REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3019 OF 2017

AIR COMMODORE NAVEEN JAIN .....APPELLANT(S)

VERSUS

UNION OF INDIA & ORS. .....RESPONDENT(S)

J U D G M E N T

HEMANT GUPTA, J.

1) The challenge in the present appeal is to an order passed by the Armed Forces Tribunal, Principal Bench, New Delhi[1] on March 9, 2016 whereby, the Original Application filed by the appellant was dismissed and also an order of the same date declining leave to appeal to this Court under Section 31(1) of the Armed Forces Tribunal Act, 2007[2].

2) The appellant was commissioned in the Administrative Branch of the Indian Air Force on December 11, 1981. He was promoted to the rank of Air Commodore in the year 2011. He along with nine other officers were considered for promotion against five vacancies in the rank of Air Vice Marshal. The appellant could not be promoted though he was first in the merit list in view of the fact

1 for short, 'Tribunal'
2 for short, 'Act'

that he was placed at Sl. No. 3 in seniority in the select list of four officers. The first officer on the select list was promoted to the rank of Air Vice Marshal on May 11, 2015 against the first available vacancy whereas, next two vacancies arose on August 1, 2015 and September 1, 2015 i.e. after the appellant attained the age of superannuation on June 30, 2015. Since, there was no post available for his promotion prior to his superannuation, he was not promoted to the rank of Air Vice Marshal.

3) The appellant invoked the jurisdiction of the Tribunal claiming promotion to the rank of Air Vice Marshal selected by Promotion Board in order of merit and not in the order of seniority challenging the clause in the Promotion Policy dated February 20, 2008 that the merit list prepared by the Board has to be rearranged in the order of seniority.

4) The argument of learned counsel for the appellant is that promotion to the rank of Air Vice Marshal is on the principle of "merit-cum-seniority". Therefore, seniority cannot be the guiding principle for promotion once the appellant was found to be meritorious by the Promotion Board. In support of his argument, learned counsel for the appellant relied upon judgment of this Court in ***Ajit Singh & Ors. (II)*** v. ***State of Punjab & Ors.***[3] and also to an order passed by this Court in ***Union of India & Anr.*** v. ***Major General Manoj Luthra & Ors.***[4] whereby, the order of the

3 (1999) 7 SCC 209
4 Civil Appeal No. 9390 of 2014 decided on September 29, 2015

Tribunal was affirmed while examining the policy for promotion to the post of Major General in the Armed Forces Medical Services. The argument is that similar policy is applicable for promotion to the post of Air Vice Marshal, therefore, in view of the affirmance of the judgment of the Tribunal by this Court, such policy cannot be relied upon. The Tribunal in ***Major General Manoj Luthra***, held as under:

> "12. ...Once selection is made on the basis of merit and officers are graded in the select list based on that merit following the policy of seniority thereafter is contrary to the provisions of Article 14 and 16. We are handicapped on this issue as policy is not subject matter of challenge. Admittedly, the petitioner is on merit at S. No. 1 should have been permitted to pick up the rank of Lt. Gen. But for this policy he is at S.No. 3 of the list and he would pick up the rank of Lt. Gen. only on 01.07.2014 which is the date when he would have retired. Therefore, he loses out his right of promotion on account of faulty policy being followed..."

5) The appeal against the said order was dismissed by this Court observing that the policy is quite ambiguous but the cause of justice is best sub-served if the respondent is conferred with the rank of Lieutenant General w.e.f. May 1, 2014 but no arrears shall be paid.

6) On the other hand, the argument of learned counsel for the respondents is that the promotion policy is not "merit-cum-seniority" as argued by the appellant but is a policy which contemplates that merit list of officers is prepared from amongst the candidates in the zone of consideration on the basis of total

marks obtained after adding AR Marks and Board Marks. The names of the officers will be rearranged in order of seniority at the second stage of determining the suitability of the officers for promotion. The right of promotion is in terms of policy alone. Therefore, if the policy contemplates a particular procedure for promotion, the promotion can be effected only in such a manner and in no other manner. It is also argued that the appellant was aware of the policy and has participated in the promotion process, therefore, after participating in the selection process and after remaining unsuccessful, he is estopped to challenge the policy under which his name was considered for promotion to the post of Air Vice Marshal.

