

**BEFORE THE UTTARAKHAND PUBLIC SERVICES TRIBUNAL
BENCH AT NAINITAL**

Present: Hon'ble Mr. Rajendra Singh

----- Vice Chairman (J)

Hon'ble Mr. Rajeev Gupta

----- Vice Chairman (A)

Claim Petition No. 32/NB/DB/2022

Dinesh Chandra Bisht (Male), aged about 59 years, s/o Late Sri Nand Kishore Bisht, presently working as Assistant Labour Commissioner, Shram Bhawan, Haldwani, District Nainital.

.....Petitioner

versus

1. State of Uttarakhand through its Secretary, Ministry of Labour, Civil Secretariat, Dehradun.
2. Labour Commissioner, Uttarakhand, Haldwani, District Nainital.
3. Suresh Chandra Arya, s/o Kishan Ram, presently posted as Assistant Labour Commissioner, Dehradun.

..... Respondents

Present: Sri Pankaj Miglani, Advocate, for the Petitioner
Sri Kishore Kumar, A.P.O.,
for the Respondents No. 1 & 2.
Sri Hari Mohan Bhatia, Advocate,
for the Respondent No. 3

Judgement

Dated: 07th December, 2022

Per: Mr. Rajeev Gupta, Vice Chairman (A)

This claim petition has been filed seeking the following reliefs:

“(i) Issue an order setting aside impugned order dated 01.11.2021 whereby respondent no. 3 has been granted notional promotion w.e.f. 11.01.2003.

(ii) Issue an order setting aside the consequential seniority list dated 04.04.2022 whereby the petitioner has been made junior to respondent no. 3 and further directing respondent no. 1 to revise the seniority list as it was existing prior to the issuance of order dated 01.11.2021.

(iii) To award the cost of the petition in favour of the petitioner.”

2. Counter affidavits have been filed by respondent no. 2 and respondent no. 3.

3. The case of the petitioner, in brief, is that he was appointed as Stenographer on 22.09.1984, then promoted as Senior Stenographer on 12.01.1996, further promoted on the post of Labour Enforcement Officer (L.E.O.) on 01.06.2010 and finally promoted as Assistant Labour Commissioner on 30.08.2017. The respondent no. 3, who is from reserved category, was appointed as Stenographer on 18.08.1989, then promoted as Senior Stenographer on 27.02.1997, further promoted on the post of L.E.O. on 02.03.2010 and finally promoted as Assistant Labour Commissioner on 27.08.2018. The petitioner is senior to respondent no. 3 because of seniority in the feeding cadre for promotions and he has been shown as senior to respondent no. 3 in the seniority list of L.E.O.s issued in 2013 wherein the petitioner is at serial no. 6 and respondent no. 3 is at serial no. 7.

3.1 Respondent No. 3 filed a writ petition in the Hon'ble High Court of Uttarakhand registered as WPSS No. 1252 of 2006, Suresh Chandra Arya vs. State of Uttaranchal and others, praying for considering his promotion on the post of L.E.O. from the date when he got the eligibility for the same as per rules. This writ petition was disposed of by the Hon'ble High Court vide its order dated 30.10.2009 directing the respondent authorities to consider the case of the petitioner for promotion on the post of L.E.O. as per relevant service rules as well as the reservation rules. Pursuant to this order, the proposal of promotion of respondent no. 3 from the year 2003 was declined by the Personnel Department of the Govt. of Uttarakhand,

according to the Govt. letter dated 16.12.2011 filed as Annexure No. 7 to the claim petition.

3.2 Respondent No. 3 again approached Hon'ble High Court by filing writ petition, which was registered as WPSS No. 751 of 2013, which was dismissed by Hon'ble High Court of Uttarakhand vide order dated 11.05.2015 observing that this subsequent writ petition is barred by the principle of constructive *res judicata*. Respondent No. 3 again filed writ petition, which was registered WPSS No. 2016 of 2017 titled as Suresh Chandra Arya vs. State of Uttarakhand and others, praying for quashing of seniority lists issued in the year 2011 and 2013 but no interim order was passed thereon and the writ petition is still pending before the Hon'ble High Court.

3.3 Despite the above orders of the Hon'ble High Court, respondent no. 3 has been granted notional promotion on the post of L.E.O. since 11.01.2003 vide impugned order dated 01.11.2021 (Annexure No. 1 to the claim petition).

