



MAJESTY LEGAL
Advocates & Solicitors

APPLICATION OF PRINCIPLE OF 'MERIT-CUM-SENIORITY' IS DYNAMIC IN NATURE

"RAVIKUMAR DHANSUKHLAL MAHETA & ANR. VS HIGH COURT OF GUJARAT & ORS"

Hon'ble Supreme Court in case of *Ravikumar Dhansukhlal Maheta & Anr. vs High Court of Gujarat & Ors*¹, held that when both seniority and merit are considered, and merit plays the dominant role then 'Merit-cum-Seniority' for purpose of promotion to the cadre of District & Sessions Judges cannot be said to be violative of the principle of 'Merit-cum-Seniority', as such principles are dynamic & fluid in nature. Petitioner in present case alleged that final Select List was contrary to principle of 'Merit-cum-Seniority' as stipulated in Rule 5(1)(I) of the Gujarat State Judicial Service Rules, 2005. Hon'ble Court referred to judgment pronounced in case of *All India Judges' Association v. Union of India*², asserting that principle of 'Merit-cum-Seniority' stipulated in Rule 5(1) of Gujarat State Judicial Service Rules, 2005, should be understood as explained in the abovementioned decision.

Hon'ble Court noted that in present case, merit of a candidate is assessed through a suitability test, as outlined in paragraph 27 of the *All India Judges' Association* decision. Therefore, it is incorrect to conclude that process followed in present case does not adhere to the principle of 'Merit-cum-Seniority' merely because the test was not one of comparative merit and seniority was applied at the final stage of the selection process. Hon'ble Court further provided suggestions to make the suitability test more meaningful, emphasizing that the suitability of each candidate should be tested based on their own merit.

Hence, Hon'ble Supreme Court dismissed the petition.

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¹ WRIT PETITION (C) NO. 432 OF 2023

² (2010) 15 SCC 170

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**IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION**

WRIT PETITION (C) NO. 432 OF 2023

RAVIKUMAR DHANSUKHLAL MAHETA & ANRPETITIONER(S)

VERSUS

HIGH COURT OF GUJARAT & ORS.....RESPONDENT(S)

J U D G M E N T

J.B. PARDIWALA, J.:

For the convenience of exposition, this judgment is divided in the following parts: -

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1. Two judicial officers of the rank of Civil Judge (Senior Division) governed by the Gujarat State Judicial Service Rules, 2005 (for short, the “**2005 Rules**”) have invoked the jurisdiction of this Court under Article 32 of the Constitution. Their grievance against the High Court of Gujarat is that it erroneously applied the principle of ‘Seniority-cum-Merit’ in the recruitment undertaken by it in the year 2022 for promotion of Civil Judges (Senior Division) to the post of Additional District Judge against 65% quota, though Rule 5(1) of the 2005 Rules stipulates that the promotion shall be based on the principle of ‘Merit-cum-Seniority’. In other words, it is contended that the High Court wrongly subjected all eligible candidates in the feeder cadre i.e., Civil Judge (Senior Division) to a process of assessment of a specified level of minimum merit and then proceeded to prepare the final Select List strictly in accordance with the seniority of the candidates. This according to the petitioners is nothing but ‘Seniority-cum-Merit’.

A. FACTUAL MATRIX

2. The High Court of Gujarat issued an advertisement/recruitment notice dated 12.04.2022 notifying a total of 68 vacancies in the cadre of District Judges for promotion of Civil Judges (Senior Division) against the 65% quota on the basis of ‘Merit-cum-Seniority’ and passing a Suitability Test as envisaged under Rule 5(1)(I) of the 2005 Rules. The said advertisement/recruitment notice reads as under: -

**“HIGH COURT OF GUJARAT AT SOLA,
AHMEDABAD**

Website: www.gujarathighcourt.nic.in AND <https://hc-ojas.gujarat.gov.in>

NO.RC/1250/2022

RECRUITMENT NOTICE - DISTRICT JUDGE (65%)

**PROMOTION TO THE CADRE OF DISTRICT JUDGE (65%)
FROM AMONGST THE SENIOR CIVIL JUDGES ON THE
BASIS OF PRINCIPLE OF MERIT-CUM-SENIORITY AND
PASSING A SUITABILITY TEST.**

1. VACANCIES AND PAY-SCALE :

- (i) *In view of the guidelines of the Hon'ble Supreme Court in the case of **Malik Mazhar Sultan & Anr. Vs. UP Public Service Commission & Ors.** and The Gujarat State Judicial Service Rules, 2005, as amended from time to time, The High Court of Gujarat has decided to fill up 68 (53+15) vacancies in the cadre of District Judges (65%) by promotion from amongst us the Senior Civil Judges (including ad-hoc Additional District Judges) having **not less than two years of qualifying service in that cadre** as on 25/03/2022, in the pay-scale of Rs. 51650-63260 plus Allowances as admissible under the Rules.*

**15 unfilled vacancies of 10% quota of year-2020 are to be filled up by regular promotion in view of Judgment dated 09.12.2021 of the High Court of Gujarat (Coram: - Honourable Ms. Justice Sonia Gokani and Honourable Mr. Justice Rajendra M. Sareen delivered in SCA/7915/2020 with SCA/13631 & 13458/2020 and by operation of proviso to Rule 5(1)(ii) of the Gujarat State Judicial Service Rules, 2005 amended by Notification dated 23.06.2011.*

- (ii) *The High Court reserves its right to alter the number of vacancies.*

- (iii) *The List showing eligible Senior Civil Judges (including ad-hoc Additional District Judges) included in the zone of consideration for being considered for promotion to the cadre of District Judges (65%) is placed on the High Court website and HC-OJAS Portal along with this Notice.*

2. SCHEME FOR PROMOTION :

*Following are the **Four Components** for assessing the suitability of a Judicial Officer for promotion.*

Sr. No	Components of Suitability Test	Marks
1.	<i>Written Test (Objective Type - MCQs)</i>	100
2.	<i>Examination and Evaluation of Annual Confidential Reports for last five years</i>	20
3.	<i>Assessment of Average Disposal of last five years of the Judicial Officer concerned.</i>	20
4.	<i>Evaluation of Judgments delivered by the Judicial Officer concerned during the period of last one year. *</i>	60

** Due to unprecedented time of COVID-19 pandemic in Year 2020 & 2021, the Subordinate Courts in the state were not functioning regularly. Hence, this time round, the Hon'ble Committee has decided for the instant Promotion Process to call upon the requisite Four Judgments rendered by the Officer concerned during the period between 01/01/2020 to 31/12/2021. However, this should not be treated as a precedent in upcoming Promotion Process.*

3. Written Test (Objective Type - MCQs) :

- (i) *The Written Test (Objective Type - MCQs) shall consist of **01 (One) Paper of 100 Marks** of duration of 02 Hours consisting of Objective Type Multiple Choice Questions (MCQs) each of 01 Mark. There will be no **Negative marking system**. The subject would be as under:*

Sr. No	Subject	Marks
1.	<i>Legal Knowledge [Detailed Syllabus attached herewith at Annexure- 'A']</i>	50
2.	<i>Administrative Knowledge [GCS Rules 2002, Civil Manual, Criminal Manual, etc.]</i>	25
3.	<i>General Knowledge & Aptitude Test [Test of Reasoning, Numerical & Mental Ability & Psychological Test, etc.]</i>	25

- (ii) *The Written Test (Objective Type - MCQs) shall be conducted on **OMR Sheet*** or by any other mode that would be decided by the High Court later on.*

**The OMR Sheets of the Written Test (Objective Type - MCQs) will be assessed/evaluated by the Computer as per entries made on OMR Sheet. As the evaluation is being done on the Computer by Scanning, there is no human intervention and hence, queries relating to rechecking of the OMR Sheets, subsequent to the Written Test (Objective Type - MCQs), will not be entertained by the High Court*

- (iii) *The Language of the Question Paper will be English.*
- (iv) *Out of the abovementioned Four Components of Suitability Test, the Written Test (Objective Type - MCQs) will be conducted first. Nonetheless mere passing of Written Test (Objective Type - MCQs) by the Judicial Officers would not give him/her right of having secured the position in the Select List. It will be subject to passing of other 03 (Three) components as well.*
- (v) *ACR, Disposal and Judgments of only those Judicial Officers who will secure minimum 40% Marks in Written Test (Objective Type - MCQs), will be called for after the declaration of the result of Written Test (Objective Type - MCQs).*

4. ELIGIBILITY FOR PROMOTION :

The Judicial Officer, who obtains minimum 40% Marks in each Component and minimum 50% Marks in aggregate in the Grand

Total of all Four Components, shall be eligible for being included in the Select List for promotion.

5. GENERAL INSTRUCTIONS :

- (i) *The date and venue of the Written Test (Objective Type - MCQs) will be declared by the High Court in due course.*
- (ii) *The eligible Judicial Officers may download their E-call letter from the High Court websites viz. www.gujarathighcourt.nic.in and <https://hc-ojas.gujarat.gov.in>, as and when the same is made available by the High Court on the aforesaid websites.*
- (iii) *The Judicial Officer attending the Written Test (Objective Type - MCQs) may be treated as on duty and may be admissible for TA/DA as applicable.*
- (iv) *Result of the Written Test (Objective Type - MCQs) will be made available on the High Court websites and/or by any other mode that may be decided by the High Court.*
- (v) *The Marks of Written Test (Objective Type - MCQs) would be communicated to all the Judicial Officers, whereas, the Marks of other 03 Components along-with the Total Marks obtained by the concerned, would be provided to only those who qualify in the Written Test (Objective Type - MCQs).*

Such Marks shall be communicated by providing a link to a webpage on the HC-OJAS Portal with individual password (OTP – One Time Password) via SMS on his/her Registered Mobile Number, after the conclusion of the Selection Process

*High Court of Gujarat,
Sola, Ahmedabad - 380 060.*

Date: 12/04/2022

(Recruitment and Finance)

*Sd/-
Registrar*

Syllabus For the LEGAL KNOWLEDGE of the Written Test (Objective Type - MCQs) :

- (a) → *The Constitution of India*
 - *The Code of Civil Procedure, 1908,*
 - *The Transfer of Property Act, 1882,*
 - *The Specific Relief Act, 1963,*

- *The Indian Partnership Act, 1932,*
- *The Indian Contract Act, 1872,*
- *The Sale of Goods Act, 1930,*
- *The Limitation Act, 1963,*
- *The Arbitration and Conciliation Act, 1996,*
- *The Motor Vehicles Act, 1988,*
- *The Commercial Courts Act, 2015*
- *The Family Courts Act, 1984,*
- *The Environment (Protection) Act, 1986,*
- *The Wild Life (Protection) Act, 1972,*
- *The Indian Penal Code, 1860,*
- *The Code of Criminal Procedure, 1973,*
- *The Indian Evidence Act, 1872,*
- *The Narcotic Drugs & Psychotropic Substances Act, 1985,*
- *The Negotiable Instruments Act, 1881,*
- *The Protection of Children from Sexual Offence Act, 2012,*
- *The Juvenile Justices (Care & Protection of Children) Act, 2015,*
- *The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989,*
- *The Prevention of Corruption Act, 1988*
- *The Electricity Act, 2003,*
- *The Protection of Women from Domestic Violence Act, 2005*
- *The Immoral Traffic (Prevention) Act, 1956*
- *The Information Technology Act, 2000*
- *The Indecent Representation of Women (Prohibition) Act, 1986*

(b) Legal Maxims

(c) Medical Jurisprudence

(d) Jurisprudence and Legal Phraseology”

3. The High Court along with the aforesaid advertisement/recruitment notice, also issued a list of 205 judicial officers in the cadre of Civil Judge (Senior Division) i.e., the feeder cadre, falling under the ‘Zone of Consideration’ for the aforesaid purpose of filling up the vacancies in the cadre of District Judges as against 65% quota.

4. The High Court prepared the list of 205 candidates falling within the zone of consideration by including the senior-most Civil Judges (Senior Division) not exceeding three-times the notified vacancies. In other words, the zone of consideration only included the 205 senior-most Civil Judges (Senior Division).

5. As per the advertisement/recruitment notice dated 12.04.2022, the suitability of the aforesaid 205 candidates falling within the zone of consideration, for the purpose of promotion, was to be assessed on the basis of four components which are being reproduced hereunder: -

<i>Sr. No.</i>	<i>Components of Suitability Test</i>	<i>Marks</i>
<i>1.</i>	<i>Written Test (Objective Type – MCQs)</i>	<i>100</i>
<i>2.</i>	<i>Examination and Evaluation of Annual Confidential Reports for last five years.</i>	<i>20</i>
<i>3.</i>	<i>Assessment of Average Disposal of last five years of the Judicial Officer concerned.</i>	<i>20</i>
<i>4.</i>	<i>Evaluation of Judgments delivered by the Judicial Officer concerned during the period of last one year.</i>	<i>60</i>

6. The aforesaid advertisement/recruitment notice dated 12.04.2022 further stipulated that all those judicial officers who obtain a minimum 40% marks in each of the abovementioned component and a minimum aggregate of 50% marks in all four components shall be eligible for being included in the Select List for promotion.

7. Pursuant to the aforesaid, the Written Test (Objective Type – MCQs) was conducted by the High Court and out of 205 candidates, a total of 175 judicial officers cleared the written test i.e., all those who were able to secure a minimum of 40% marks. Thereafter, the High Court called for the month-wise list of the judgments disposed of and the annual confidential reports (ACRs) of all 175 candidates who qualified.

8. After the evaluation of the ACRs, judgments and disposal rates, a total of 149 judicial officers were found to be eligible for promotion as they had secured a minimum 40% marks in each of the abovementioned component and a minimum aggregate of 50% marks in all the four components of the suitability test.

