled to move as rapidly up the promotion ladder as their merits deserve and when selection for promotion is made on the sole basis of merit. For the merit system ought to apply as specifically in making promotions as in original recruitment.....

Employees often prefer the rule of seniority, by which the eligible longest in service is automatically awarded the promotion. Within limits, seniority is entitled to consideration as one criterion of selection. It tends to eliminate favoritism or the suspicion thereof and experience is certainly a factor in the making of a successful employee. Seniority is given most weight in promotions from the lowest to other subordinate positions. As employees move up the ladder of responsibility, it is entitled to less and less weight. When seniority is made the sole determining factor, at any level, it is a dangerous guide. It does not follow that the employee longest in service in a particular grade is best suited for promotion to a higher grade; the very opposite may be true.

Introduction to the Study of Public Administration, 4th Edn. pp. 380, 383.

This passage shows that the principal object of any system of promotion is to secure the best possible incumbent for higher positions while at the same time to maintain the morale of the whole organization. The pertinent consideration is to serve the public interest and not the personal interest of members of the official group concerned. It was also pointed out that public interest is best secured when reasonable opportunities for promotion exist for all qualified employees, when really superior civil servants are enabled to move as rapidly up the promotion ladder as their merits deserve and as vacancies occur.

20. Rule 32 adopts in essence what was stated in Rule 28-B. Rule 28-B provides for two methods of selection; one based on seniority-cum-merit; and the other based on

merit. In plain language the rule directs that promotion based on merit in contradiction to that based on seniority-cum-merit shall be strictly on the basis of merit. This clear direction that the selection against the merit quota has to be strictly on merit is clear statement of policy which was to ensure the availability of best persons in order to mark senior posts under the State. In that situation it can, by no stretch of imagination, be contended that the impugned rules placed unguided discretion in the hands of selection committees. The selection committees have to advance the policy of discovering the best talent in the lower cadre for promoting persons to higher cadre. Then it is to be further remembered that the selection committee consists of very senior officers of the State. The Chairman of the Rajasthan Public Service Commission is to be the Chairman of the Selection Committee. The Chairman undoubtedly is a person of high status and can be expected to recognise merit by adopting a reasonable standard for judging the merit. Likewise, the other members like the Chairman, Board of Revenue Commissioner, Development Department and the Special Secretary to the Government in the Appointments Department are all persons with wide knowledge of state affairs and the availability of human material in the State and can be expected to bear a proper approach in selecting persons for higher posts. These rules, therefore, are not in my opinion, violative of Article 14 of the Constitution. It is true, Rule 27 (2) which came to be deleted on 13-12-65 did provide that regard shall be had to; (a) personality and character; (b) tact and energy (including ability to undertake extensive tours); (c) intelligence and ability to express themselves in English and Hindi clearly; (d) court and other work; (e) integrity; and. (f) previous record of service. But these are only broad and general considerations and even in the absence of any reference to these considerations specifically in the statutory rules, the committee consisting of high State officers cannot be taken to be oblivious of such considerations which are normal for appraisal of the merit of an officer or to evaluate the comparative merit of more than one officers. The term 'merit,' in my view, is not capable of an easy definition, though one may be able to recognize merit in a person or one may very well be able to find out the demerit as well in a person. Sri Agarwal has pointed out that merit is a sum total of good qualities and attributes of an employee, such as, his academic qualifications, his University distinctions, his seniority, character, his devotion to duty his readiness to do everything and to suffer all discomforts for the purpose of his duty with a view to achieve the target, his punctuality, amount of work performed and the tours undertaken in a financial year, command over language and expression, courtesy and sweet reasonableness in dealing with the people, a rational and logical outlook, a broad vision, a spirit of adaptation in