3.4 Subsequently, a tentative seniority list has been issued showing respondent no. 3 as senior to the petitioner and objections have been invited to the same within 7 days. For disposal of objections to this tentative seniority list, a three member committee was formed, which raised objection to the order dated 01.11.2021 regarding grant of notional promotion to respondent no. 3 and requested the Govt. to review this order. The Govt. vide its order dated 31.03.2022 rejected this request and directed for issuing the final seniority list immediately. Then, the final seniority list has been issued on 04.04.2022 but the objections filed on tentative seniority list have been decided on 07.04.2022 which reveals the high-handedness and prejudicial mindset of the respondent authorities that they were pre-determined to upset the seniority merely to bring respondent no. 3 up in the list for ulterior motives, malafide intentions and unlawful gains.

3.5 While passing the order dated 01.11.2021, respondent authorities have kept all the norms, guidelines of promotions at bay and without caring to look into the situation of the vacancy at the relevant time, the roster, the situation of reservation, the eligibility of other employees and confidential reports, the respondent authorities have given the illegal benefit of notional promotion to respondent no. 3.

3.6. Feeling aggrieved by the aforesaid illegal and arbitrary actions on the part of respondent authorities, the petitioner filed his detailed representation dated 20.04.2022 but no action has been taken thereon as yet and now respondent authorities are preparing to give further notional promotion to respondent no. 3 de hors the rules.

Hence the claim petition.

4. Respondent No. 3, in his counter affidavit, has mainly stated that the petitioner cannot be said to be an aggrieved person as the petitioner is junior in the seniority list and not even eligible or in the zone of consideration for promotion and the claim petition has been preferred by the petitioner at the behest of some other persons; the petitioner has not stated as to what is the outcome of his representation dated 20.04.2022; when the tentative seniority list was published inviting objections, the petitioner raised the objection that the writ petition no. 2016 (S/S) of 2017, filed by respondent no. 3, was pending while it is relevant that the respondent no. 3 has requested and executed an affidavit to withdraw the said writ petition from the Hon'ble High Court and such application has already been preferred by the petitioner through his Counsel; it is a settled proposition of law that the claim petitioner cannot get benefit on the ground that the writ petition preferred by respondent no. 3 is still pending; the letter whereby objections to the tentative seniority list made by the claim petitioner were rejected has not been challenged in the present claim petition;

claim petitioner cannot go beyond the scope of objections filed by him against the tentative seniority list and by way of this claim petition, new grounds have been set out; the petition has been filed challenging the order passed by the Joint Secretary on 01.11.2021 whereby the respondent no. 3 has been granted the service benefits since 11.01.2003 with which the petitioner cannot be said to be an aggrieved person; the order dated 01.11.2021 was passed by the Joint Secretary as directed by the Hon'ble High Court vide its order dated 30.10.2009; the claimant has absolutely no right to challenge such order granting notional promotion to respondent no. 3 from 11.01.2003 as well as the consequential seniority list dated 04.04.2022; the petitioner has already preferred a representation dated 20.04.2022 as an alternative remedy and therefore, the claim petition is not maintainable and deserves to be dismissed.

5. The counter affidavit filed by the Labour Commissioner (respondent no. 2) mainly states the background of the posts of L.E.O.s, persons working on the same; rejection of the proposal of grant of promotion to respondent no. 3 w.e.f. 2003 by the Personnel Department; rejection of writ petition no. 751 (S/S) of 2013 filed by the respondent no. 3 in the Hon'ble High Court; that the writ petition no. 2016 (S/S) of 2017 filed by respondent no. 3 is pending; vide Govt. letter dated 01.11.2021, the promotion order dated 25.02.2010 of respondent no. 3 to the post of L.E.O. was amended to grant him service benefits from the date of promotion 11.01.2003; constitution of committee for amending the seniority list; issuance of the tentative seniority list and inviting objections on the same; in the committee's meeting dated 18.12.2021 it was decided to issue letters to the petitioner and respondent no. 3 for producing evidence about writ petition no. 2016 (S/S) of 2017; according to the decision taken in the committee's meeting dated 03.01.2022, the Govt. was requested vide letter dated 05.01.2022 to re-consider the matter; the Govt. vide letter dated 31.03.2022 directed to