9. The High Court thereafter proceeded to prepare the final Select List dated 10.03.2023 wherein the seniormost 68 candidates amongst the aforementioned 149 eligible candidates were given promotion to the post of District Judge.

10. In such circumstances referred to above, the petitioners are here before this Court with the present petition under Article 32 of the Constitution.

i. Method of Promotion followed by the High Court of Gujarat.

11. For the better adjudication of the issues involved in the case at hand, it would be necessary to delineate the step-wise process of promotion undertaken by the High Court of Gujarat for the purpose of preparing the final Select List.

12. The process, as explained by the High Court in its counter affidavit and additional affidavit is as under: -

1.	Total number of Civil Judges (Senior Division) in Gujarat.	444
2.	Civil Judges (Senior Division) who fulfilled the eligibility criteria of a minimum of two-years of qualifying service.	417
3.	Senior-most of the Civil Judges (Senior Division) falling under the zone of consideration as per 1:3 ratio.	205
4.	Civil Judges (Senior Division) who appeared for the Suitability Test (MCQ's with no negative marking). (Seven candidates chose not to appear for the suitability test)	198
5.	Civil Judges (Senior Division) who secured 40% marks in the Suitability Test (MCQs with no negative marking).	175
6.	Total number of Civil Judges (Senior Division) who secured total of 50% marks and a minimum 40% marks in all four components being the Written Test,	149

	evaluation of ACRs, assessment of average disposal and evaluation of Judgments.	
7.	Select List as per the notified vacancy prepared on the basis of seniority.	68

B. REFERENCE ORDER

13. The present writ petition was earlier heard by a two-Judge Bench of this Court wherein it was *prima facie* observed that in *All India Judges' Association (3) v. Union of India & Ors.* reported in (2002) 4 SCC 247 while emphasizing on the need for merit-based criteria for promotion in the cadre of Higher Judicial Service, this Court had held that the promotion to the post of District Judge shall be on the basis of 'Merit-cum-Seniority'.

14. This Court further observed that the principle of 'Merit-cum-Seniority' lays greater emphasis on merit, and seniority plays a less significant role. Therefore, seniority should be considered only when merit and ability are equal.

15. This Court *prima facie* opined that the final Select List dated 10.03.2023 could be said to be in contravention of the principle of 'Merit-cum-Seniority' as envisaged in the rules and the decision in *All India Judges' Association (3)* (supra). However, in view of the importance of the matter and the observations made in *All India Judges' Association (3)* (supra), the matter was referred to the

Bench of Hon'ble the Chief Justice of India. The relevant observations read as under: -

“8.1 It is also required to be noted that even as per the Recruitment Notice – District Judge (65%), the promotion to the cadre of District Judge (65%) from amongst the Senior Civil Judges shall be on the basis of principle of merit-cum-seniority and passing a suitability test. The suitability of a judicial officer for promotion is also provided in the Recruitment Notice, which consists of four components reproduced hereinabove. Thus, as per the statutory Rules and even as per the Recruitment Notice, the promotion to the cadre of District Judge (65%) shall be on the basis of principle of merit-cum-seniority and passing a suitability test. At this stage, it is required to be noted that the Rules, 2005 further amended in the year 2011, have been framed by the High Court pursuant to the directions issued by this Court in the case of All India Judges’ Association and Ors. (supra). It is required to be noted that prior to the decision of this Court in the case of All India Judges’ Association and Ors. (supra), the promotion in the cadre of Higher Judicial Service, i.e., District Judges and Additional District Judges were given on the basis of principle of seniority-cum-merit. Emphasising the need for merit-based criteria for promotion in the cadre of Higher Judicial Service, i.e., District Judges and Additional District Judges [...]

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xxx

xxx

8.8 The law on the principle of “merit-cum-seniority is by now, settled by this Court in a catena of decisions. As observed, while applying the principle of “merit-cum-seniority”, greater emphasis is given on merit and ability and seniority plays a less significant role. As observed, while applying the principle of “merit-cum-seniority”, the seniority is to be given weight only when merit and ability are approximately equal.

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xxx

xxx

9. Thus, we are more than satisfied that the impugned Select List dated 10.03.2023 issued by the High Court and the subsequent Notification dated 18.04.2023 issued by the State Government granting promotion to the cadre of District Judge are illegal and contrary to the relevant Rules and Regulations and even to the decision of this Court in the case of All India Judges’ Association and Ors. (supra). Therefore, we are more than prima facie satisfied that

the same as such are not sustainable. Though, we were inclined to dispose of the writ petition finally, however, as Shri Dushyant Dave, learned Senior Advocate appearing on behalf of some of the respondents - promotees has prayed not to dispose of the writ petition finally and, therefore, may consider the question of interim relief, we are not disposing of the writ petition finally. [...]

10. Looking to the importance of the matter and the observations made by this Court in the case of All India Judges' Association and Ors. (supra), pursuant to which the High Court has amended the Rules and the Regulations, we are of the opinion that let the matter be heard by the Bench headed by Hon'ble the Chief Justice of India, however, subject to and after obtaining appropriate orders from the Hon'ble the Chief Justice of India on the administrative side. The Registry is directed to notify the present writ petition for final hearing on 08.08.2023.

(Emphasis supplied)

16. Accordingly, the present writ petition came to be referred to this Bench and was accordingly taken up for hearing.

C. SUBMISSIONS ON BEHALF OF THE PETITIONERS

17. Mr. P.S. Patwalia, learned Senior Counsel appearing for the petitioners submitted that the statutory rules as well as the decision in *All India Judges' Association (3)* (supra) stipulate that promotion to the cadre of District Judges against the 65% quota has to be on the basis of the principle of 'Merit-cum-Seniority'. Although the High Court has used the nomenclature 'Merit-cum-Seniority' yet the method ultimately followed for the purpose of promotion to the cadre of District Judge is nothing but 'Seniority-cum-Merit'.

18. He further submitted that the High Court in its methodology subjected all eligible candidates in the feeder cadre to a process of assessment of a specified minimum necessary merit and then proceeded to promote the candidates found possessing the minimum requisite merit strictly in the order of seniority. He submitted that the said method is nothing but 'Seniority-cum-Merit'.

19. Finally, Mr. Patwalia submitted that where promotion is on the basis of 'Merit-cum-Seniority', seniority has to be considered only in the event merit is equal in all respects. In other words, seniority should be considered only if there is a tie between the candidates on their individual merit.

20. Mr. R. Basant, learned Senior Counsel submitted that in the procedure that came to be followed by the High Court for promotion, seniority has been applied and given effect twice - once at the stage of preparation of the zone of consideration and then again at the stage of preparing the final Select List.

21. He further submitted that by applying seniority at the last stage of preparing the final Select List, the principle of 'Merit-cum-Seniority' has been given a go-by and instead 'Seniority-cum-Merit' has been applied.

22. He also submitted that in cases of promotion on the principle of 'Merit-cum-Seniority', there is always an element of comparative merit and the promotion must be as per the *inter-se* merit of the persons who obtained the

minimum marks. In this regard, strong reliance has been placed on the decisions of this Court in *Rupa Rani Rakshit & Ors. v. Jharkhand Gramin Bank* reported in (2010) 1 SCC 345 and in *Dr. Kavita Kamboj v. High Court of Punjab and Haryana & Ors.* reported in 2024 SCC OnLine SC 254.

23. He further submitted that ‘Merit-cum-Seniority’ is not a vague literary term, but carries a specific meaning in service jurisprudence. He submitted that the decision in *All India Judges’ Association (3)* (supra) consciously substituted the earlier criteria of ‘Seniority-cum-Merit’ with ‘Merit-cum-Seniority’.

24. In the last, Mr R. Basant submitted that this Court in a plethora of its decisions has consistently held that where a minimum benchmark is laid down and candidates having secured the minimum required marks are promoted on the basis of the seniority irrespective of the individual marks secured by them, it is an instance of ‘Seniority-cum-Merit’.

D. SUBMISSIONS ON BEHALF OF THE HIGH COURT

25. Mr. V. Giri, learned Senior Counsel appearing for the High Court of Gujarat submitted that ‘Merit-cum-Seniority’ should not be conflated with Merit and that there is a clear distinction between the two concepts. He submitted that whilst merit is concerned only with the grade/credit of the candidate, the former not only checks the merit but also lays emphasis on seniority.

26. He submitted that if the interpretation of ‘Merit-cum-Seniority’ as canvassed by the petitioners is accepted, then the entire process of promotion would become solely based on merit and the aspect of seniority would be completely obliterated from the principle of ‘Merit-cum-Seniority’.

27. He further submitted that doing so would have a far-reaching effect. The same would result in an amalgamation of the promotion process against 65% posts on the basis of ‘Merit-cum-Seniority’ and the process against 10% posts on the basis of strict merit in the cadre of District Judges and would completely do away with the fine distinction between the two modes of promotion.

28. Finally, Mr. Giri submitted that the High Court has been following the same methodology since 2011.

E. SUBMISSIONS ON BEHALF OF THE PROMOTED CANDIDATES

29. Mr. Dushyant Dave, learned Senior Counsel appearing for judicial officers who found place in the final Select List submitted that the writ petition under Article 32 ought not to be entertained as the petitioners have an alternative efficacious remedy of filing a writ petition under Article 226 of the Constitution before the High Court.

30. He submitted that in *All India Judges’ Association (3)* (supra) the principle of ‘Merit-cum-Seniority’ and Suitability Test was provided only to

objectively ascertain a minimum standard of merit for the purpose of promotion to the Higher Judicial Services in the cadre of District & Sessions Judge.

31. Mr. Dave submitted that merely having scored a few marks more than the other candidates is neither an indication of being tangibly more meritorious nor a cogent reason to completely negate the length of service of the senior candidates. He submitted that if the interpretation as canvassed by the petitioners is accepted, it would cause undue hardship and result in unjust treatment to his clients whose names were included in the final Select List, as they would end up losing their precious years of seniority in service only on account of having obtained a few marks lesser compared to the petitioners.

32. Ms. Mayuri Raghuvanshi, learned Counsel appearing for some of the respondents submitted that the principle of 'Merit-cum-Seniority' does not mean that the length of service or seniority has no relevance. She submitted that the marks secured in the written examination and other tests are not indicative of merit as the marks may be obtained even without possessing other important qualities such as practical experience or by cramming.

33. She further submitted that the various decisions on the principle of 'Merit-cum-Seniority' as relied upon by the petitioners do not deal with judicial services and have not been delivered in the context of promotion of Civil Judges (Senior Division) to the cadre of District Judge. It was submitted that 'Merit-cum-

Seniority’, as stipulated in the 2005 Rules, should be read in line with the observations in *All India Judges’ Association (3)* (supra).

34. Learned counsel further submitted that the reliance placed by the petitioners on the process of promotion followed by the High Court of Jharkhand and High Court of Calcutta is absolutely misplaced, as the statutory rules therein are not *pari-materia* to the 2005 Rules.

35. Finally, Ms. Raghuvanshi submitted that her clients whose names have been included in the final Select List, had also participated in the promotion process undertaken in the year 2020. Although her clients had scored higher marks compared to the other candidates in the 2020 recruitment process, yet they were not promoted as they were comparatively junior to the other officers. She submitted that the process which was followed by the High Court applying the principle of ‘Merit-cum-Seniority’ has been followed consistently since 2011. She submitted that deviating from the process as followed by the High Court will result in inequitable and unjust repercussions, as her clients who lost out on promotions in the previous recruitment process because of being relatively junior would again end up losing out on their promotions in this process despite being relatively senior.

F. POINTS FOR DETERMINATION

36. Having heard the learned counsels appearing for the parties and having gone through the materials on record, the two pivotal questions that fall for our consideration are as under: -

- I. What is the scope of principle of the ‘Merit-cum-Seniority’ in service jurisprudence; and
- II. Whether promotion of Civil Judges (Senior Division) to the cadre of District Judges in accordance with Rule 5(1) of the 2005 Rules and the Recruitment Notice dated 12.04.2022 issued by the High Court of Gujarat is contrary to the principle of ‘Merit-cum-Seniority’ as laid down in *All India Judges’ Association (3)* (supra).

G. ANALYSIS

i. Maintainability of the present Writ Petition under Article 32.

37. At the outset, a preliminary objection was raised as regards the maintainability of the writ petition under Article 32 of the Constitution, on the ground that the petitioners have an efficacious alternative remedy available to them under Article 226 of the Constitution.

38. In *Mohammed Ishaq v. S. Kazam Pasha & Anr.* reported in (2009) 12 SCC 748 this Court held that where Article 32 has been invoked, even where an alternative remedy exists, relegating the parties to avail the same is discretionary

and a matter of convenience, and the same by no stretch restrains this Court to entertain the same. The relevant observations read as under: -

“23. On the preliminary issue of maintainability of the present writ petition, it is well-settled position of law that simply because a remedy exists in the form of Article 226 of the Constitution for filing a writ in the High Court concerned, it does not prevent or place any bar on an aggrieved person to directly approach the Supreme Court under Article 32 of the Constitution. It is true that the Court has imposed a self-restraint in its own wisdom on the exercise of jurisdiction under Article 32 where the party invoking the jurisdiction has an effective, adequate alternative remedy in the form of Article 226 of the Constitution. However, this rule which requires the exhaustion of alternative remedies is a rule of convenience and discretion rather than a rule of law. At any rate it does not oust the jurisdiction of this Court to exercise its writ jurisdiction under Article 32 of the Constitution. We, therefore, reject the preliminary objection raised and proceed to examine the contentions raised in the writ petition on merits.”