adverse circumstances, honesty and integrity, co-operation with seniors and obedience to their orders, affectionate co-operation with the juniors and encouraging them to improve the quantity and quality of the work and so many other factors. One may broadly accept the several indicia for recognition of merit, as pointed out by Sri Agarwal, but all the same they remain as indicia of a general nature and as I have pointed out senior officers who have to sit on the selection committee cannot be taken to be unaware of these criteria. The dictionary meaning of the term 'merit' (vide Chambers's Twentieth Century Dictionary) is "excellence that deserves honour or reward; worth; value; desert; that which one deserves; the intrinsic right or wrong." This again, in my view, can, by no means, be taken to be a complete definition of the term 'merit.' For judging one's merit one may also take into account the time and energy devoted and the quality of the performance of a person in doing any job which he is required to do. For judging the suitability of a person for a higher post the requirements of such higher posts have also to be kept in view. The recognition of merit, by and large, will depend on considerations which cannot all be put in a cut and dry formula. It is always better to leave the term undefined to be understood in its comprehensive sense than to attempt a definition which may be found to be incomplete or may, at times, be misleading and may miss the point. In view of this when the rule enjoins a selection based strictly on merit such a rule cannot be said to be bereft of a policy and the exercise of discretion will in the circumstances be taken to be guided by such a policy of selecting best person for the higher posts on considerations of merit. However, there is one thing in the rule that struck me while I was reading the rule. Sub-rule (2) of Rule 28-B provided that the selection strictly on the basis of merit shall be made from amongst persons who are otherwise eligible for promotion under these rules and the number of eligible candidates to be considered for the purpose shall be ten times the total number of vacancies to be filled in on the basis of merit and seniority-cum-merit. I put it to learned counsel for the petitioner as well as the learned Advocate General if the restrictions contained in this sub-rule regarding the number of eligible candidates to be considered will not violate Article 16 of the Constitution. The effect of Article 16 of the Constitution is that whenever the question of promotions to a higher post is to be considered, cases of all eligible candidates for promotion have to be considered. It is the right of every civil servant, who fulfils the test of eligibility for promotion to higher posts, to be considered for promotion along with other candidates who are eligible. Learned Advocate General submitted that this ground has not been specifically taken by the petitioner in the case. This is so, but as this clause stares one in the face, I called upon both the parties to address me on this

question. Learned Advocate General submitted that as in the present case the number of vacancies that were available were sufficiently large, almost about 44, and as many as 440 officers in the ordinary time scale of Rajasthan Administrative Service had to be considered and the petitioner as well as the other respondents were within that group and, therefore, there was no such violation of the provisions of Article 16 of the Constitution. The argument is, no doubt, attractive, but in judging the validity of a rule one has to see beyond the facts of a particular case in hand. The question is whether such a rule restricts the consideration of eligible candidates to only some of the candidates and does not take the entire body of candidates who are eligible for promotion and will it not be violative of Article 16 of the Constitution on the very face of it and when this has come to the knowledge of the Court such a provision cannot be allowed to exist. The writ petitioner taking the clue from the Court argued this point vehemently to which learned Advocate General had no cogent answer. Therefore, the provision in sub-rule (2) of Rule 28-B to the effect that the number of eligible candidates to be considered for the purpose shall be ten times the total number of vacancies is clearly ultra vires Article 16 of the Constitution. It may be that on the present occasion the number of available vacancies were quite large, but in future, they may be just one or two to be filled up and then the choice will necessarily be limited, if this rule were allowed to stand, to 20 or 25 persons. This cannot be allowed to be done. In these circumstances I am of opinion that (i) Rules 28-B and 32 of the Rules are not bad on the ground that no criteria for adjudging merit had been laid down in the Rules, but the portion of sub-rule (2) of Rule 28-B to the extent the choice is restricted to ten times the number of eligible candidates is bad and that has to be struck down (ii) the provision that is being struck down is not easily severable from the remaining portion of the sub-rule and, therefore, the whole of sub-rule (2) of Rule 28 has to be struck down.

21. I may now turn to the circular. The circular undoubtedly contains administrative instructions and it does not profess to lay down anything else. Shri Mridul contended that the circular could not have been issued as the selection committee being a statutory body, such directions could not have been rightly issued to such a body. Shri Agarwal likewise contended that the circular seeks to cut down or curtail the discretion vested in the committee and in fact it goes contrary to the rules and was accordingly bad. I have already referred to the salient features of the circular. There is no manner of doubt that the Government clearly intended the administrative instructions contained in the circular to be complied with by the selection committee.

This is evident from what they have said in the first paragraph of the circular. It was provided therein that the Administrative instructions and the statutory service rules should together be taken as a complete code on the subject. The clear intention, therefore, was that the selection committee was to be guided both by the Rules as well as by what was contained in the circular even if the committee not so wanted to do. Shri Mridul invited my attention to a number of cases such as, *State of Punjab v. Suraj Prakash*,⁶ *Mannalal Jain v. State of Assam*,⁷ *S. K. Ghose v. Union of India*,⁸ and *B. Rajagopala v. S. T. A. Tribunal*,⁹ I have read these cases. They relate to bodies created by the statute which have to act as tribunals and have to proceed in matters before them quasi judicially. A statute may create a statutory body. Its action may, no doubt, be administrative, but in the particular case the body may be required to act quasi-judicially and in that event it is not to be guided by anyone else and has to deal with the matter according to its best judgment. In another case where a body is created by the statute and is not required to act quasi-judicially, administrative instructions by Government may be issued, provided they do not impinge on the statutory rules. Their Lordships of the Supreme Court in Saint Ram's case, AIR 1967 SC 1910, observed :-

"It is true that Government cannot amend or supersede statutory Rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed."