7) A consolidated Promotion Policy was circulated on February 20, 2008 as the existing policy for promotion based upon “seniority-cum-fitness” was found to have resulted in the older age profile for the officers being promoted to the higher ranks. The requirement was felt to formalize the norms and introduce a merit-based system for promotion at senior levels. The norms and criteria for promotion to the rank of Air Marshal and No.1 Promotion Board for promotion of Air Commodore and Group Captains to the ranks of Air Vice Marshal and Air Commodore were fixed in such policy. The officer who fulfils the qualifying service and is eligible in terms of criteria framed, the merit list is prepared on the basis of AR Marks; Board Marks and on the basis of numerical gradings of available Annual Confidential Reports during last ten years. The Board

Marks are the sum total of marks given by each member present in the Board meeting on the scale of 05.

8) The relevant clauses from the Policy dated February 20, 2008 read as under:

> "11. Zone of consideration. (a) Zone of consideration will be 3 times the number of vacancies occurring. However, if Zone of Consideration extends to the next course then all officers who have retained their seniority from that course would be considered.
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> (b) All the second and third timers will necessarily form part of zone of consideration, irrespective of the number of vacancies.
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> (c) In cases where available offices in any branch from which promotions are to be made is less than the stipulate zone consideration of 3 times, the actual number of officers available will form the zone of consideration.
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> 13. Eligibility. An officer should have at least one appraisal report in the rank held by him at the time of his consideration for promotion.
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> 15. Qualifying Service. The minimum qualifying service in the rank, for promotion to the ranks of Air Marshal, AVMs and Air Cmdes as on 31 March of the year preceding the promotion year for which Board is conducted, will be as follows:-
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> (a) AVM 1 year
> (b) Air Cmde 1 year
> (c) Gp Capt 2 years
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> Exceptions in qualifying service may be made due to any service reasons. Such exceptions will be required to be authorized by the CAS.
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> 16. Preparation of Merit List. Merit list will be prepared on the basis of 'AR Marks' and 'Board Marks' with weightage of 95.05 respectively. In the case of

promotion to the rank of Air Marshal average of numerical gradings of the available ARs during last five years will be taken into account to determine the AR marks. For promotion to the ranks of Air Cmde and AVMs, average of numerical gradings of available ARs during last ten years will be taken into consideration. 'Board Marks' will be sum total of marks given by each member present in the Board meeting on the scale of 05…."

17. Overall Merit. A merit list of officers considered by the Board will be prepared on the basis of total marks obtained in AR Marks and Board Marks. An illustration to demonstrate the actual computation of an officer's marks is placed as Annexure-I to this paper.

A Select List of the officers will be prepared from the Merit List. The Select List will contain the names of the officer restricted to the number of forecast vacancies and rearranged in the order of seniority. The officers from the list will be promoted in that order.

In case of any additional vacancy/vacancies (unforeseen or ex-cadre) arising during the promotion year, these should be added to the forecast vacancies for the next promotion year and the Promotion Board for the next promotion year should be appropriately advanced. The zone of consideration will be as provided in para 11 above. Therefore, there will be no "Select Reserve List".

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22. The recommendations of the Promotion Boards will be forwarded to Min of Defence for their approval. The promotions will take effect from the Select List in the order of seniority against a suitable vacancy arising in turn.

23. Actual promotion will be subject to the officer's maintaining continuity in performance, medical fitness and availability of a suitable vacancy in his turn."

9) The validity of such Policy has been upheld by the Tribunal relying upon Division Bench judgment of High Court of Delhi in ***Air Cmde***

Randhir Pratap v. ***Union of India & Ors.***[5]. The Tribunal relied upon ***Hardev Singh*** v. ***Union of India & Anr.***[6] to hold that no employee has a right to get promotion but only a right to be considered for promotion. The Tribunal found that the Promotion Policy is based on the principle of "seniority-cum-merit" and not "merit-cum-seniority" as the ultimate promotions are based on seniority. This Court in ***Hardev Singh*** held as under:-