(Emphasis supplied)

39. In Maharashtra State Judicial Service Assn. & Ors. v. High Court of Judicature at Bombay & Ors. reported in (2002) 3 SCC 244 this Court held that where the issue pertained only to the interpretation of the relevant rules and there was no dispute as regards the facts of the case by either side, the same could be entertained under Article 32 even though the alternative remedy under Article 226 was available. The relevant observations read as under: -

“1. [...] On behalf of the direct recruit respondents, a preliminary objection had been taken by Shri M.L. Verma that the dispute being one of inter se seniority within a cadre, the Court ought not to entertain a petition under Article 32, as the parties were entitled to approach the High Court under Article 226 against the administrative decision of the Bombay High Court. We have no doubt in our mind that an administrative decision of the Court could be assailed by filing a writ petition under Article 226 in the High Court itself, but this Court having entertained the petition under Article 32 by issuing rule on 8-12-2000 and the dispute being one which centres around interpretation of the relevant Rules and both the direct

recruits and the promotees having made their stand known, and further, no disputed question on facts having arisen, we do not think it appropriate to direct the promotees to approach the High Court in the first instance. We, therefore, heard the parties at length on the merits of the matter.”

(Emphasis supplied)

40. From the aforesaid, it is clear that the availability of an alternative remedy does not in any manner affect the maintainability of the writ petition under Article 32 of the Constitution. The rule behind relegating a party to first avail the alternative remedy before knocking the doors of this Court is a rule of self-restraint that is exercised by this Court as a matter of convenience.

41. Further, wherever the facts of the case are not in dispute, and the issue involves the interpretation of rules which are of significant importance having a far-reaching effect, it would be a fit case for this Court to exercise its discretion and entertain the writ petition under Article 32 even if there is an alternative remedy available.

42. It is contended by the petitioners that they had to come before this Court invoking Article 32 of the Constitution instead of Article 226 because the impugned final Select List dated 10.03.2023 which is the subject matter of challenge had been ratified by the High Court in its Full Court meeting. We are not impressed with such a submission as the High Court on its judicial side can always review any decision or action taken by it on its administrative side. It

would be erroneous to say that if any decision taken by the High Court on its administrative side is ultimately challenged on any legal ground on its judicial side, then the High Court may not undertake judicial review of such administrative decision dispassionately.

43. In the present case, the facts are not in dispute either at the end of the petitioners herein or at the end of the High Court or the respondents. Moreover, since the issues involve not just the interpretation of Rule 5(1)(I) of the 2005 Rules but also the decision of this Court in *All India Judges' Association (3)* (supra), we are of the considered opinion that the petition under Article 32 deserves to be entertained.

ii. **The Legislative History and Scheme of the Gujarat State Judicial Service Rules, 2005.**

a. **Shetty Commission on Judicial Reforms and the Decision of this Court in *All India Judges' Association (3)*.**

44. The subject matter of the controversy with which we are concerned in the present litigation is with regard to the scheme and policy for promotions in the Higher Judicial Services, particularly to the cadre of Additional District & Sessions Judge. The genesis of the same can be traced back to the decision of this Court in *All India Judges' Association (3)* (supra).

45. The First Law Commission of India under the Chairmanship of Shri M.C. Setalvad in its 14th Report in the year 1958 expressed concerns over the growing problem of finding capable and competent judicial officers for the District Judiciary. It reported that most of the difficulties brought to the notice of the Commission had their origin in the inefficiency or inexperience of the judicial personnel on account of the falling standards in their recruitment. The relevant observations read as under: -

“2.Subordinate Judiciary

Personnel

2. As has been said repeatedly elsewhere, the problem of efficient judicial administration, whether at the level of the superior courts or the subordinate courts, is largely the problem of finding capable and competent judges and judicial officers. Delays in the disposal of cases and the accumulation of arrears are in a great measure due to the inability of the judicial officers to arrange their work methodically and to appreciate and apply the provisions of the Procedural Codes.
[...]

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4. As we shall point out later, the problem has since grown in dimensions, because there is unmistakable testimony that the standards of the judicial officers recruited from the bar and other sources have, during recent years, fallen in a substantial degree for various reasons. That has been almost the unanimous view expressed by the witnesses before us. It is thus obvious that no scheme of reform of judicial administration will be effective or worth-while, unless the basic problem of providing trained and capable judicial personnel is satisfactorily solved. Before we can suggest adequate measures for raising the level of judiciary, we have to examine the causes which have led to the decline in its efficiency.”

(Emphasis supplied)

46. Accordingly, the Law Commission made a slew of recommendations in order to deal with the afore-stated problems. The Law Commission, *inter-alia*,

recommended devising a more robust mechanism for recruitment and in-service training of judicial officers with a view to improve their calibre. It further recommended that a third source of recruitment to the Higher Judiciary i.e., the cadre of District & Sessions Judge, should be created. It stated that this third category should be recruited purely by way of a competitive examination, and recruitment through the existing two categories i.e., by promotion and from the Bar should continue as per the existing process. The Law Commission was of the view that the new avenue as recommended would enlarge the field of selection and bring in Judicial Officers of high calibre and brilliance. The relevant observations read as under: -

“10. If we are to improve the personnel of the subordinate judiciary, we must first take measures to extend or widen our field of selection so that we can draw from it really capable persons. A radical measure suggested to us was to recruit the judicial service entirely by a competitive test or examination. It was suggested that the higher judiciary could be drawn from such competitive tests at the all-India level and the lower judiciary can be recruited by similar tests held at State level. Those eligible for these tests would be graduates who have taken a law degree and the requirement of practice at there Bar should be done away with.

Such a scheme, it was urged, would result in bringing into the subordinate judiciary capable young men who now prefer to obtain immediate remunerative employment in the executive branch of Government and in private commercial firms. The scheme, it was pointed out, would bring to the higher subordinate judiciary the best talent available in the country as a whole, whereas the lower subordinate judiciary would be drawn from the best talent available in the State.”

(Emphasis supplied)

47. In *All India Judges' Association (1) v. Union of India* reported in (1992) 1 SCC 119, the issues pertaining to the working conditions of the District Judiciary throughout the country came up for consideration, including the issues pertaining to uniformity in the judicial cadres in different States and Union Territories, and for adequate provisions for in-service training and promotion.

48. This Court took notice of the aforesaid recommendations that were made by the First Law Commission of India in its Fourteenth Report in 1958, particularly with respect to improving the standard of the District Judiciary and widening the field of selection and promotion to the Higher Judiciary in a balanced manner so as to induct capable and efficient persons as Judicial Officers in the District Judiciary.

49. While this Court acknowledged that the creation of an All-India Judicial Service as proposed by the Law Commission may undermine the control of the High Courts over the District Judiciary, yet at the same time this Court suggested to the Union of India to undertake appropriate steps towards the implementation of the recommendations made by the Law Commission, as far as feasible, at the earliest, and directed the Central Government to consider setting up an All-India Judicial Service. The relevant observations read as under: -

"11. [...] We are of the view that the Law Commission's recommendation should not have been dropped lightly. There is considerable force and merit in the view expressed by the Law Commission. An All India Judicial Service essentially for manning

the higher services in the subordinate judiciary is very much necessary. The reasons advanced by the Law Commission for recommending the setting up of an All India Judicial Service appeal to us.

12. Since the setting up of such a service might require amendment of the relevant articles of the Constitution and might even require alteration of the Service Rules operating in the different States and Union territories, we do not intend to give any particular direction on this score particularly when the point was not seriously pressed but we would commend to the Union of India to undertake appropriate exercise quickly so that the feasibility of implementation of the recommendations of the Law Commission may be examined expeditiously and implemented as early as possible. It is in the interest of the health of the judiciary throughout the country that this should be done.

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63. We would now briefly indicate the directions we have given in the judgment:

(i) An All India Judicial Service should be set up and the Union of India should take appropriate steps in this regard. [...]

(Emphasis supplied)

50. Thereafter, review petitions came to be filed against the decision in *All India Judges' Association (1)* (supra) seeking certain modifications and clarifications in respect of the directions that were issued by this Court. The review petitions came to be disposed in *All India Judges' Association (2) v. Union of India* reported in (1993) 4 SCC 288, wherein *inter-alia* it was clarified that although the direction for setting up an All-India Judicial Service was only recommendatory, yet in view of the necessary and expedient nature of the

recommendations made by the Law Commission, the Central Government should take an earnest initiative in realizing the same.

51. Pursuant to the directions issued by this Court in *All India Judges' Association (1)* (supra) and *All India Judges' Association (2)* (supra), the First National Judicial Pay Commission under the Chairmanship of Hon'ble Mr. Justice K.J. Shetty (Former Judge of this Court), more popularly known as the "Shetty Commission on Judicial Reforms" came to be constituted. After due deliberations, the Shetty Commission submitted its report on 11.11.1999, and responses to the same were filed by the States and Union Territories.

52. The recommendations made in the Shetty Commission's report along with the responses of the States/Union Territories were taken into consideration and the same ultimately culminated into the decision of this Court in *All India Judges' Association (3)* (supra).

(1) In the said decision, this Court, *inter-alia*, accepted the recommendation of the Shetty Commission that 75% of the posts in the cadre of District & Sessions Judge shall be filled by promotion from Civil Judge (Senior Division) and 25% of the posts shall be filled by direct recruitment from the Bar by way of a competitive examination encompassing a written examination and viva.

- (2) At the same time, this Court was of the view that when it comes to appointment by promotion to the cadre of District & Sessions Judge, (i) some incentive for improving must exist for the judicial officers and (ii) a certain minimum standard ought to be maintained in the cadre of District & Sessions Judge and further, there must be an objective method for testing the suitability of a Judicial Officer for promotion.
- (3) Accordingly, this Court held that even within the quota of 75% there should be two methods of appointment by way of promotion. It held that 50% of the total posts shall be filled by promotion based on the principle of 'Merit-cum-Seniority' through a test for assessing the continued efficiency and adequate knowledge of case-law of the Judicial Officers and the remaining 25% of the posts shall be filled by promotion strictly on the basis of merit through a limited departmental competitive examination (LDCC) with an eligibility requirement of five-years of qualifying service as a Civil Judge (Senior Division).
- (4) Thus, this Court directed that recruitment to the Higher Judicial Service i.e., in the cadre of District & Sessions Judge shall be through three different avenues, namely: -
- (i) 50% by promotion of Civil Judges (Senior Division) on the basis of 'Merit-cum-Seniority' and passing a Suitability Test.

- (ii) 25% by promotion strictly based on merit through a limited departmental competitive examination of Civil Judges (Senior Division) not having less than five-years qualifying service; and
 - (iii) 25% by direct recruitment from amongst the eligible advocates based on written and viva voce test.
- (5) Accordingly, all the High Courts were directed to frame appropriate rules in terms of the aforesaid directions. The relevant observations read as under: -

“27. Another question which falls for consideration is the method of recruitment to the posts in the cadre of Higher Judicial Service i.e. District Judges and Additional District Judges. At the present moment, there are two sources for recruitment to the Higher Judicial Service, namely, by promotion from amongst the members of the Subordinate Judicial Service and by direct recruitment. The subordinate judiciary is the foundation of the edifice of the judicial system. It is, therefore, imperative, like any other foundation, that it should become as strong as possible. The weight on the judicial system essentially rests on the subordinate judiciary. While we have accepted the recommendation of the Shetty Commission which will result in the increase in the pay scales of the subordinate judiciary, it is at the same time necessary that the judicial officers, hard-working as they are, become more efficient. It is imperative that they keep abreast of knowledge of law and the latest pronouncements, and it is for this reason that the Shetty Commission has recommended the establishment of a Judicial Academy, which is very necessary. At the same time, we are of the opinion that there has to be certain minimum standard, objectively adjudged, for officers who are to enter the Higher Judicial Service as Additional District Judges and District Judges. 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 posts 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.

28. As a result of the aforesaid, to recapitulate, we direct that recruitment to the Higher Judicial Service i.e. the cadre of District Judges will be:

(1)

- (a) 50 per cent by promotion from amongst the Civil Judges (Senior Division) on the basis of principle of merit-cum-seniority and passing a suitability test;
- (b) 25 per cent by promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years' qualifying service; and
- (c) 25 per cent of the posts shall be filled by direct recruitment from amongst the eligible advocates on the basis of the written and viva voce test conducted by respective High Courts.

(2) Appropriate rules shall be framed as above by the High Courts as early as possible.

29. [...] As a result of the decision today, there will, in a way, be three ways of recruitment to the Higher Judicial Service. The quota for promotion which we have prescribed is 50 per cent by following the

principle “merit-cum-seniority”, 25 per cent strictly on merit by limited departmental competitive examination and 25 per cent by direct recruitment. [...]”

(Emphasis supplied)

53. Thereafter, in *Malik Mazhar Sultan & Anr. (1) v. U.P. Public Service Commission* reported in (2006) 9 SCC 507, this Court underscored the importance for filling up judicial vacancies on time and directed the High Courts to undertake necessary steps towards fixing a timeline for determining vacancies, issuing advertisements, conducting examinations, interviews and declaring results for final appointment. The relevant observations read as under: -

“23. It is absolutely necessary to evolve a mechanism to speedily determine and fill vacancies of judges at all levels. For this purpose, timely steps are required to be taken for determination of vacancies, issue of advertisement, conducting examinations, interviews, declaration of the final results and issue of orders of appointments. For all these and other steps, if any, it is necessary to provide for fixed time schedule so that the system works automatically and there is no delay in filling up of vacancies. [...]”