22. In my view, this is the relevant statement of the legal position governing the case in hand. Administrative instructions may no doubt be issued but such instructions cannot be allowed to impinge on the statutory rules by which the statutory body has to be guided. Let me, therefore, view the circular from this stand point. The circular proceeds to lay down what it describes as the marking system. I have already extracted Para. 5 of the circular above. A properly evolved marking system may be quite helpful for assessing the merit of persons who are already in the State service and that may have the virtue of ensuring objectivity of approach on the part of the selection committee. But where the administrative directions instead, of doing that place a rigid formula before the selection committee and if such a formula is calculated to do away with the policy of selection strictly on merit as enjoined by Rule 28-B, then such directions cannot be allowed to stand. Now it is noteworthy that for first promotion to be made on the basis of merit alone under the rules, the eligibility of officers in the lower cadre is restricted to six years service in substantive capacity, but for future promotions that will have to be made as occasion arises this rule of

eligibility has been done away with.

23. Now let me examine the so-called marking system for the two contingencies; (1) for first selection and (2) what will be done on the basis of the circular at the time of future selections. For future selections the marking system provides 50 marks for the record prior to 5 years and for the 5 years preceding the selection the marking will be on the basis of confidential rolls. An officer who has rendered less than 5 years of service will not be able to get a single mark out of 50 on the basis of the record for the period preceding 5 years period for which confidential rolls have to be assessed, for the simple reason that he will have no such record. Therefore, if out of 75 marks, 50 marks are to be denied to him outright, he is to show his worth within the much smaller range of 25 marks for his confidential rolls will be available only for the period of less than 5 years. Thus this formula for marking contained in paragraph 5 of the circular clearly militates against Rule 28-B; as the underlying policy or the rule being that merit and merit alone has to be the basis for promotion as against the quota provided for merit in contradiction to the provision made for promotion on the principle of seniority-cum-merit.

24. Then let me examine the position in respect of the so-called first selection. An officer who had put in just six years of service will get 50 marks for his record of previous service which just exceeds five years by one year. Another officer will have to face the destiny with much longer record. This can by no means, be a fair comparison of merits. An average officer who has just one year's record to his credit has much more chances of getting all the 50 marks, whereas another average officer with the longer experience will suffer the handicap of some marks being deducted if over a much longer period he had come to have an adverse entry or two to his credit. Thus paragraph 5 of the circular which embodies the marking system does not ensure a reasonable or a fair basis for a selection strictly on merit for the first selection and for subsequent selections it fails to provide any such basis at all, but definitely puts officers with less than 5 years service at a handicap, which with the best of talent in him an officer may not be able to get over. Thus while the rule gives a wide discretion for judging merit to the selection committee, paragraph 5 of the circular impinges on the exercise of such a discretion and, therefore, paragraph 5 is very inconsistent with the underlying policy of Rule 28-B or Rule 32 for that matter. Paragraph 5 also mixes up the formula both for judging merit and seniority-cum-merit. It is not possible to rewrite para. 5 after eliminating the objectionable part contained therein relating to the

so-called merit formula. This is an administrative instruction and it is not for this Court to rewrite it.

