

# IN THE HIGH COURT OF SIKKIM

## ORDER SHEET

Writ Petition (C)

No. 29 of 2004

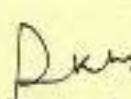
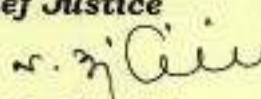
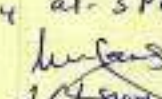
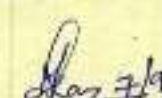
PHURBA WANGDI PULGER

Petitioner / Appellant

Versus

STATE OF SIKKIM & OTHERS

Respondent

Serial No. of Order	Date of Order	Order with Signature	Office Note as to action (if any) taken on Order
1.	25.8.2004	<p>Heard Miss Sapna Rai, learned counsel for the petitioner.</p> <p>Defects as pointed out by the Stamp Reporter shall be removed within three days', failing which this writ petition shall stand dismissed without further reference to the Bench.</p> <p style="text-align: right;">   (R. K. Patra)  Chief Justice    (N. S. Singh)  Judge </p>	<p>Legible copies filed on 26-8-04 at 3 PM.</p> <p style="text-align: right;">   26/8/04 </p> <p style="text-align: right;"> As directed list this petition for admission on 8-9-04.    8/9/04 </p>
2.	08.09.2004	<p>The petitioner in this petition under Article 226 of the Constitution of India seeks to quash the office order no.674/G/DOP dated 24.07.2004 of the Government of Sikkim in the Department of Personnel, Administrative Reforms and Training at annexure 9 temporarily promoting the respondent no.3 as District &amp; Sessions Judge in the cadre of Sikkim Superior Judicial Service and the consequential office order no.118/HCS dated 28.7.2004 at annexure 10 of this Court posting the said respondent no.3 as District &amp; Sessions Judge, Special Division - II, Gangtok.</p>	





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		<p><b>2.</b> We have heard Shri S. K. Homchoudary, learned senior counsel for the petitioner.</p> <p><b>3.</b> The petitioner is a member of the Sikkim Judicial Service and at present is in the cadre of Chief Judicial Magistrate-cum-Senior Civil Judge. At the outset, it is appropriate to state that no one denies his legal right to invoke the writ jurisdiction of this Court challenging his non-promotion. It is however not appreciated that in a case like alleged non-promotion, when an alternative remedy, equally effective and efficacious was available to him by way of filing a representation to this Court on its administrative side he should not have resorted to the writ jurisdiction. He seems to be very conscious of his legal right but is not mindful to the observations made of the Hon'ble Supreme Court in the first All India Judges' Association case that there is a marked distinction between the officers belonging to judiciary and executive and the Court has placed the judicial officers at a higher pedestal. The petitioner like an ordinary litigant should not have rushed to this Court by presenting a writ petition to challenge his non-promotion which is usually done by some officers belonging to the executive. The Hon'ble Supreme Court in the Orissa Judicial Services Association vs. State of Orissa AIR 1991 SC 382 had dis-approved the conduct of judicial officers indulging in litigation as "it does not bring credit to the judicial administration". Since he has chosen to pursue the legal remedy, we have nothing more to say.</p> <p><b>4.</b> Learned counsel for the petitioner firstly submitted that petitioner is a grade II officer in the cadre of Chief Judicial Magistrate-cum-Senior Civil Judge whereas respondent no.3 is in grade III of the</p>	





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		<p>same cadre of Chief Judicial Magistrate-cum-Senior Civil Judge and has not yet completed 5 years' of service therein and therefore is not eligible to be promoted as District Judge which is in the Sikkim Superior Judicial Service. In support of this submission he has referred to paragraph 2(A) of the writ petition wherein the direction of the Hon'ble Supreme Court in All India Judges' Association case [2002 (4) SCC 247] has been extracted. We repeatedly asked the learned counsel to point out the rule requiring completion of 5 years' of service in the rank of Chief Judicial Magistrate for being considered for promotion to the cadre of District Judge. Learned counsel could not point out any such rule. Admittedly there is no such provision in the Sikkim Superior Judicial Service Rules, 1980 prescribing such requirement. No doubt in the direction of the Hon'ble Supreme Court (supra) there is mention that for recruitment to the cadre of District Judge, there shall be 25% by promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having <u>not less than 5 years qualifying service</u>. We put it on record that till now no rules have been made by the Governor under the proviso to Article 309 of the Constitution of India prescribing the requirement of 5 years' of qualifying service for consideration for promotion to the post of District Judge. Rules were drafted in obedience to the direction of the Hon'ble Court and have been sent to the State Government and are awaited for promulgation. Therefore, the position as it stands, the Sikkim Superior Judicial Service Rules, 1980 governs the field.</p>	