(Emphasis supplied)

54. The aforesaid was followed by the decision in *All India Judges’ Association (4) v. Union of India* reported in (2010) 15 SCC 170, wherein this Court took note of the fact that various posts of the cadre of District & Sessions Judge earmarked for the 25% promotional quota strictly on the basis of merit were lying vacant on account of insufficiency of candidates or their inability to clear the competitive exam. In such circumstances, it was directed that the 25% promotional quota, to be filled on the basis of Merit, shall be reduced to 10% of the cadre strength, and the 50% promotional quota to be filled by ‘Merit-cum-

Seniority' shall be increased to 65% of the total seats. The relevant observations read as under: -

“6. Having regard to various strategies available, we are of the considered view that suitable amendment is to be made for this 25% quota of limited departmental competitive examination. We are also of the view, with the past experience, that it is desirable that 25% quota be reduced to 10%. We feel so as the required result, which was sought to be achieved by this process could not be achieved, thus it calls for modification.

7. Thus, we direct that henceforth only 10% of the cadre strength of District Judges be filled up by limited departmental competitive examination with those candidates who have qualified service of five years as Civil Judge (Senior Division). Every year vacancies are to be ascertained and the process of selection shall be taken care of by the High Courts. If any of the post is not filled up under 10% quota, the same shall be filled up by regular promotion. In some of the High Courts, process of selection of these 25% quota by holding limited departmental competitive examination is in progress, such process can be continued and the unfilled seats, if meritorious candidates are available, should be filled up. But if for some reason the seats are not filled up, they may be filled up by regular promotion and apply the usual mode of promotion process. Thus we pass the following order.

8. Hereinafter, there shall be 25% of seats for direct recruitment from the Bar, 65% of seats are to be filled up by regular promotion of Civil Judge (Senior Division) and 10% seats are to be filled up by limited departmental competitive examination. If candidates are not available for 10% seats, or are not able to qualify in the examination then vacant posts are to be filled up by regular promotion in accordance with the Service Rules applicable.”

(Emphasis supplied)

55. In **Malik Mazhar Sultan & Anr. (3) v. U.P. Public Service Commission & Ors.** reported in (2009) 17 SCC 530 this Court, in view of the large number of vacancies in the promotional quota in the cadre of District & Sessions Judge,

directed the High Courts to be practical in the matters of promotion and ensure timely filling up of the vacancies on the basis of the principle of ‘Seniority-cum-Merit’, deviating from the observations in *All India Judges’ Association (3)* (supra) mandating promotion by ‘Merit-cum-Seniority’. It further observed that seniority should have a predominant role in giving promotions to the Civil Judges (Senior Division) and that the High Court may decline promotion only in case the Judicial Officer is not suitable for being promoted. The relevant observations read as under: -

“3. We see large number of vacancies of District Judges are lying vacant as the promotion of these posts are not being done timely by the High Court. Considering the large number of vacant posts of District Judges, the High Court should take timely action to fill up these vacancies keeping in mind the principle of seniority-cum-merit. The High Court may deny promotion to a Civil Judge (Senior Division) only in case he/she is not suitable for being promoted and the seniority should always have a predominant role in giving promotion to the Civil Judge (Senior Division) to the post of District Judge. If the posts of District Judges are not filled up in time it is likely that sessions cases may not have timely trial, thereby delaying the whole procedure of justice delivery system. We request the High Court to be practical in the matter of promotion and filling up the posts of the District Judges. [...]”

(Emphasis supplied)

b. Relevant Statutory Provisions of the Gujarat State Judicial Service Rules, 2005.

56. At this stage, it would be necessary to look into the statutory scheme and refer to the relevant provisions governing the promotion of Civil Judges (Senior Division) to the cadre of District & Sessions Judge in the State of Gujarat.

57. The 2005 Rules provide for the service conditions and policies pertaining to the Judicial Officers and the service framework of the District Judiciary in the State of Gujarat.

58. Rule 5 sub-rule (1) of the 2005 Rules provides for the various modes or methods of appointment to the cadre of District & Sessions Judge. Rule 5(1) of the 2005 Rules framed in accordance with the directions issued in *All India Judges' Association (3)* (supra), lays down three distinct modes of recruitment to the cadre of District & Sessions Judge. The said Rule reads as under: -

“5. Method of recruitment, qualification and age limit.

(1) Recruitment to the cadre of District Judges shall be as under, -

(I) 50 per cent by promotion from amongst the Senior Civil Judges on the basis of principle of merit-cum-seniority and passing a suitability test.

(II) 25 per cent by promotion strictly on the basis of merit through limited competitive examination of Senior Civil Judges having not less than five years qualifying service, and

(III) 25 per cent of the posts shall be filled by direct recruitment from amongst the eligible advocates on the basis of the written and viva voce test conducted by the High Court.”

59. Rule 5(1) sub-clause (I) of the 2005 Rules provides that appointment to 50% of the posts in the cadre of District & Sessions Judge shall be by promotion from the cadre of Civil Judges (Senior Division) i.e., the feeder cadre, on the basis of the principle of ‘Merit-cum-Seniority’ and upon passing a Suitability Test. In

other words, 50% of the posts of District & Sessions Judge shall be filled by promotions on the basis of the principle of 'Merit-cum-Seniority'.

60. Rule 5(2) sub-clause (II) of the 2005 Rules provides that 25% of the posts in the cadre of District & Sessions Judge shall be filled by promotions on the basis of merit through a limited departmental competitive examination.

61. Rule 5(2) sub-clause (III) provides the third method of recruitment, by which the remaining 25% of the posts in the cadre of District & Sessions Judge shall be filled by direct recruitment of the eligible advocates on the basis of a written exam and viva-voce.

62. Pursuant to the directions of this Court in *All India Judges' Association (4)* (supra), Rule 5 referred to above was amended by the Gujarat State Judicial Service (Amendment) Rules, 2011, whereby, the second category of posts being the 25% promotional quota to be strictly filled on the basis of merit, was reduced to 10% and the 50% promotional quota, to be filled on the basis of principle of 'Merit-cum-Seniority' and passing a Suitability Test, was increased to 65%.

63. In other words, the aforesaid 2011 amendment reduced the posts for promotion on the basis of merit from 25% to 10% and increased the posts for promotion on the principle of 'Merit-cum-Seniority' from 50% to 65% in the cadre of District & Sessions Judge.

64. Rule 5 sub-rule (3) further prescribes the eligibility criteria for the aforesaid two modes of promotion provided in Rule 5(1) of the 2005 Rules, as amended in 2011. The said rule reads as under: -

“5. Method of recruitment, qualification and age limit.

(3) (I) For being eligible for promotion against 65% of the total posts in the cadre of District Judges required to be filled by promotion on the basis of the principle of merit-cum-seniority, the qualifying service as Senior Civil Judge shall not be less than two years service in the cadre.

(II) For eligibility for promotion against the remaining 10% posts required to be filled in by promotion strictly on the basis of merit through limited departmental competitive examination, the qualifying service as Senior Civil Judge shall not be less than five years.”

65. Rule 5 sub-rule (3)(I) of the 2005 Rules stipulates that a minimum of two-years of qualifying service in the feeder cadre i.e., as a Civil Judge (Senior Division) is required in order to be eligible to participate in the promotion process for the 65% posts in the cadre of District & Sessions Judge on the basis of the principle of ‘Merit-cum-Seniority’ as envisaged under Rule 5(1)(I). In other words, all Civil Judges (Senior Division), having a minimum of two-years of service, are eligible to be promoted to the 65% posts in the cadre of District & Sessions Judge on the basis of the principle of ‘Merit-cum-Seniority’.

66. On the other hand, Rule 5 sub-rule (3)(II) provides for the requirement of a minimum of five-years of qualifying service in the feeder cadre i.e., as a Civil Judge (Senior Division), for participating in the promotion process for the 10% posts in the cadre of District & Sessions Judge on the basis of strict merit as

provided under Rule 5(1)(ii) of the 2005 Rules. In other words, all Civil Judges (Senior Division) who have completed a minimum of five-years of service are eligible to be promoted to the 10% posts in the cadre of District & Sessions Judge on the basis of Merit through the competitive examination.

67. In other words, a combined reading of the aforesaid Rule 5(1) with Rule 5(3) of the 2005 Rules makes it clear that there are three distinct modes of recruitment to the cadre of District & Sessions Judge which are as follows: -

- (I) 65% posts by promotion from the eligible Civil Judges (Senior Division) having a minimum of two-years of service on the basis of 'Merit-cum-Seniority';
- (II) 10% posts by promotion from eligible Civil Judges (Senior Division) with a minimum of five-years of service on basis of merit through a competitive examination and;
- (III) 25% posts by direct recruitment from the eligible members of the Bar on the basis of a written exam and viva voce.

iii. Evolution of the Principles of 'Merit-cum-Seniority' and 'Seniority-cum-Merit' in Service Jurisprudence.

a. Concept of Promotion: The meaning and origin of seniority and merit as parameters.

68. Promotion is an integral part of any formal sector employment. The principal object of a promotion system is to secure the best possible incumbents for higher positions while maintaining the morale of the whole organization.¹ In

¹ *High Court of Calcutta v. Amal Kumar Roy*, (1963) 1 SCR 437.

the matter of formulation of a policy for promotion to a higher post, the two competing principles which are taken into account are *inter-se* seniority and comparative merit of employees who are eligible for promotion.

Understanding the meaning of Seniority and Merit

69. The Black's Law Dictionary defines 'seniority' as follows²: -

“Represents in the highest degree the right to work, and by seniority the oldest man in point of service, ability and fitness for the job being sufficient, is given choice of jobs, is first promoted within range of jobs subject to seniority, and is the last laid off, proceeding so on down the line to the youngest in point of service.”

70. Weber, the sociologist, described “promotion according to seniority or to achievement” as an important component of an efficient bureaucracy.³

Establishing a promotion system based on seniority is fundamental to modern management, which ensures that individuals joining an organization have opportunities for career advancement. Further, promotions based on seniority is tried and tested method because those who have been engaged at the employment for longer have had more time to refine the skills necessary for the higher posts.

What constitutes 'Merit'

71. According to the Cambridge Dictionary, merit is defined as the quality of being good and deserving. In the context of employment, it is the sum total of various qualities which are relevant for fulfilling the requirements of the

² Henry Campbell Black, *Black's Law Dictionary*, p. 1528 (6th Edn., 1968).

³ H. Gerth and C.W. Mills, *From Max Weber: Essays in Sociology*, 199, 202 (Oxford University Press, New York, 1958).

employment.⁴ There are multiple attributes of merit which must be taken into consideration such as character, integrity, and devotion to the assigned official duties. The manner in which the candidate discharges their final duties would also be a relevant factor.

72. Further, past performance is a relevant factor to judge the merit of the candidate, particularly in promotional posts, since it would indicate the capability of the candidate to discharge their duties effectively. Merely because any person possesses higher qualifications or higher marks in an examination does not mean that they are meritorious than others.⁵

73. In the United States, the Federal Civil Services Act of 1871, provides for filling of vacancies in higher positions by competitive promotion tests, wherever practicable. H. Eliot Kaplan, General Counsel of the New York Bar, in his “Law of Civil Services” writes that in some jurisdictions promotions may be made on a wider basis, the field of promotion being left to the discretion of the personnel agency.⁶ He also notes that the eligibility requirements for promotion are usually not specified in the statutes but are usually left to be determined by rules of the personnel agency. Personnel agencies fix educational and experience requirements for eligibility to compete for promotion. A hint of the ‘Merit-cum-

⁴ *K.K. Parmar v. High Court of Gujarat*, (2006) 5 SCC 789.

⁵ *Kartar Kaur v. State*, (1967) SLR 34.

⁶ H. Eliot Kaplan, *The Law of Civil Services* (New York University Press, Mathew Bender & Company, New York, 1958).

Seniority’ and ‘Seniority-cum-Merit’ principle can be traced in his words where he states that where the law requires that promotions be made from among those serving in the next lower grade, the incumbents of such lower positions would be deemed to be presumably qualified for promotion. For ‘Merit-cum-Seniority’, particularly, the competitive test/qualification criteria would serve to determine the relative excellence among those presumably qualified for promotion⁷, so that those demonstrating superior merit and fitness would be available to fill the vacancies.⁸

74. In Britain, the 1854 Northcote-Trevelyan Report founded a public service system based on merit, where open competitive examinations were practiced under the principle of promotion by merit but also held that seniority and experience counted in some respects.⁹

75. Similarly, in France, the 19th century saw the introduction of the doctrine of the “Concours” or competitive examination to support the merit system in the civil service, yet giving seniority and experience due regard in promotion to higher ranks.¹⁰

⁷ *Id.*

⁸ Elman, B.A., *Political, social, and cultural reproduction via civil service examinations in late imperial China*, 50(1) *Journal of Asian Studies*, pp.7-28 (1991).

⁹ Jenifer Hart, *The genesis of the Northcote–Trevelyan report*, in *Studies in the growth of nineteenth century government* pp. 63-81 (Ed. Gillian Sutherland, Routledge & Kegan Paul, London, 1972).

¹⁰ Kaplan, N.I., *A changing culture of merit: French competitive examinations and the politics of selection*, pp. 1750-1820 (Columbia University Press, 1999).

76. During the British Raj, the East India Company adopted the principle of seniority for promotions. This principle was officially recognized in the Charter Act, 1793 and continued until the enactment of the Indian Civil Service Act, 1861. Apart from the seniority principle, considerations of merit, integrity, competence, and ability were also taken into account for promotions. This ‘Seniority-cum-Merit’ formula remained in practice until 1947.

77. The Indian Civil Service (hereinafter referred as the “ICS”) system, initiated in the 19th century, encapsulated aspects of recruitment based on competitive examinations and seniority. For entry into the ICS, competitive examinations were conducted and for promotions to higher positions, seniority and experience were considered as important factors.

78. Under the Charter Act, 1833, following Lord Macaulay’s Report of the Select Committee of British Parliament¹¹, the concept of competitive examinations in modern Civil Services in India was introduced in 1854. The Report recommended that the patronage-based system of East India Company should be replaced by a permanent Civil Service where candidates are recruited through competitive examinations.¹² As stated, competitive examinations were “designed to protect career employees against improper political influences or

¹¹ The Macaulay Committee’s Report on the Indian Civil Service 1854.