> "25. In our opinion, it is always open to an employer to change its policy in relation to giving promotion to the employees. This Court would normally not interfere in such policy decisions. We would like to quote the decision of this Court in *Virender S. Hooda* v. *State of Haryana* [(1999) 3 SCC 696 : 1999 SCC (L&S) 824] where this Court had held in para 4 of the judgment that: (SCC p. 699)
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> > "*4*. … When a policy has been declared by the State as to the manner of filling up the post and that policy is declared in terms of rules and instructions issued to the Public Service Commission from time to time and so long as these instructions are not contrary to the rules, the respondents ought to follow the same."
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> 26. Similarly, in *Balco Employees' Union* v. *Union of India* [(2002) 2 SCC 333] it has been held that a court cannot strike down a policy decision taken by the Government merely because it feels that another policy would have been fairer or wiser or more scientific or logical. It is not within the domain of the court to weigh the pros and cons of the policy or to test the degree of its beneficial or equitable disposition.
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> 27. For the aforestated reasons, we are of the view that no injustice had been caused to the appellant as his case was duly considered for promotion to the rank of Lieutenant-General by the SSB twice but as other officers were found better than the appellant, he could not be promoted. In the circumstances, we do not find any substance in the appeal and, therefore, the appeal deserves to be dismissed."

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5 Writ Petition (C) No. 18935 of 2006 decided on August 24, 2007

6 (2011) 10 SCC 121

10) The Policy dated February 20, 2008 does not use the expression that the promotion is based either on the principle of “merit-cum-seniority” or “seniority-cum-merit”. Therefore, the entire policy is required to be examined as to what is the criteria for promotion rather than using the expression either “merit-cum-seniority” or “seniority-cum-merit”. Therefore, the first and the foremost question is as to whether the promotion to the rank of Air Vice Marshal is based upon the general principle of “merit-cum-seniority” or “seniority-cum-merit” or that the promotions are to be made on the basis of the eligibility criteria, procedure and on the basis of seniority after determining merit of the candidates falling in the zone of consideration.

11) The Army Order circulating Promotion Policy on February 20, 2008 is statutory in nature. The appellant has challenged such policy *inter alia* on the ground that the policy is based upon “merit-cum-seniority” but the condition in the policy promoting the officers on the basis of seniority after short listing the officers is contrary to the principles of promotion based on “merit-cum-seniority”. Therefore, clause 17 of the Promotion Policy is contrary to established principles of law pertaining to promotion on the basis of “merit-cum-seniority” and, thus, not sustainable.

12) A three Judge Bench of this Court in ***B.V. Sivaiah & Ors.*** v. ***K.***

Addanki Babu & Ors.[7] while examining the principle seniority-cum-merit held as under:

> "10. On the other hand, as between the two principles of seniority and merit, the criterion of "seniority-cum-merit" lays greater emphasis on seniority. In *State of Mysore* v. *Syed Mahmood* [AIR 1968 SC 1113 : (1968) 3 SCR 363 : (1970) 1 LLJ 370] while considering Rule 4(3)(*b*) of the Mysore State Civil Services General Recruitment Rules, 1957 which required promotion to be made by selection on the basis of seniority-cum-merit, this Court has observed that the Rule required promotion to be made by selection on the basis of "seniority subject to the fitness of the candidate to discharge the duties of the post from among persons eligible for promotion". It was pointed out that where the promotion is based on seniority-cum-merit, the officer cannot claim promotion as a matter of right by virtue of his seniority alone and if he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted."

13) In ***State of Mysore & Anr.*** v. ***G.B. Purohit & Ors.***[8], this Court held that a right to be considered for promotion, is a condition of service but mere chances of promotion are not. The rule which merely affects the chances of promotion cannot be regarded as varying a condition of service. The said judgment was quoted with approval in later judgment reported as ***Ramchandra Shankar Deodhar & Ors.*** v. ***State of Maharashtra & Ors.***[9], wherein this Court held as under:

> "15.....All that happened as a result of making promotions to the posts of Deputy Collectors division wise and limiting such promotions to 50 per cent of the total number of vacancies in the posts of Deputy Collector was to reduce the chances of promotion available to the petitioners. It is now well settled by the

7 (1998) 6 SCC 720
8 (1967) SLR 753
9 (1974) 1 SCC 317

> decision of this Court in *State of Mysore* v. *G.B. Purohit* [CA No. 2281 of 1965, decided on January 25, 1967] that though a right to be considered for promotion is a condition of service, mere chances of promotion are not. A rule which merely affects chances of promotion cannot be regarded as varying a condition of service. In *Purohit's case* the district wise seniority of sanitary inspectors was changed to State wise seniority, and as a result of this change the respondents went down in seniority and became very junior. This, it was urged, affected their chances of promotion which were protected under the proviso to Section 115, sub-section (7). This contention was negatived and Wanchoo, J. (as he then was), speaking on behalf of this Court observed: "It is said on behalf of the respondents that as their chances of promotion have been affected their conditions of service have been changed to their disadvantage. We see no force in this argument because chances of promotion are not conditions of service....."