25. Now apart from this I have not been able to follow the rational basis in some of the provisions relating to the marking. It is true, it is for the administrative authority to evolve a formula for judging comparative merit, if it wants to do, but there are some startling features which cannot be ignored. Between what has been termed as "a satisfactory report" and "an unsatisfactory report" the difference is of half a mark, that is, a person who has a satisfactory report" earns 2 ½ marks and a person with an unsatisfactory report also earns 2 marks. Likewise, person with an adverse entry with punishment also earns a mark or a mark and a half, as the case may be. But when one has to evaluate the record preceding 5 years then such adverse entries result in deduction of marks. One has to strain his understanding and has to perform mental gymnastics to understand the logic of an adverse entry resulting in deduction of marks at one place and addition of marks for a different period. Ensuring of objectivity of approach on the part of an administrative body, be it the selection body, is a very desirable thing, but the way in which it is desired to be achieved by paragraph 5 of the circular has brought about a situation where a selection committee is left to ignore the clear mandate of the rule. It is better if a reasonable criteria or a marking system is embodied in the statutory rules themselves so that the candidates concerned may know in advance how their fate will be judged. But, as the matter stands, I am unable to hold that the instructions contained in paragraph 5 of the circular are in keeping with the letter and spirit of Rule 28-B or Rule 32 of the Rules. Indeed these instructions are repugnant to the rules and cannot be allowed to stand. Learned Advocate General submitted that even though selection may be made by the selection committee, the ultimate authority for making the appointment is the Government and before making the appointments it is for the Government to examine the suitability of the candidates to be appointed. Therefore, it was argued that even if any flaw is found in the Rule 28-B or 32 or in the circular for that matter, that will not affect the validity of the appointment made by the competent authority namely, the Government. To my mind, the submission has little force. Marking of a selection in accordance with the rules by a selection committee is an integral part of the process of making appointments to posts in the higher cadre of Rajasthan Administrative Service. Rule 32 enjoins that appointments to senior scales and selection grade posts shall be made by the Government from amongst the members of service on the basis of merit and seniority-cum-merit in the ratio of 1:2 on the recommendations of the Committee which consists

of the officers named therein. To my mind, the appointment can be made only on the basis of the recommendation of the committee. If the recommendations made by the committee are on the basis of a circular which goes contrary to the rules, an appointment made on the basis of such a recommendation cannot be upheld. Learned Advocate General also argued that the selection committee is not before the Court, as it has not been impleaded as a respondent and, therefore, he is not in a position to say how the selection committee made its recommendation. The selection committee may not be a party before the Court. Even so it has not been disputed that the appointments were made on the recommendations of the selection committee. The petitioner has asserted that the selections were made on the basis of the impugned circular. Learned Advocate General who is supposed to be in possession of all relevant information has not been able to say that the impugned circular so far as the marking system was concerned was not followed. I have, therefore, no reason to think that the selection committee did not adopt the marking system as contained in paragraph 5 of the circular. Learned Advocate General, however, had to admit that the impugned circular was before the selection committee. This is reasonable to infer because three of the members of the selection committee namely, the Chairman, Rajasthan Public Service Commission, the Commissioner, Development Department and Special Secretary to the Government must have been undoubtedly aware of the circular. Since it has not been stated by respondent No. 1, who had the special knowledge that the marking system contained in paragraph 5 of the circular was not adopted as the basis for selection based on merit, I have no reason to think otherwise and it is reasonable to infer that the marking system contained in paragraph 5 of the circular was adopted by the selection committee for the assessment of merit on the basis of the so-called merit formula. Of course, proviso to Rule 32 enables the Government to make temporary appointments for a period not exceeding six months in an officiating capacity of any member of the service who is eligible for such appointment under the rules. This proviso could be resorted to by the State Government, for a temporary period. Respondent Nos. 2 to 5 have been appointed only in an officiating capacity. It is admitted that six months period for which they could be appointed in an officiating capacity has long expired. That being so, they cannot be allowed to continue on the senior posts in officiating capacity.

26. In view of the conclusion that I have reached on the above point, it is unnecessary to deal with the other points raised in the writ petition.

27. The result is that I allow this writ petition and declare; (1) that Rule 28-B and Rule

32 of the Rules are valid except for sub-rule (2) of Rule 28-B and I hereby declare that sub-rule (2) of Rule 28-B is ultra vires Article 16 of the Constitution; (2) that circular Annexure 2 dated 27-8-66 is bad to the extent it enjoins that the administrative instructions contained therein together with the rules have to be taken as a complete code on the subject. I also declare that paragraph 5 of the circular impinges on Rule 28-B of the Rules and is repugnant with it and is consequently bad and has to be struck down. I further hold that the appointments of respondents Nos. 2 to 5 as senior scale officers in the Rajasthan Administrative Service are bad and accordingly I direct that they shall not hold these posts. The respondents are restrained from giving effect to the portion of the rules and the circular that has been declared to be void. The parties are left to bear their own costs of this writ petition.

Petition allowed.

Cases Referred.

1. AIR 1952 SC 75
2. AIR 1954 SC 224
3. AIR 1958 SC 538
4. AIR 1967 SC 1427
5. AIR 1967 SC 1910
6. AIR 1963 SC 507
7. AIR 1962 SC 386
8. 1968 Serv LR 741: (AIR 1968 SC 1385)
9. AIR 1964 SC 1573