¹² History of the Commission, Union Public Service Commission.

personal favouritism in the recruiting, hiring, promotion, or dismissal processes, to ensure that personnel management is conducted without discrimination”.¹³

79. The First Pay Commission in 1947 recommended a blend of direct recruitment and promotion, suggesting that seniority be emphasized for roles requiring familiarity with office work, while merit be the basis for higher-level positions. Subsequent commissions, such as the Second Pay Commission in 1959 and the First Administrative Reforms Commission in 1969, echoed the importance of merit-based promotions alongside seniority.

80. The principle of seniority as a parameter of selection for promotion was found to be derived from the belief that competence is related to experience and that it limits the scope of discretion and favouritism. There is always an additional assumption that long-serving employees have demonstrated loyalty to the employing organization and so are entitled to reciprocal treatment.

81. However, in India, no government servant can claim promotion as their right because the Constitution does not prescribe criteria for filling seats in promotional posts. The Legislature or the executive may decide the method for filling vacancies to promotional posts based on the nature of employment and the functions that the candidate will be expected to discharge. The courts cannot sit in review to decide whether the policy adopted for promotion is suited to select

¹³ S. REP. No. 969; recited from O'Rourke, 1993, p. 344.

the ‘best candidates’, unless on the limited ground where it violates the principle of equal opportunity under Article 16 of the Constitution.

b. Principle of ‘Merit-cum-Seniority’ and ‘Seniority-cum-Merit’ in Service Jurisprudence.

82. This Court in its decision in *State of Kerala & Anr. v. N.M. Thomas & Ors.* reported in (1976) 2 SCC 310 held that policies pertaining to promotions can be said to broadly fall within two distinct categories being: (i) promotions which are based on the principle of ‘Merit-cum-Seniority’ and, (ii) promotions which are based on the principle of ‘Seniority-cum-Merit’. It further held that when it comes to promotions based on principle of ‘Seniority-cum-Merit’, a senior who has the minimum requisite merit shall be entitled to promotion even though there might be others who are more meritorious. The relevant observations read as under: -

“38. The principle of equality is applicable to employment at all stages and in all respects, namely, initial recruitment promotion, retirement, payment of pension and gratuity. With regard to promotion the normal principles are either merit-cum-seniority or seniority-cum-merit. Seniority-cum-merit means that given the minimum necessary merit requisite for efficiency of administration, the senior though the less meritorious shall have priority. This will not violate Articles 14, 16(1) and 16(2). A rule which provides that given the necessary requisite merit, a member of the backward class shall get priority to ensure adequate representation will not similarly violate Article 14 or Article 16(1) and (2). [...]”

(Emphasis supplied)

83. This Court in *State of Mysore v. Syed Mahmood* reported in (1968) 3 S.C.R. 363, on the criterion of ‘Seniority-cum-Merit’ observed that any rule that mandates selection based on the principle of ‘Seniority-cum-Merit’, such rule mandates that the promotions must be determined through a selection process that evaluates “seniority, subject to the fitness of the candidate, to discharge the duties of the post from among persons eligible for promotion”. In consequence, where promotion is based on the ‘Seniority-cum-Merit’ principle, the candidate cannot claim promotion as a matter of right on the grounds of his seniority alone. Further, if the officer fails to discharge his duties of the higher post, he may be passed over by a junior officer.

84. In *Jagathigowda, C.N. & Ors. v. Chairman, Cauvery Gramina Bank & Ors*, reported in (1996) 9 SCC 677, while moving a step ahead, it was held that where promotion is based on the principle of ‘Seniority-cum-Merit’, it would still be open for the selection committee to take into consideration the performance appraisal forms to first ascertain the suitability of the candidates being considered for promotion. The relevant observations read as under: -

“8. [...] It is settled proposition of law that even while making promotions on the basis of seniority-cum-merit the totality of the service record of the officer concerned has to be taken into consideration. The performance appraisal forms are maintained primarily for the purpose that the same are taken into consideration when the person concerned is considered for promotion to the higher rank. The High Court, with respect, was not justified in holding that the performance appraisal could not be taken into consideration by

the Director's Committee while considering the officers for promotion to the higher rank.”

(Emphasis supplied)

85. This Court in *Rajendra Kumar Srivastava & Ors. v. Samyut Kshetriya Gramin Bank & Ors.* reported in (2010) 1 SCC 335 held that where promotion is on the basis of ‘Seniority-cum-Merit’, the standard method is to first ascertain the candidates who possess the minimum required merit and thereafter making promotions strictly on the basis of seniority from among those who are found to possess the minimum necessary merit. It further held that the minimum requisite merit may be ascertained from either one or a combination of multiple processes of assessment. The relevant observations read as under: -

“11. It is also well settled that the principle of seniority-cum-merit, for promotion, is different from the principle of “seniority” and the principle of “merit-cum-seniority”. Where promotion is on the basis of seniority alone, merit will not play any part at all. But where promotion is on the principle of seniority-cum-merit, promotion is not automatic with reference to seniority alone. Merit will also play a significant role. The standard method of seniority-cum-merit is to subject all the eligible candidates in the feeder grade (possessing the prescribed educational qualification and period of service) to a process of assessment of a specified minimum necessary merit and then promote the candidates who are found to possess the minimum necessary merit strictly in the order of seniority. The minimum merit necessary for the post may be assessed either by subjecting the candidates to a written examination or an interview or by assessment of their work performance during the previous years, or by a combination of either two or all the three of the aforesaid methods. There is no hard-and-fast rule as to how the minimum merit is to be ascertained. So long as the ultimate promotions are based on seniority, any process for ascertaining the minimum necessary merit, as a basic requirement, will not militate against the principle of seniority-cum-merit.”

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13. Thus it is clear that a process whereby eligible candidates possessing the minimum necessary merit in the feeder posts is first ascertained and thereafter, promotions are made strictly in accordance with seniority, from among those who possess the minimum necessary merit is recognised and accepted as complying with the principle of “seniority-cum-merit”. What would offend the rule of seniority-cum-merit is a process where after assessing the minimum necessary merit, promotions are made on the basis of merit (instead of seniority) from among the candidates possessing the minimum necessary merit. If the criteria adopted for assessment of minimum necessary merit is bona fide and not unreasonable, it is not open to challenge, as being opposed to the principle of seniority-cum-merit. We accordingly hold that prescribing minimum qualifying marks to ascertain the minimum merit necessary for discharging the functions of the higher post, is not violative of the concept of promotion by seniority-cum-merit.”

(Emphasis supplied)

86. In *Dr. Kavita Kamboj* (supra), this Court speaking eruditely through one of us, Dr. D.Y. Chandrachud, CJI., observed that the principle of ‘Merit-cum-Seniority’ is an approved method of selection where the emphasis is primarily on the comparative merit of the judicial officers being considered for promotion whereby even a junior who demonstrates greater merit than the senior can be considered for promotion. The relevant observations read as under: -

“45. [...] The principle of merit-cum seniority is an approved method of selection where merit is the determinative factor and seniority plays a less significant role. Where the principle of ‘merit-cum seniority’ is the basis, the emphasis is primarily on the comparative merit of the judicial officers being considered for promotion. Resultantly, even a junior officer who demonstrates greater merit than a senior officer will be considered for promotion.”

(Emphasis supplied)

[Also see *Central Council for Research in Ayurveda and Siddha and Anr. v. Dr. K. Santhakumari* reported in (2001) 5 SCC 60]

87. This Court in *B.V. Sivaiah & Ors. v. K. Addankl Babu & Ors.* reported in (1998) 6 SCC 720 whilst explaining the difference between the principle of ‘Merit-cum-Seniority’ vis-à-vis the principle of ‘Seniority-cum-Merit’, held as follows: -

- (i) *First*, where promotion is based on the principle of ‘Merit-cum-Seniority’ a greater emphasis is laid on merit & the ability of the candidate and seniority is to be given weight where merit and ability are approximately equal. Whereas, when it comes to the principle of ‘Seniority-cum-Merit’, the promotion is to be made on the basis of seniority alone subject to having the minimum requisite merit and suitability of the candidate amongst the eligible persons. The relevant observations read as under: -

“9. 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 where merit and ability are approximately equal. [...]

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18. We thus arrive at the conclusion that the criterion of 'seniority-cum-merit' in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit.”

(Emphasis supplied)

(ii) **Secondly**, the principle of ‘Merit-cum-Seniority’ postulates the requirement of making a comparative assessment of merit, whereas no such comparative assessment is required where the criterion for promotion is based on the principle of ‘Seniority-cum-Merit’. Even if the candidates have the same length of service, it is only to be determined whether the candidates possess the minimum required threshold of merit or not. The relevant observations read as under: -

“15. [...] Since comparison assessment of merit is required to made while applying the criterion of 'merit cum-seniority' and for 'seniority-cum merit' no such comparative assessment is required, the aforementioned observations in the case of C.R. Seshadri (supra) on which reliance has been placed cannot be regarded as correctly reflecting as what is meant by the criterion of 'seniority-cum-merit'.

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17. [] We are unable to agree. While applying the principle of seniority-cum-merit for the purpose of promotion what is required to be considered is inter se seniority of the employees who are eligible for consideration. Such seniority is normally determined on the basis of length of service, but as between employees appointed on the same date and having the same length of service, it is generally determined on the basis of placement in the select list for appointment. Such determination of seniority confers certain rights and the principle of seniority-cum-merit gives effect to the such rights flowing from seniority. It cannot, therefore, be said that in the matter of promotion on the basis of seniority-cum-merit seniority has no role where the employees eligible for promotion were appointed on the same date and have the same length of service.”

(Emphasis supplied)

(iii) *Thirdly*, the Court concluded by observing that where the criterion of promotion is principle of ‘Seniority-cum-Merit’, marks can only be prescribed as a ‘minimum qualifying requirement’ and as such where promotion was being given to the eligible seniormost candidates on the basis of their individual marks, such promotion would be contrary to the principle of ‘Seniority-cum-Merit’. The relevant observations read as under: -

“26. It is not a case where minimum qualifying marks are prescribed for assessment of performance and merit and those who secure the prescribed minimum qualifying marks are selected for promotion on the basis of seniority. In the circumstances, it must be held that the High Court has rightly come to the conclusion that the mode of selection that was in fact employed was contrary to the principle of 'seniority-cum-merit' laid down in the Rules.”

(Emphasis supplied)

88. This distinction was reiterated in *Union of India and Ors. v. Lt. Gen. Rajendra Singh Kadyan & Anr.* reported in (2000) 6 SCC 698, *State of U.P. v. Jalal Uddin & Ors.* reported in (2005) 1 SCC 169 and *Haryana State Electronics Development Corporation Ltd. & Ors. v. Seema Sharma & Ors.* reported in (2009) 7 SCC 311.

89. This Court in *Palure Bhaskar Rao & Ors. v. P. Ramaseshaiah & Ors.* reported in (2017) 5 SCC 783 reiterated the distinction between the principles of ‘Seniority-cum-merit’ and ‘Merit-cum-Seniority’. As far as promotion by

‘seniority-cum-merit’ or seniority *per se*, the eligible senior cannot be superseded. Other things being equal, the senior automatically get promoted. But in the case of selection based on ‘Merit-cum-Seniority’, the senior candidate can be superseded if the candidate who is senior is not otherwise eligible to be considered according to the applicable service rules.

90. This Court in its decision in *K. Samantaray v. National Insurance Co. Ltd.* reported in (2004) 9 SCC 286 reaffirmed that when it comes to promotion, apart from the two guiding principles that have come to be accepted namely; ‘Seniority-cum-Merit’ and ‘Merit-cum-Seniority’, a third model has also now come to be recognized as a mode of promotion known as the ‘Hybrid Mode of Promotion’. This Court while explaining the ‘Hybrid Mode of Promotion’ observed that the requirement is that seniority is to be duly respected and merit is to be appropriately recognized. The relevant observations read as under: -

“10. [...] *The third mode (apart from seniority-cum-merit and merit-cum-seniority modes) has been recognized. It has been described as a “hybrid mode of promotion”. In other words, there is a third category of cases where seniority is duly respected and merit is appropriately recognized.*

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, nor has the effect of violating of any statutory scope of interference and other relatable matters. The decision in B. V. Sivaiah case (supra) is clearly distinguishable on facts and in law. That was a case where statutory rules governed the field. This Court, inter alia, held that fixing terms which are at variance with the statutory rules is impermissible. In the case at hand,*

prior to the formulation of policy in February, 1990, there were no codified prescriptions. It was the stand of the respondent-employer that prior to the formulation of the policy, certain guidelines existed and the objectives of the policy were to rationalize and codify the existing guidelines relating to promotions within officers cadre. There is no statutory rule operating. 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.”

(Emphasis supplied)

91. In *Bhagwandas Tiwari & Ors. v. Dewas Shajapur Kshetriya Gramin Bank & Ors.* reported in (2006) 12 SCC 574, this Court observed that although the requirement of minimum marks for assessing merit can be prescribed for the purpose of promotion on the basis of ‘Seniority-cum-Merit’, yet where a very high requirement of minimum marks has been prescribed, the same would amount to laying greater emphasis on merit and thereby departing from the principle of ‘Seniority-cum-Merit’ and shifting towards to the principle of ‘Merit-cum-Seniority’ where merit and ability play a predominant role. The relevant observations read as under: -

“11. 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.

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20. There is no basis, in the instant case, for the stand that for assessing merit a minimum number of marks has been prescribed.