14) In ***Dwarka Prasad & Ors.*** v. ***Union of India & Ors.***[10], the argument examined was that the promotion opportunities have to be provided in ratio with the strength of the feeder cadre. It was held as under:

> "16. Fixation of quotas or different avenues and ladders for promotion in favour of various categories of posts in feeder cadres based upon the structure and pattern of the Department is a prerogative of the employer, mainly pertaining to the policy-making field. The relevant considerations in fixing a particular quota for a particular post are various such as the cadre strength in the feeder quota, suitability more or less of the holders in the feeder post, their nature of duties, experience and the channels of promotion available to the holders of posts in the feeder cadres. Most important of them all is the requirement of the promoting authority for manning the post on promotion with suitable candidates. Thus, fixation of quota for various categories of posts in the feeder cadres requires consideration of various relevant factors, a few amongst them have been mentioned for illustration. Mere cadre strength of a particular post in the feeder cadre cannot

10 (2003) 6 SCC 535

be a sole criterion or basis to claim parity in the chances of promotion by various holders of posts in feeder categories."

15) In ***A. Satyanarayana & Ors.*** v. ***S. Purushotham & Ors.***[11], this Court held that the power of the State to fix quota for promotion cannot be said to be violative of the Constitutional Scheme of equality as contemplated under Articles 14 and 16 of the Constitution of India. The Court held as under:

"23. We, however, are of the opinion that the validity or otherwise of a quota rule cannot be determined on surmises and conjectures. Whereas the power of the State to fix the quota keeping in view the fact situation obtaining in a given case must be conceded, the same, however, cannot be violative of the constitutional scheme of equality as contemplated under Articles 14 and 16 of the Constitution of India. There cannot be any doubt whatsoever that a policy decision and, in particular, legislative policy should not ordinarily be interfered with and the superior courts, while exercising their power of judicial review, shall not consider as to whether such policy decision has been taken mala fide or not. But where a policy decision as reflected in a statutory rule pertains to the field of subordinate legislation, indisputably, the same would be amenable to judicial review, inter alia, on the ground of being violative of Article 14 of the Constitution of India. (See *Vasu Dev Singh* v. *Union of India* [(2006) 12 SCC 753 : (2006) 11 Scale 108] and *State of Kerala* v. *Unni* [(2007) 2 SCC 365] .)

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25. While saying so, we are not unmindful of the legal principle that nobody has a right to be promoted; his right being confined to right to be considered therefor.

26. Similarly, the power of the State to take a policy decision as a result whereof an employee's chance of promotion is diminished cannot be a subject-matter of judicial review as no legal right is infringed thereby."

11 (2008) 5 SCC 416

16) In ***A.P. Public Service Commission*** v. ***Baloji Badhavath & Ors.***[12], this Court held that the Court will not ordinarily interfere with the process of determining merit unless the procedure adopted by it is held to be arbitrary or against known-principles of fair play. The Court held as under:

> "25. How the Commission would judge the merit of the candidates is its function. Unless the procedure adopted by it is held to be arbitrary or against the known principles of fair play, the superior courts would not ordinarily interfere therewith. The State framed Rules in the light of the decision of the High Court in *S. Jaffer Saheb* [(1985) 2 APLJ 380]. Per se, it did not commit any illegality. The correctness of the said decision, as noticed hereinbefore, is not in question having attained finality. The matter, however, would be different if the said Rules per se are found to be violative of Article 16 of the Constitution of India. Nobody has any fundamental right to be appointed in terms of Article 16 of the Constitution of India. It merely provides for a right to be considered therefor. A procedure evolved for laying down the mode and manner for consideration of such a right can be interfered with only when it is arbitrary, discriminatory or wholly unfair."

17) In ***Rajendra Kumar Srivastava & Ors.*** v. ***Samyut Kshetriya Gramin Bank & Ors.***[13], this Court was examining two-stage process adopted by Bank - the first preparing list of candidates who secure minimum marks in the performance appraisal and interview, and the second promoting the candidates who secure the minimum marks, strictly on the basis of seniority. It was held that such is seniority-cum-merit criteria for promotion. The Court held as under:

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12 (2009) 5 SCC 1
13 (2010) 1 SCC 335

> "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."