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		<p>Rule 7 thereof, which is relevant for our purpose is quoted hereunder:-</p> <p><b>"7. RECRUITMENT TO SERVICE:</b> (1) Recruitment to the service shall be made -</p> <p>(i) <u>by promotion from the Sikkim Judicial Service</u>; or</p> <p>(ii) by direct recruitment.</p> <p>NOTE: Notwithstanding the provisions of sub-rules 1(i) and (ii) persons may be appointed against any of the posts in Appendix 'A' on deputation from the Judicial Service of other States in India for a period of five years from the commencement of these rules. This period of 5 years may be further extended by the Governor in consultation with the High Court if the circumstances so warrant.</p> <p>(2) Of the total number of posts specified in Appendix 'A' two-thirds shall be manned by promoted Officers and one-third by direct recruits if filled by promotion or direct recruitment as the case may be:</p> <p>Provided that nothing in this sub-rule shall prevent the officiating appointment of a member of the Sikkim Judicial Service on any post which is to be filled up by direct recruitment till a direct recruit is appointed."</p> <p>It may be seen from the above rule that an officer belonging to the Sikkim Judicial Service is eligible to be considered for promotion to the cadre of District Judge i.e. the Sikkim Superior Judicial Service. In the State of Sikkim, the echelon of the subordinate judiciary is as follows:-</p> <ol style="list-style-type: none"> <li>1. Civil Judge-cum-Judicial Magistrate;</li> <li>2. Chief Judicial Magistrate-cum-Senior Civil Judge;</li> <li>3. District Judge.</li> </ol> <p>Promotion from the post of Civil Judge-cum-Judicial Magistrate to the post of Chief Judicial</p>	





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		<p>Magistrate-cum-Senior Civil Judge is governed by the Sikkim Judicial Service Rules, 1975 with which we are not concerned. For promotion from the cadre of Chief Judicial Magistrate-cum-Senior Civil Judge to the cadre of District Judge, one has to follow rule 7 of the Sikkim Superior Judicial Service Rules, 1980 (supra) which do not require 5 years' of qualifying service in the rank of Chief Judicial Magistrate-cum-Senior Civil Judge for being considered for promotion to the cadre of District Judge. There is also no mention in the said rule 7 that for promotion to the post of District Judge, the Chief Judicial Magistrate-cum-Senior Civil Judge should be in the particular grade of scale of pay. Therefore we have no hesitation to hold that all officers in the cadre of Chief Judicial Magistrate-cum-Senior Civil Judge are eligible to be considered for promotion to the cadre of District Judge. For the reasons aforesaid, we do not find any merit in the submission of the petitioner and we outright reject it.</p> <p>5. It was next contended by the learned counsel for the petitioner that he is in grade II of Chief Judicial Magistrate-cum-Senior Civil Judge whereas respondent no.3 is in grade III of Chief Judicial Magistrate-cum-Senior Civil Judge and he being on higher grade he alone is eligible for promotion. The contention is based on mis-conception of service jurisprudence. It is usually found that in many service rules incremental scale of pay is fixed depending on the duration of the service rendered by an officer. In other words different grades of scale of pay are provided on the basis of the duration of the service rendered by the officers in the cadre. Merely because in the cadre of Chief Judicial Magistrate-cum-Senior Civil Judge there are 3 grades of</p>	