The contention that minimum marks were 45 out of 60, means that an employee is to secure 75% of marks. Such a high percentage cannot be a measure for prescribing minimum marks to assess merit. It obviously would be a case of shifting the focus to merit-cum-seniority principle. In para 37 of Sivaiah case this Court noted that minimum marks prescribed for assessing merit do not depart from the seniority-cum-merit principle. But the factual position is different here. There is no mention that 45 marks out of 60 relate to the prescription of minimum marks for assessing the merit. In Jalal Uddin case it was noted that in seniority-cum-merit greater emphasis is on seniority though it is not the determinative factor. In the case of merit-cum-seniority, merit becomes a determinative factor. In fact, the position noted by this Court in paras 19, 20, 24 and 25 of Sivaiah case dealt with almost identical fact situation, apart from para 16 of the judgment.”

(Emphasis supplied)

92. In *Shriram Tomar & Anr. v. Praveen Kumar Jaggi & Ors.* reported in (2019) 5 SCC 736, for the purpose of promotion on the basis of ‘Seniority-cum-Merit’ it was stipulated that the assessment would be on the basis of a written test, interview and performance appraisal for a grand total of 100 marks out of which requirement of a minimum aggregate of 40% marks was prescribed. In addition to the above, a further requirement of minimum 12 marks in one of the components i.e., the interview had also been prescribed.

93.1 This Court held that the principle of ‘Seniority-cum-Merit’ postulates only one requirement i.e., once the minimum required merit is assessed, thereafter the promotion must be strictly in accordance with the seniority of the candidates having the requisite merit. How the minimum merit ought to be assessed is immaterial.

93.2 As such, prescribing of an additional requirement of minimum marks in any one component of assessment such as interview in addition to the requirement of aggregate minimum marks in the overall assessment process was permissible under the principle of ‘Seniority-cum-Merit’ provided that the ultimate promotion is taking place as per seniority. The relevant observations read as under: -

“13. [...] *As the promotion to the post of Junior Management Scale II shall be made on the basis of seniority-cum-merit, the only requirement would be that after it is found that the candidates have possessed the minimum necessary merit, namely, minimum 40% qualifying marks in the written test and minimum 12 marks each out of 20 marks each in interview and the performance appraisal reports respectively, thereafter the candidates are required to be promoted in the order of seniority, irrespective of anyone among them having obtained more marks.*”

(Emphasis supplied)

93. In *Sujata Kohli v. Registrar General, High Court of Delhi and Ors.* reported in (2020) 14 SCC 58, this Court observed that since both the channels of promotion to the cadre of District & Sessions Judge being (i) 65% promotion on basis of principle of ‘Merit-cum-Seniority’ and (ii) 10% promotion strictly on merit through competitive examination postulate the criterion of merit, it necessarily meant that: -

- (i) **First**, for the purposes of any promotion through the above two channels, merit would have to play a major role in promotion through these channels and will acquire primacy and that seniority alone cannot be given primacy.
- (ii) **Secondly**, the requirement of merit in such promotions cannot be less than the merit which is required at the entry level i.e., in the lower cadres.

(iii) **Thirdly**, that comparative assessment of merit is crucial, such as through the evaluation of the respective ACRs of the candidates.

Thus, this Court was of the view that the minimum requirement of grade ‘A’ in ACRs was in consonance with the policy envisaged by the abovementioned two channels of promotion and the relevant observations read as under: -

“14.3 [...] As noticed, two channels of recruitment to the posts in the cadre of District Judge have been provided: one by promotion from amongst the Civil Judges (Senior Division) and another by direct recruitment from the eligible persons. As regards promotion, the bifurcation is provided in the manner that 65% are to be recruited by way of promotion on the basis of merit-cum-seniority and 10% by promotion strictly on the basis of merit through limited competitive examination (vide Rule 7 and 7A). [...]

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15. Keeping the principles aforesaid in view, when we revert to the scheme of the Rules of 1970, the striking feature is that even at the entry level, the promotions are to be made either on merit-cum-seniority basis or on merit basis. Further, grant of Selection Grade and Super Time Scale is also on assessment of merit-cum-seniority¹⁰. In the given scheme of the Rules of 1970, it is difficult to countenance any suggestion that in DHJS, merit could be forsaken at any level or only seniority be given primacy in the matter relating to upward progression to the higher posts of District and Sessions Judge or Principal Judge, Family Court. Rather, looking to the nature of posts, in every higher progression, merit would play a major role and would, perforce, acquire primacy.

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19.1. [...] Viewed in the light of such requirements, it goes without saying that any upward progression in DHJS could only be on the higher requirements of merit and in any case, such requirements cannot be lesser than the requirements at entry level. In this view of the matter too, the Appellant was conscious of the fact that for upward movement in DHJS, merit would acquire primacy; and that seniority alone was not going to be decisive for promotion to the higher posts

of District and Sessions Judge and the Principal Judge, Family Court. Although there is no requirement in law that criteria for promotion based on ACR alone be also notified but, in any case, in the scheme of the Rules and the requirements of the posts in question, the Appellant cannot contend that she was not aware of the position that comparative merit of the incumbents shall be a crucial factor for any upward progression in the cadre.”

(Emphasis supplied)

c. ‘Hybrid-Dynamic Mode of Promotion’ in Service Jurisprudence.

94. What can be discerned from the aforementioned decisions is that this Court over the years has consistently held that where promotion is on the basis of the principle of ‘Merit-cum-Seniority’ a greater emphasis is placed on merit, whereas, when the promotion is on the basis of the principle of ‘Seniority-cum-Merit’, a greater emphasis is laid on seniority.

95. One must be mindful that the terms ‘Merit-cum-Seniority’ or ‘Seniority-cum-Merit’ are not statutorily defined by the legislature.

96. These principles are judicial connotations that have been evolved over a period of years through various decisions of this Court and the High Courts whilst dealing with matters of promotion pertaining to different statutes and service conditions.

97. This Court in *B.V. Sivaiah* (supra), *Rajendra Kumar Srivastava* (supra), *Shriram Tomar* (supra), *Sujata Kohli* (supra) and a catena of other decisions has

held that the principles of ‘Merit-cum-Seniority’ and ‘Seniority-cum-Merit’ are conceptually different. Whilst explaining the difference between these two principles, this Court has only gone to the extent of laying down what these principles postulate for the purpose of promotion. In other words, this Court has only gone so far as to lay down what is permissible within the four corners of these principles and by no stretch of imagination has this Court in any manner held that such postulations are *stricto-sensu* required to be complied with.

98. The various decisions of this Court have only developed upon the principles of ‘Merit-cum-Seniority’ and ‘Seniority-cum-Merit’ by explaining the criteria that may be postulated within the framework of these principles for the purpose of promotion. The scope of the aforesaid principles is summarized below: -

I) The principle of ‘Seniority-cum-Merit’ postulates that: -

- i. Minimum requirement of merit and suitability which is necessary for the higher post can be prescribed for the purpose of promotion.
- ii. Comparative Assessment amongst the candidates is not required.
- iii. Seniority of a candidate is not a determinative factor for promotion but has a predominant role.
- iv. Upon fulfilling the minimum qualifications, promotions must be based on *inter-se* seniority.

II) The principle of ‘Merit-cum-Seniority’ postulates that: -

- i. Merit plays a predominant role in and seniority alone cannot be given primacy.
- ii. Comparative Assessment of Merit is a crucial, though not a mandatory, factor.
- iii. Only where merit is equal in all respects can *inter-se* seniority be considered. Meaning that a junior candidate can be promoted over the senior if the junior is more meritorious.

99. The underlying reason why the afore-stated postulations ought not be understood as mandatory stems from the very fact that they are not a result of a legislative creation, but rather one of judicial interpretation whilst dealing with different promotion policies, different service conditions, the varied nature and requirement of posts and more importantly different sets of rules. Since, these postulations have been laid down in different context and varied facts, it would be preposterous to say that such postulations will apply uniformly to all services and matters of promotion including the judicial services.

100. The principles of ‘Merit-cum-Seniority’ and ‘Seniority-cum-Merit’ should by no means be regarded as rigid or inflexible in nature, otherwise, these judicial connotations would effectively assume the character of statutory stipulation laid down through various judicial pronouncements and would become applicable to all types of services, posts and promotions. This would lead to the transgression by the judiciary into the realms of policy making.

101. This Court in *Lt. Gen. Rajendra Singh Kadyan* (supra) whilst explaining the intricacies between the principles of ‘Merit-cum-Seniority’ and ‘Seniority-cum-Merit’ made a pertinent observation that selection for promotion is based on different criteria depending upon the nature of the post and requirements of service, and that such criteria could be said to fall into three categories which include ‘Merit-cum-Seniority’ and ‘Seniority-cum-Merit’.

102. In *Palure Bhaskar Rao* (supra) and *Kavita Kamboj* (supra) this Court equated the principle of ‘Merit-cum-Seniority’ and ‘Seniority-cum-Merit’ as modes or methods of promotion. However, modes of promotion should not be conflated with modalities of promotion. The expressions ‘Merit-cum-Seniority’ and ‘Seniority-cum-Merit’ in service jurisprudence are nothing but principles which are used to broadly categorize policies pertaining to promotions. They only lay down the broad framework within which specific policies of promotion can be elaborately laid down.

103. In *Bhagwandas Tiwari* (supra) this Court held that where for the purpose of promotion a high threshold of minimum required marks has been prescribed, the same would be an instance of ‘Merit-cum-Seniority’, even in the absence of a comparative assessment of merit, thus clearly indicating that these postulations are not mandatory. As even without an element of comparative merit, the promotion could be based on ‘Merit-cum-Seniority’, provided that merit is given prominence over seniority in the promotion process. Therefore, the only factor

that sets apart ‘Merit-cum-Seniority’ from ‘Seniority-cum-Merit’ is whether emphasis is laid on merit or seniority. All other ancillary factors or postulations such as comparative merit or a minimum specified benchmark may or may not be material to these principles.

104. The fluid nature of the principles of ‘Merit-cum-Seniority’ and ‘Seniority-cum-Merit’ is further evinced by the decision of this Court in *K. Samantaray* (supra) wherein although the policy stipulated that promotion would be on the basis of ‘Seniority-cum-Merit’, yet this Court after going through the elaborate promotion policy held that a third mode of promotion known as the “Hybrid Mode of Promotion” has come to be recognized by this Court, wherein it is open for the employer to specify the area and parameter of weight required to be given to merit and seniority for the purpose of promotion. It was further held that it is always open for the employer or the selection body to decide and stipulate their own criteria for adjudging the claims on the principles of ‘Seniority-cum-Merit’ or ‘Merit-cum-Seniority’ depending upon the class, category and nature of post and the requirements of efficiency.

105. What can be discerned from the aforesaid is that, wherever the expression ‘Merit-cum-Seniority’ or ‘Seniority-cum-Merit’ has been supplemented by an elaborate promotion policy or statutory rules clearly indicating the parameters on which promotions are to be made, the mode of promotion assumes the character of a Hybrid or Dynamic Mode of Promotion as held in *K. Samantaray* (supra).

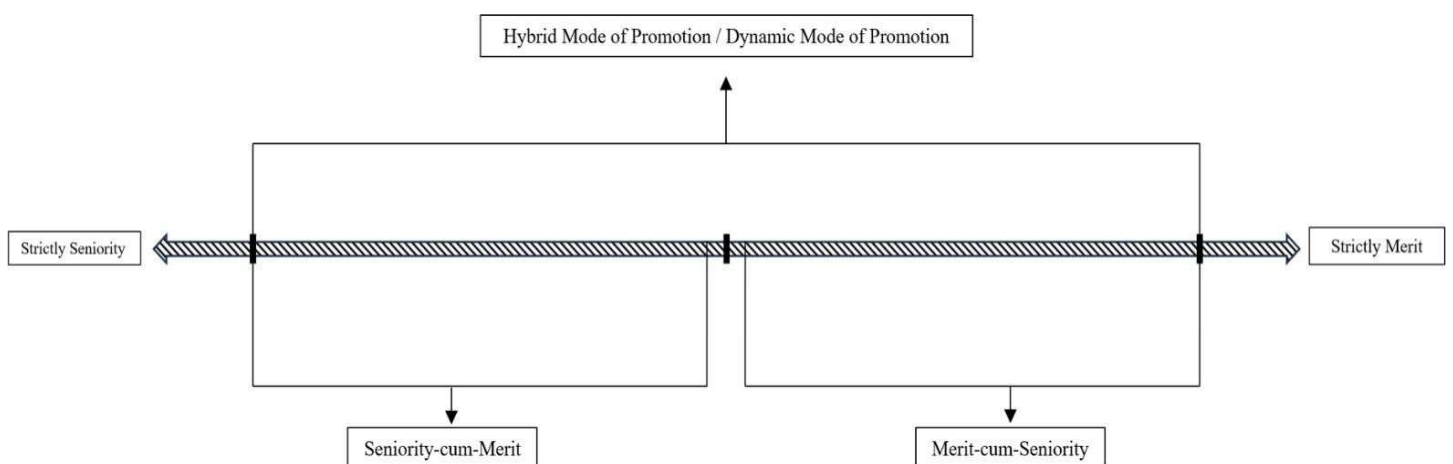
106. In such scenario, these principles serve as a beacon for the selection body which, in exercise of its delegated legislative powers, can formulate policies and lay down different criteria and conditions of assessment for the purposes of promotion. It does so by providing the selection body with the tools for formulating the promotion policy in the form of the aforementioned postulations or criteria which are permissible under these principles. Thereafter, the selection body can, as a conscious choice, decide the criteria it deems necessary or most suitable for the purpose of promotion keeping in mind the nature of the post, the requirements of service, etc.

107. For instance, where the promotion is based on ‘Merit-cum-Seniority’, the selection body may opt for a comparative assessment of merit, more particularly, in cases where the promotions are competitive in nature or it may say that seniority should only be considered where merit is equal in all respect if the post is of such nature that it requires significant knowledge and ability.