18) In view of the principles governing the right of promotion as delineated above, we find that the grievance of the appellant is in respect of lost chances of promotion inasmuch as he attained the age of superannuation before the vacancy arose. Clauses 17 and 22 are categorical that the select list of officers will be prepared from merit list and rearranged in order of seniority. Thus, the final list of the candidates falling within the zone of consideration in terms of clause 11 and who are eligible in terms of clause 13 is determined first by preparing the merit list on the basis of AR marks and Board marks. Thereafter, the names of the officers found meritorious are to be rearranged in order of seniority as per clauses 17 and 22 of the Promotion Policy. Thus, it ensures that the candidates falling within the zone of consideration are short listed for promotion but ultimate promotion from amongst the

selected candidates is on the basis of seniority. Such policy *per se* cannot be said to be illegal, arbitrary and discriminatory so as to attract the violation of either Article 14 or Article 16 of the Constitution.

19) In ***Ajit Singh***, referred to by learned counsel for the appellant, the Court held that equal opportunity contemplated by Article 14 of the Constitution means the right to be considered for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be considered for his promotion, which is his personal right. The rules and the considerations contemplated promotion by "seniority-cum-merit" particularly in the light of reserved category candidates promoted at the roster points. It was held that in terms of Article 16, every employee eligible for promotion or who comes within the zone of consideration, has a fundamental right to be considered for promotion but his right is of consideration alone. The Court held as under:

> "22. … It has been held repeatedly by this Court that clause (1) of Article 16 is a facet of Article 14 and that it takes its roots from Article 14. The said clause particularises the generality in Article 14 and identifies, in a constitutional sense "equality of opportunity" in matters of employment and appointment to any office under the State. The word "employment" being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be "considered" for promotion. Equal opportunity here means the right to be "considered" for promotion. If a person satisfies the eligibility and zone

> criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be "considered" for promotion, which is his personal right...."
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> 27. In our opinion, the above view expressed in *Ashok Kumar Gupta* [(1997) 5 SCC 201 : 1997 SCC (L&S) 1299] and followed in *Jagdish Lal* [(1997) 6 SCC 538 : 1997 SCC (L&S) 1550] and other cases, if it is intended to lay down that the right guaranteed to employees for being "considered" for promotion according to relevant rules of recruitment by promotion (i.e. whether on the basis of seniority or merit) is only a *statutory right* and not a *fundamental right*, we cannot accept the proposition. We have already stated earlier that the right to equal opportunity in the matter of promotion in the sense of a right to be "considered" for promotion is indeed a fundamental right guaranteed under Article 16(1) and this has never been doubted in any other case before *Ashok Kumar Gupta* [(1997) 5 SCC 201 : 1997 SCC (L&S) 1299] right from 1950."

20) In ***Major General Manoj Luthra***, the Promotion Policy has not been struck down by this Court but in the facts of that case, in view of superannuation of the officer, the benefit was ordered to be conferred to the respondent. Such is not a binding precedent as the merit of the policy has not been examined.

21) The promotion to the post of Air Vice Marshal is regulated by Circular dated February 20, 2008, therefore, the promotion can be claimed only in terms of eligibility and the norms fixed therein. Mere fact that the appellant could not be promoted on account of non-availability of vacancies before his superannuation is not a ground on which the Promotion Policy can be struck down. The

Promotion Policy can be struck down only if the policy has no reasonable nexus with the objective to be achieved and is discriminatory. The lack of vacancy is not a ground on the basis of which promotion policy can be struck down. Since the Promotion Policy is in two stages as in ***Rajendra Kumar Srivastava*** i.e. to shortlist the candidates on the basis of eligibility criteria and on the basis of the marks obtained in the Annual Confidential Report and the marks given by the Board, therefore, the applicability of principle of seniority cannot be said to be arbitrary or irrational which may make the policy illegal and unsustainable.

22) The promotion has to be affected in terms of statutory rules and in absence thereof, as per the executive instructions. The policy provides equal opportunities to the officers falling within the zone of consideration and subsequent promotion. Such policy is not discriminatory in terms of Article 14 or denies lack of equal opportunity in terms of Article 16. The promotion to the post of Air Vice Marshal is governed by the policy of Air Force which is applicable to all officers falling in the zone of consideration. Therefore, the Promotion Policy cannot be said to be illegal, arbitrary and irrational warranting interference in exercise of power of judicial review.