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		<p>scale of pay it does not mean that there is a sub-cadre within the same cadre of Chief Judicial Magistrate-cum-Senior Civil Judge in absence of anything in the rule to the contrary. Moreover if the contention of the petitioner is accepted that a grade in the cadre of Chief Judicial Magistrate-cum-Senior Civil Judge should be considered for promotion to the post of District Judge, then one has to go to grade I and then only the case for consideration for promotion would arise. In such a case the petitioner himself being in grade II is ineligible for consideration because he has yet to go to grade I. As noted above under the rule governing the field, all Chief Judicial Magistrates-cum-Senior Civil Judge are eligible to be considered for promotion to the cadre of District Judge. Therefore we do not find any flaw in considering respondent no.3 for promotion to the cadre of District Judge. The petitioner is in the cadre of Chief Judicial Magistrate-cum-Senior Civil Judge since 17.11.1997 whereas the respondent no.3 is with effect from 20.4.2000 in the same cadre. It is true that the petitioner is senior to the respondent no.3 in the cadre of Chief Judicial Magistrate-cum-Senior Civil Judge but seniority itself is not the criterion for promotion. A District Judge is the principal judicial officer of the District. Therefore for promoting an officer to the cadre of District Judge merit cannot be sacrificed. The Full Court after considering the ACRs of the petitioner and respondent no.3 considered the later to be more suitable and accordingly recommended her name to the State Government for being appointed as District Judge. The State Government on consideration of the recommendation has issued the impugned notification.</p>	





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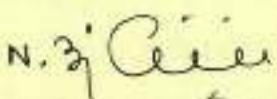
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		<p><b>6.</b> In course of hearing we also looked at the ACRs of the petitioner and respondent no.3. As Chief Judicial Magistrate-cum-Senior Civil Judge the reports of the petitioner are dismal <i>inasmuch</i> as for the year 1<sup>st</sup> April, 1998 to 31<sup>st</sup> March, 1999, 1<sup>st</sup> April, 1999 to 31<sup>st</sup> March, 2000, 1<sup>st</sup> April, 2000 to 31<sup>st</sup> March, 2001, 1<sup>st</sup> April, 2001 to 31<sup>st</sup> March, 2002 and 1<sup>st</sup> April, 2002 to 31<sup>st</sup> March, 2003 he has been rated as an "average officer" by this Court. As Chief Judicial Magistrate-cum-Senior Civil Judge the reports of the respondent no.3 for the year 1<sup>st</sup> April, 2000 to 31<sup>st</sup> March, 2001, 1<sup>st</sup> April, 2001 to 31<sup>st</sup> March, 2002 and 1<sup>st</sup> April, 2002 to 31<sup>st</sup> March, 2003 show that this Court has rated her as "very good" officer. From the above, it can be safely concluded that respondent no.3 is more meritorious than the petitioner. Therefore her promotion to the cadre of Sikkim Superior Judicial Service is unexceptionable.</p> <p><b>7.</b> For all the reasons aforesaid, we do not find any merit in this writ petition which is accordingly dismissed with costs assessed at Rs.3,000/- and this amount shall be taken as fund of the Sikkim High Court Bar Association. The District &amp; Sessions Judge (East &amp; North), Gangtok is directed to deduct the above amount from the salary of the petitioner for the month of September, 2004 and deposit the same with the Sikkim High Court Bar Association forthwith.</p> <p><b>8.</b> Before parting with the case, it would not be out of place to mention that counsel for the petitioner in course of his submission had been harping that we should consider this matter dis-passionately. It is well-accepted that the Judges who decide matters on administrative side may have to decide those very</p>	<p>Extract of order 9. Sl no-7 is forwarded to J+S (E+N) on 14.9.04. <i>[Signature]</i> 14/9/04</p>





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		<p>matters on judicial side. While sitting in judicial capacity a Judge decides the matter with judicious blend. We state without any hesitation that we heard the matter with an open mind and decided it keeping nothing except the law in view.</p> <p> ( R. K. Patra ) Chief Justice 08.09.2004</p> <p> ( N. Surjamani Singh ) Judge 08.09.2004</p>	