108. However, at the same time, this flexibility should not be understood as a complete autonomy. While the statutory rules or, in the absence of the same, the promotion policy formulated must be followed, they must at the same time have some nexus or bearing with the nature of the post and the requirements of service. For instance, where the promotion is based on ‘Merit-cum-Seniority’ and the nature of promotion allows for superseding a senior, the selection body whilst

formulating the promotion policy cannot *simpliciter* as a matter of choice refuse to provide for assessment of comparative merit, as the promotion herein is by its nature an accelerated form of promotion and as such comparative assessment becomes crucial.

109. The principle of ‘Merit-cum-Seniority’ and ‘Seniority-cum-Merit’ are a flexible and a fluid concept akin to broad principles within which the actual promotion policy may be formulated. They are not strict rules or requirements and by no means can supplant or take the place of statutory rules or policies that have been formulated, if any. These principles are dynamic in nature very much like a spectrum and their application and ambit depends upon the rules, the policy, the nature of the post and the requirements of service. The sketch below illustrates the broad spectrum in which these principles operate: -



110. Thus, the principles applicable to promotion such as the principle of ‘Merit-cum-Seniority’ and ‘Seniority-cum-Merit’ can best be described as two

ends of a spectrum. They are broad categories or frameworks for promotion and do represent the actual modalities by which promotions are to take place. It is the rules and the promotion policy, along with the intention of the legislature or the selection board, as the case may be, that supplements these principles and delineates the actual modality of how promotion is to take place. Through these rules and promotion policy, the legislature or the selection body specifies the area and the parameters or the weightage which is to be given to the aspect of “Merit” and “Seniority” on the said spectrum.

111. No doubt while construing the rule of ‘Seniority-cum-Merit’ or ‘Merit-cum-Seniority’, some of the observations of the decided cases are not uniform. In *State of Mysore v. C. R. Seshadri & Ors.* reported in AIR 1974 SC 460, Krishna Iyer, J., held that if the criterion for promotion is one of ‘Seniority-cum-Merit’, comparative merit may have to be assessed, if length of service is equal or an outstanding junior is available for promotion.

112. The decision of this Court in *Sujata Kohli* (supra) has been strongly relied upon on behalf of the petitioner herein, however the same is of no avail to them, as in the said case this Court had no occasion to examine the meaning of the expression ‘Merit-cum-Seniority’ in reference to *All India Judges’ Association (3)* (supra). This Court in *Sujata Kohli* (supra) only went so far as to say that ‘Merit-cum-Seniority’ means that neither merit can be forsaken nor seniority alone can be given primacy. ‘Merit-cum-Seniority’ only stipulates that a balance

must be maintained between ‘Merit’ and ‘Seniority’ with ‘Merit’ playing a more predominant role in the selection process.

113. Similarly, the decision in *Dr. Kavita Kamboj* (supra) has also been strongly relied upon by the petitioners, but it is of no avail to them, as the limited question that was involved in the said case was whether minimum marks could be specified for the written exam and the viva voce separately.

114. While laying down the promotion policy or rule, it is always open to the employer to specify the area and parameter or the weightage to be given in respect of merit and seniority separately, so long as the policy is not a colourable exercise of power, nor has the effect of violating any statutory scope of interference and other relatable matters. [See *K. Samantaray* (supra)]

d. High Court as a custodian of the District Judiciary under Article 235 of the Constitution.

115. We should be mindful of the fact that the High Court by virtue of its power under Article 235 of the Constitution undertook the recruitment process for the purpose of promotion. The High Court followed the procedure which it had been following without any departure since 2011. In such circumstances, had the High Court departed from the method of promotion which it had been following since 2011, it could have been argued on behalf of the respondents that they had

legitimate expectation that the High Court would not deviate from the method or process they had been adopting since 2011.

116. In the aforesaid context we may make a reference to ***R. v. Inland Revenue Commissioners, ex parte M.F.K Underwriting Agents Ltd.*** reported in [1990] 1 W.L.R. 1545 where Lord Justice of Appeal, Thomas Bingham, while invoking fairness as a rationale for protecting legitimate expectations, expressed the following: -

“If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it [...] The doctrine of legitimate expectation is rooted in fairness.”

117. In ***Madan Mohan Choudhary v. State of Bihar*** reported in (1999) 3 SCC396 this Court held that the High Court’s control over the District Judiciary under Article 235 of the Constitution is comprehensive and extends to a variety of matters including promotion. The relevant observations read as under: -

“22. In order to ensure their independence, the control over the subordinate courts has been vested in the High Court under Article 235 [...]

23. Under this Article, the High Court's control over the subordinate judiciary is comprehensive and extends over a variety of matters, including posting, promotion and grant of leave. The three words, namely, “posting”, “promotion” and “grant of leave” used in this article are only illustrative in character and do not limit the extent of control exercised by the High Court over the officers of the subordinate judiciary.

26. From the scheme of the Constitution, as set out above, it will be seen that though the officers of the subordinate judiciary are basically and essentially government servants, their whole service is placed under the control of the High Court and the Governor cannot make any appointment or take any disciplinary action including action for removal or compulsory retirement unless the High Court is “consulted” as required by the constitutional impact of both the Articles 233 and 234 and the “control” of the High Court indicated in Article 235.”

(Emphasis supplied)

118. In *High Court of Judicature for Rajasthan v. P.P. Singh & Anr.* reported in (2003) 4 SCC 239, it was held that laying down merit criteria for appointment to selection grade was well within the domain of the High Court under Article 235 of the Constitution. The relevant observations read as under: -

“18. It is beyond any pale of controversy that the control over the subordinate courts within the meaning of Article 235 of the Constitution of India is that of the High Court. Such control of the High Court includes general superintendence of the working of the subordinate courts, disciplinary control over the presiding officers, disciplinary proceedings, transfer, confirmation and promotion and appointment etc. Such control vested in the High Court is complete. [...]

24. The submission on behalf of the respondents to the effect that in the matter relating to fixation of criteria for the purpose of appointment to the selection grade, the two-Judge Committee could not be made without consulting all the Judges is stated to be rejected. The said submission is based on a total misconception. Laying down the merit criteria for appointment to the selection grade also was within the domain of the High Court. It could not only lay down such criteria but also amend or modify the same from time to time. []”

(Emphasis supplied)

119. From the aforesaid discussion, it is clear that when it comes to promotion of judicial officers of the District Judiciary, the control vests with the High Court under Article 235 of the Constitution. The High Court being the sole authority in this regard can clearly lay down rules and policies pertaining to promotions which includes the power to specify the criteria and parameters it deems most suitable and appropriate for the purpose of promotion and the manner in which promotion is to be made as long as it is within the contours of what has been laid down in *All India Judges' Association (3)* (supra). Thus, now the only question that remains to be considered is, what is the meaning assigned to “Merit-cum-Seniority” by *All India Judges' Association (3)* (supra).

iv. What is ‘Merit-cum-Seniority’ for the purpose of Promotion to the cadre of District & Sessions Judges?

a. Intention behind the decision in All India Judges’ Association (3).

120. The entire controversy revolves around the interpretation of Rule 5(1) of the 2005 Rules which provides that 65% of the total posts in the cadre of District & Sessions Judge shall be filled by promotion on the basis of the principle of ‘Merit-cum-Seniority’.

121. As discussed in the foregoing parts of this judgment, the decision of this Court in *All India Judges' Association (3)* (supra) has laid down the method of recruitment to the posts in the Higher Judicial Service, i.e., District Judges and

Additional District Judges. Prior to the said decision, there were only two sources for recruitment to the Higher Judicial Service – *first*, by promotion from amongst the members of the District Judicial Service; and *secondly*, by direct recruitment from among the members of the Bar.

122. This Court in *All India Judges' Association (3)* (supra), with a view to enhance the efficiency of the District judiciary and to create an avenue of accelerated promotions for the relatively junior members of the service, introduced two methods of appointment, one by way of promotion, wherein 50% of the total posts were to be filled by promotion on the basis of the principle of 'Merit-cum-Seniority' through a test assessing the continued efficiency and adequate knowledge of case-law of the judicial officers, and the remaining 25% of the posts were to be filled up by promotions strictly on the basis of merit through the limited departmental competitive examination. At the cost of repetition, the relevant observations read as under: -

“27. At the same time, we are of the opinion that there has to be certain minimum standard, objectively adjudged, for officers who are to enter the Higher Judicial Service as Additional District Judges and District Judges. 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 posts 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)

123. The expressions "*certain minimum standard, objectively adjudged*" and "*in order to ascertain the legal knowledge of those candidates and to assess their continued efficiency with adequate knowledge of case law*" in ***All India Judges' Association (3)*** (supra) clearly indicate that the intention was to test each candidate on their own merit as this Court never mandated that a comparative assessment of merit was also required. In other words, what is stipulated is the determination of suitability of the candidates and assessment of their efficiency based on whether they possess adequate knowledge of case law. It goes without saying that some standards of suitability and efficiency for continued service is required. The High Court may deny promotion to a Civil Judge (Senior Division) only in case the candidate is not suitable for being promoted to the post of District & Sessions Judge. It was never the intention of this Court that after taking the suitability test, a list should be prepared based on *inter-se* merit and the judicial

officers should be promoted only if they fall in the said merit list. It cannot be said to be a competitive exam. Only the suitability of the judicial officer is to be assessed and once it is found that the candidate has secured the requisite marks in the suitability test, they cannot be thereafter ignored for promotion.

124. The first change brought around was the introduction of a mandatory assessment of the suitability of the members of the District Judicial Service before promoting them to the Higher Judicial Service. The concept of assessment of suitability was introduced to ensure that a certain minimum standard is maintained in the Higher Judicial Service. The method of devising a suitability test for this purpose was left to the respective High Courts. However, broad guiding principles were laid down by this Court on the contours of the suitability test. It was directed that the suitability test must objectively test the following: -

- a. Whether the candidate possesses legal knowledge?
- b. Whether the candidate has displayed continued efficiency during his tenure in the feeder cadre?
- c. Whether the candidate possesses adequate knowledge of case law?

125. The second change introduced by the aforesaid decision was the creation of a third category of recruitment to the Higher Judicial Service. While the allocation of seats for direct recruitment from the members of the Bar was kept at 25% of the total posts in the Higher Judicial Service, the erstwhile promotional category was split up into two categories – *firstly*, 50% of the posts in the Higher

Judicial Service were directed to be filled by promotion on the basis of ‘Merit-cum-Seniority’; and **secondly**, the remaining 25% of the seats were directed to be filled by promotion strictly on the basis of merit, through a limited departmental competitive examination.

126. We are of the view that the principle of ‘Merit-cum-Seniority’ stipulated in Rule 5(1) of the 2005 Rules should be understood in accordance with what has been observed by this Court in paragraphs 27 & 28 respectively of *All India Judges’ Association (3)* (supra).

127. It is amply clear from the aforesaid decision that this Court intended to achieve two-fold objectives –

- (i) **First**, to ensure that unlike the traditional promotion policy under which seniority alone was considered for promotion, a new policy should be devised under which seniority would be considered for promotion, but only for those candidates who possessed the minimum necessary standard of suitability for the post, and;
- (ii) **Secondly**, to prevent loss of motivation amongst the relatively junior members of the service, a third category for promotion to the Higher Judicial Service should be created, wherein promotions would be given strictly on the basis merit, to be ascertained through a limited departmental competitive examination.

128. Thus, while the comparison of *inter-se* merit to determine the most meritorious candidates was the procedure to be adopted for filling up the seats under the newly created category, it was never the intention of this Court in the aforesaid decision to mandate the comparative assessment of merit in the category of regular promotions based on seniority. The only additional requirement which was provided for by the aforesaid decision for this category of candidates was the possession of certain minimum objectively determinable standard of suitability. As long as a candidate possesses this standard of suitability, it cannot be said that this Court intended, by the aforesaid decision, to subject such a candidate to a mandatory comparative merit assessment akin to the limited departmental competitive examination and disregard the seniority of such a candidate to prefer those candidates who may have scored a few marks more than him in the suitability test.

129. The objective sought to be achieved by the introduction of a suitability test in the regular promotional category was limited to the assessment of a minimum standard of suitability. It would be incorrect to say that the marks scored by a candidate in the suitability test are proportional to the merit of the candidate. This can be understood with the aid of an illustration – take a case wherein the minimum marks required to be obtained in the suitability test is ‘x’; then for the purpose of 65% promotional quota, as soon as a candidate obtains ‘x’ marks in the suitability test, such a candidate becomes eligible for being considered for

promotion in that category subject to their seniority vis-à-vis the other suitable candidates. It cannot be said that a candidate who obtains $(x + 10)$ marks is more meritorious or more suitable than those candidates who obtain 'x' or $(x + 5)$ marks in the suitability test. Every candidate who scores higher than or equal to 'x' marks in the suitability test is considered equally suitable and equally meritorious for the purpose of 65% promotional category.

130. We have discussed in detail in the foregoing paragraphs that the concepts of 'Merit-cum-Seniority' or 'Seniority-cum-Merit' are flexible in nature and do not prescribe any fixed or strait-jacket definitions. These definitions take character and substance from the context in which they are employed. Their full import and nuances only become visible when they are exposed to the guiding light of the overall promotional policy of the organisation. The concept of promotions in the District Judiciary is a peculiar one, and one that must be analysed in its own unique context. Unlike most cases on promotions decided by this Court where the interpretation or incorrect implementation of the promotion policy contained in a statute have been in question, the present case of promotions to the Higher Judicial Service is one in which the statutory framework itself was created after the decision in *All India Judges' Association (3)* (supra). Thus, any dispute arising out of the respective rules of promotions of different States/Union Territories as devised by their respective High Courts must be construed in the context of various decisions which have ultimately shaped such rules.