23) Apart from the policy, we also find that the appellant is estopped to challenge the policy after participating in the selection process on the basis of such policy. It has been so held by this Court in

Madan Lal & Ors. v. ***State of J & K & Ors.***[14]:

> "10. Therefore, the result of the interview test on merits cannot be successfully challenged by a candidate who takes a chance to get selected at the said interview and who ultimately finds himself to be unsuccessful. It is also to be kept in view that in this petition we cannot sit as a court of appeal and try to reassess the relative merits of the candidates concerned who had been assessed at the oral interview nor can the petitioners successfully urge before us that they were given less marks though their performance was better. It is for the Interview Committee which amongst others consisted of a sitting High Court Judge to judge the relative merits of the candidates who were orally interviewed, in the light of the guidelines laid down by the relevant rules governing such interviews. Therefore, the assessment on merits as made by such an expert committee cannot be brought in challenge only on the ground that the assessment was not proper or justified as that would be the function of an appellate body and we are certainly not acting as a court of appeal over the assessment made by such an expert committee."

24) In a judgment reported as ***Ashok Kumar*** v. ***State of Bihar***[15], a three Judge Bench held that the appellants were estopped from turning around and challenging the selection once they were declared unsuccessful. The Court held as under:-

> "17. In *Ramesh Chandra Shah* v. *Anil Joshi* [*Ramesh Chandra Shah* v. *Anil Joshi*, (2013) 11 SCC 309 : (2011) 3 SCC (L&S) 129] , candidates who were competing for the post of Physiotherapist in the State of Uttarakhand participated in a written examination held in pursuance of an advertisement. This Court held that if they had cleared the test, the respondents would not have raised any objection to the selection process or to the methodology adopted. Having taken a chance of selection, it was held that the respondents were disentitled to seek relief under Article 226 and would be deemed to have waived their right to challenge the advertisement or the procedure of selection. This Court held that: (SCC p. 318, para 18)

14 (1995) 3 SCC 486
15 (2017) 4 SCC 357

> "*18*. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome."

18. In *Chandigarh Admn.* v. *Jasmine Kaur* [*Chandigarh Admn.* v. *Jasmine Kaur*, (2014) 10 SCC 521 : 6 SCEC 745] , it was held that a candidate who takes a calculated risk or chance by subjecting himself or herself to the selection process cannot turn around and complain that the process of selection was unfair after knowing of his or her non-selection. In *Pradeep Kumar Rai* v. *Dinesh Kumar Pandey* [*Pradeep Kumar Rai* v. *Dinesh Kumar Pandey*, (2015) 11 SCC 493 : (2015) 3 SCC (L&S) 274], this Court held that: (SCC p. 500, para 17)

> "*17*. Moreover, we would concur with the Division Bench on one more point that the appellants had participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the appellants did not challenge it at that time. This, it appears that only when the appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time. Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted."

This principle has been reiterated in a recent judgment in *Madras Institute of Development Studies* v. *K. Sivasubramaniyan* [*Madras Institute of Development Studies* v. *K. Sivasubramaniyan*, (2016) 1 SCC 454 : (2016) 1 SCC (L&S) 164 : 7 SCEC 462] .

19. In the present case, regard must be had to the fact that the appellants were clearly on notice, when the fresh selection process took place that written examination would carry ninety marks and the interview, ten marks. The appellants participated in the selection process. Moreover, two other considerations weigh in balance. The High Court noted in the

> impugned judgment [*Anurag Verma* v. *State of Bihar*, 2011 SCC OnLine Pat 1289.] that the interpretation of Rule 6 was not free from vagueness. There was, in other words, no glaring or patent illegality in the process adopted by the High Court. There was an element of vagueness about whether Rule 6 which dealt with promotion merely incorporated the requirement of an examination provided in Rule 5 for direct recruitment to Class III posts or whether the marks and qualifying marks were also incorporated. Moreover, no prejudice was established to have been caused to the appellants by the 90:10 allocation."

25) In view thereof, we do not find that the policy circulated on February 20, 2008 suffers from any illegality which was rightly not interfered with by the learned Tribunal. Thus, the appeal is dismissed.

.....J.
(L. NAGESWARA RAO)

.....J.
(HEMANT GUPTA)

NEW DELHI;
OCTOBER 03, 2019.