131. How 'Merit-cum-Seniority' will apply to promotions within an organization will ultimately depend on the statutory rules, if any, or the promotional policy of such an organisation. We have discussed in detail in the preceding paragraphs that the objective of this Court in *All India Judges' Association (3)* (supra) was to create a new category for accelerated promotions and to introduce a test to ascertain the suitability of candidates in the regular promotional category. While the newly created category was strictly based on merit, the due weightage on seniority in the regular promotional category was not diluted in any manner except for the introduction of the suitability test. We are aware that in a number of decisions of this Court, the term 'merit' has been infused with a competitive and comparative character, however, we are of the opinion that whether the term 'merit' includes a comparative element can only be ascertained from the context in which it is employed and not in isolation from it. Merit only indicates an assessment of qualities which are relevant for the post. It is not synonymous to scores in the competitive examination. Competitive examinations are merely one of the many ways in which the merit of the candidate is determined. This Court in *All India Judges' Association (3)* (supra) notes that merit must be determined based on a limited competitive examination with respect to the 25% (now 10%) of the seats which are to be filled by merit. Thus, this Court clarifies that merit in the context of the 25% (now 10%) of the seats must be determined through the competitive examination while for the 50% (now 65%) of the seats must be determined based on an assessment of specific

suitability parameters. Whether the idea of a ‘minimum threshold merit’ would be antithetical to the concept of ‘Merit-cum-Seniority’ would again depend on the context and the manner in which the minimum threshold is applied.

132. The term ‘Merit-cum-Seniority’ in context of 2005 Rules implies that both merit and seniority would be considered in the promotion of a candidate, with merit being determined on the basis of a suitability test. The exact modalities of how merit and seniority are to be apportioned is a legislative function and is to be performed keeping in mind the unique requirements and circumstances of the organization. In the present case, the merit of a candidate is assessed by means of a suitability test, as prescribed under paragraph 27 of the decision in *All India Judges’ Association (3)* (supra).

133. The contours of the words ‘Merit-cum-Seniority’ are drawn by this Court in the lines immediately following these words. The phrase “*for this purpose*”, as it appears in paragraph 27 of the aforesaid decision, acts as a bridge between the words – “Merit-cum-Seniority” – their substance. For the purpose of 65% promotional quota, this Court, in the said paragraph, has defined “*merit*” as the possession of a minimum standard, or suitability. This Court deliberately did not impart any competitive or comparative character to the term and such intention should be kept in mind while interpreting the term ‘Merit-cum-Seniority’ for the purpose of the 65% promotional quota.

134. The suitability test assesses multiple aspects of a candidate's merit like knowledge of law, quality of judgments, ACRs, etc. along with the efficiency of the candidate exhibited during the tenure already served. The suitability test is devised in such a manner that all candidates who clear the test can be said to possess more or less the same level of merit. Once a list of all similarly meritorious candidates is prepared, seniority is applied to select the candidates for promotion. Although seniority is applied at the last stage of the selection process, yet merit still plays the pre-dominant role as a candidate who does not possess the necessary suitability becomes ineligible for promotion irrespective of their seniority.

135. We are of the view that it would be incorrect to hold that merely because the test was not one of comparative merit and as seniority was applied at the final stage of the selection process, the process cannot be said to be one not adhering to the principle of 'Merit-cum-Seniority'. As long as 'Merit-cum-Seniority' is applied in the manner it has been explained in the decision in *All India Judges' Association (3)* (supra), wherein both merit and seniority are considered, and merit plays the dominant role, the process of promotion cannot be said to be violative of the principle of 'Merit-cum-Seniority'. The expressions used in the rules should be interpreted bearing in mind the principles enunciated in the aforesaid decision, and not on the basis of the various decisions of this Court that have been decided in entirely different factual situations. Further, if the principle

of 'Merit-cum-Seniority' is applied as argued by the petitioners, there would necessarily be no difference between the categories of 'merit' (10%) and 'Merit-cum-Seniority' (65%). It must be noted that the minimum qualifying service for the 65% category according to the 2005 Rules is two-years while that for the 10% category is five-years. Thus, appointment to the former category given the lesser years of minimum service allows relatively junior candidates to supersede the senior candidates based on the suitability test. Thus, while candidates who have two to five years of service will not be eligible to apply for promotion for the 10% promotional quota, they may still have the opportunity to apply and be considered for the 65% quota based on securing a minimum of 40% (and 50% aggregate) in each of the following indicators which measures the merit of the candidate: suitability test, evaluation of ACR, assessment of average disposal and evaluation of judgments. Thus, it is beyond any doubt that the criteria prescribed for promotion of candidates to the 65% promotional quota complies with the principle of 'Merit-cum-Seniority'.

136. Words used in a judgment are not to be read as words of a statute, but should be understood in the context of the facts of a given case. (See *Ambica Quarry Works v. State of Gujarat*, (1987) 1 SCC 213; *Bharat Petroleum Corporation Ltd. v. NR Vairamani*, (2004) 8 SCC 579, *Municipal Corporation Delhi v. Mohd Yasin*, (1983) 3 SCC 229). The attempt on the part of the petitioners is to persuade us to take the view that the connotation 'Merit-cum-

Seniority’ as figuring in the 2005 Rules, should be strictly understood as all merit and no seniority. This is not correct to our understanding. Such attempt must necessarily fail as the words “Merit-cum-Seniority” as they figure in the 2005 Rules read in conjunction with paragraphs 27 and 28 respectively of *All India Judges’ Association (3)* (supra), should be interpreted in the context in which they have been used by this Court – which we have discussed elaborately in the foregoing paragraphs.

137. The petitioners have relied on the decision of this Court in *Thampanoor Ravi v. Charupara Ravi* reported in (1999) 8 SCC 74 to contend that the term “Merit-cum-Seniority” has acquired a technical meaning and thus, should be given the meaning which is used ordinarily in relation to it. The relevant passage from the said decision is extracted here: -

“22. In ascertaining the meaning of an expression used in a statute, certain norms are adopted. If the legislature has used an expression which has acquired a technical meaning and such expression is used ordinarily in the context of a particular branch of law, it must be assumed that because of its constant use the legislature must be deemed to have used such expression in a particular sense as is understood when used in a similar context. If an expression has acquired a special connotation in law, dictionary or general meaning ceases to be helpful in interpreting such a word. Such an expression must be given its legal sense and no other. In this context, we may refer to the weighty observation in the decision of this Court in State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. [AIR 1958 SC 560 : 1959 SCR 379] that a term of well-recognised import in the general law should be accepted as confining the meaning in interpreting the Constitution. If the expression “undischarged insolvent” has acquired a special meaning under the law of

insolvency, we must understand that that is the meaning that is sought to be attributed to the expression used in Article 191(1)(c) of the Constitution.”

138. The aforesaid contention of the petitioner deserves to be rejected for two good reasons: -

- (1)** *First*, the observations in the said case have been made in the context of a technical meaning used in a statute. In the present case, the term ‘Merit-cum-Seniority’ as it appears in the 2005 Rules has been imported verbatim from the decision in *All India Judges’ Association (3)* (supra) and thus has to be assigned the meaning as given to it in the said case. Thus, it cannot be said that ‘Merit-cum-Seniority’ should be assigned the same meaning as understood in other decisions of this Court, or as assigned to it in different statutory provisions.
- (2)** *Secondly*, the term ‘Merit-cum-Seniority’, as elaborately discussed hereinabove, is a term of flexible meaning and the exact contours of it depend on the context and the policy in furtherance of which it is used.

139. In *Malik Mazhar Sultan & Anr. (3)* (supra) this Court directed the High Courts to be practical in matters of promotion to the cadre of District & Sessions Judges and held that the 65% promotion quota of the cadre of District & Sessions Judges should be filled on the basis of the principle of ‘Seniority-cum-Merit’. This Court further held that seniority should have a predominant role in giving

promotions to Civil Judge (Senior Division) and that the High Court may deny only in case the judicial officer is not suitable for being promoted. The relevant observations read as under: -

“3. We see large number of vacancies of District Judges are lying vacant as the promotion of these posts are not being done timely by the High Court. Considering the large number of vacant posts of District Judges, the High Court should take timely action to fill up these vacancies keeping in mind the principle of seniority-cum-merit. The High Court may deny promotion to a Civil Judge (Senior Division) only in case he/she is not suitable for being promoted and the seniority should always have a predominant role in giving promotion to the Civil Judge (Senior Division) to the post of District Judge. If the posts of District Judges are not filled up in time it is likely that sessions cases may not have timely trial, thereby delaying the whole procedure of justice delivery system. We request the High Court to be practical in the matter of promotion and filling up the posts of the District Judges. It is also brought to our notice that as the promotion policy itself is not working properly, a large number of Civil Judges (Junior Division) are continuing in the same post, causing stagnation from about 15 to 18 years. This is because the timely promotion is not being taken care of by the High Court and this should be corrected at the earliest. Now we are told that a total number of 217 posts have been advertised for appointment of Civil Judges (Junior Division) and 12 posts of District Judges (direct).”

(Emphasis supplied)

H. FEW SUGGESTIONS TO MAKE THE SUITABILITY TEST MORE MEANINGFUL

140. We have exhaustively discussed and explained the true meaning to be assigned to the principle of ‘Merit-cum-Seniority’ in context of Rule 5(1) of the 2005 Rules. However, we are of the view that this debate should not come to an end as we propose to convey to the High Court of Gujarat to amend its Rules

appropriately in line with the Uttar Pradesh Higher Judicial Service Rules, 1975 where the recruitment process has been elaboratively laid down. We are also of the view that the minimum standard to be objectively assessed by way of a suitability test should be made more efficacious and productive. In this regard, we would like to suggest the following: -

- (i) Apart from the four components included in the Suitability Test, an additional fifth component in the form of an Interview or Viva Voce should also be included in order to assess the ability and knowledge of the candidates.
- (ii) The High Court may consider enhancing the minimum specified threshold of marks as prescribed in the suitability test and each of its component.
- (iii) The evaluation of judgments delivered by the judicial officer being considered for promotion should be of the last two years instead of one year.
- (iv) Instead of seniority being considered at the very last stage of the process, some marks may be allocated for seniority at the stage of suitability test and thereafter, the final select list may be prepared on the basis of total marks.

I. CONCLUSION

141. We summarise our final conclusion as under: -

- (A) What has been conveyed, in so many words, by this Court in *All India Judges' Association (3)* (supra) is that the suitability of each candidate should be tested on their own merit. The aforesaid decision does not speak about comparative merit for the 65% promotional quota. In other words, what

is stipulated is the determination of suitability of the candidates and assessment of their continued efficiency with adequate knowledge of case law.

(B) For the 65% promotional quota this Court in *All India Judges' Association*

(3) (supra) did not state that after taking the suitability test, a merit list should be prepared and the judicial officers should be promoted only if they fall in the said merit list. It cannot be said to be a competitive exam. Only the suitability of the judicial officer is determined and once it is found that candidates have secured the requisite marks in the suitability test, they cannot be thereafter ignored for promotion.

(C) However, we clarify that for the 65% promotional quota, it is for a particular High Court to prescribe or lay down its own minimum standard to judge the suitability of a judicial officer, including the requirement of comparative assessment, if necessary, for the purpose of determining merit to be objectively adjudged keeping in mind the statutory rules governing the promotion or any promotion policy in that regard.

(D) We find no fault with the promotion process adopted by the High Court of Gujarat as the same fulfils the twin requirements stipulated in paragraph 27 of *All India Judges' Association (3)* (supra) being: -

- (I) The objective assessment of legal knowledge of the judicial officer including adequate knowledge of case law and;
- (II) Evaluation of the continued efficiency of the individual candidates.

- (E) The four components of the Suitability Test as prescribed under the recruitment notice dated 12.04.2022 comprehensively evaluate (i) the legal knowledge including knowledge of the case law through the objective MCQ - based written test AND (ii) the continued efficiency by evaluation of the ACRs, average disposal and past judgments of the concerned judicial officer.
- (F) We are of the view that if the contention of the petitioners were to be accepted then it would completely obliterate the fine distinction between the two categories of promotion in the cadre of District & Sessions Judge by way of 65% promotion on the basis of 'Merit-cum-Seniority' and 10% promotion strictly on the basis of merit. In other words, the 65% quota for promotion will assume the character of the 10% quota for promotion by way of a departmental competitive examination which is distinct in its nature since the latter is strictly based on merit.
- (G) Deviating from the process of promotion duly followed by the High Court of Gujarat since 2011 would cause grave prejudice to those judicial officers who lost out in the previous selections to the Higher Judicial Service despite having scored higher marks in the suitability test since, judicial officers who were relatively senior were promoted to the cadre of District & Sessions Judges. Accepting the argument of the petitioners would completely flip the process and displace the respondents once again, for a contrary reason.

142. We clarify that this judgment shall not be construed to invalidate the promotions to the Higher Judicial Service granted by other High Courts based on a construction of their own rules and requirements of service in the state judiciary. If any challenge to such promotion process is pending, it shall be dealt with independently by the High Court or the forum where any issue is pending.

143. For all the foregoing reasons, we have reached the conclusion that the impugned final Select List dated 10.03.2023 is not contrary to the principle of ‘Merit-cum-Seniority’ as stipulated in Rule 5(1)(I) of the 2005 Rules.

144. In the result, the present petition fails and is hereby dismissed. Interim Order granted earlier stands vacated.

145. The parties shall bear their own costs.

146. Pending application(s), if any, shall also stand disposed of.

..... **CJI.**
(Dr. Dhananjaya Y. Chandrachud)

..... **J.**
(J.B. Pardiwala)

..... **J.**
(Manoj Misra)

New Delhi
May 17th, 2024