finalize the interim seniority list immediately and on the basis of the final seniority list to submit proposal for promotion on the vacant posts of Deputy Labour Commissioner; in response to the letter about the present condition of writ petition no. 2016 (S/S) of 2017, the claim petitioner (respondent no. 4 in the writ petition) informed that in the writ petition, he has timely filed the counter affidavit and has no information about the decision taken in the writ petition; in the seniority list of L.E.O.s issued vide letter dated 13.06.2013, the name of the petitioner is at serial no. 6 and the name of the respondent no. 3 is at serial no. 7; pursuant the directions received in Govt. letter dated 31.03.2022, the final seniority list of L.E.O.s was issued vide letter dated 04.04.2022 in which the name of respondent no. 3 is at serial no. 10 and the name of the petitioner is at serial no. 22; the final seniority list of Assistant Labour Commissioners has been issued vide Govt. letter dated 07.03.2022 in which the names of the petitioner and respondent no. 3 are at seniority serial no. 12 and 15 respectively; the representation of the petitioner dated 20.04.2022 has been sent with comments to the Govt. for necessary action vide letter dated 04.05.2022; the final seniority list of L.E.O.s has been issued in compliance of orders received vide Govt. letter dated 01.11.2021 and 31.03.2022 which also bears the signature of the petitioner.

6. The order recorded by the Tribunal after the hearing on 27.07.2022 is as follows:

'Learned Counsel for the petitioner states that he does not intend to file R.A.

Arguments were heard at some length.

Learned Counsel for the petitioner submits that the impugned seniority list is dated 04.04.2022, while the order, in which objections against the tentative seniority list have been decided, has been issued on 07.04.2022.

The Tribunal also observes that the order dated 07.04.2022, according to which objections of the claim petitioner have been decided, mentions the Government order dated 31.03.2022. This Government order dated 31.03.2022 has been annexed as **Annexure No. 9** to the Counter Affidavit. This letter refers to two

letters dated 08.03.2022 and 09.01.2022 of the Labour Commissioner and further states that the request made *vide* the letter dated 09.01.2022 has not been found justified. No details of the request made by the Labour Commissioner in his letter dated 09.01.2022 and no reason for not finding the same justified are mentioned in this Government order. It is necessary to peruse the letters dated 08.03.2022 and 09.01.2022 of Labour Commissioner and to know the reason why the request of the Labour Commissioner was not found justified.

The respondent No. 3 has been given promotion from 11.01.2003 by Government Order dated 01.11.2021 (Annexure No. 1 to the claim petition) but this office order does not show whether Personnel Department has been consulted for the same. Earlier the Personnel Department had rejected the proposal to promote the respondent No. 3 which was conveyed to the Labour Commissioner *vide* letter dated 16.12.2011 of the Labour Department (Annexure No.-7 to the claim petition). In the interest of justice, it is necessary to peruse the file notings of the Government which have led to the issuance of the promotion order dated 01.11.2021.

The learned A.P.O. seeks two months' time to produce the above records and clarifications.

The final seniority list dated 04.04.2022, *prima facie*, appears to be unjust as the objections against tentative seniority list have been decided subsequently *vide* letter dated 07.04.2022. Therefore, as an interim measure, the Tribunal directs the respondents No. 1 & 2 not to make any promotions on the basis of impugned seniority list dated 04.04.2022 till the next date of listing.

Let a copy of this order be given to the learned A.P.O. today itself to procure the necessary records and clarifications from the official respondents.

List on 28.09.2022 for further hearing.”

7. Against the above order dated 27.07.2022, respondent no. 3 filed writ petition no. 517 (S/B) of 2022, Suresh Chandra Arya vs. State of Uttarakhand and others, on which the Hon'ble High Court passed the following order on 31.08.2022:

"Mr. H.M. Bhatia, learned counsel for the petitioner.

Mr. B.S. Parihar, learned Standing Counsel for the State/ respondent nos. 1 & 2.

Mr. Pankaj Miglani, learned counsel along with Mr. Aakib Ahmed, learned counsel for the caveator/ private respondent.

The present petition is directed against the order dated 27.07.2022 passed by the Uttarakhand Public Service Tribunal, Nainital in Claim Petition No. 32/NB/DB/2022 preferred by the private respondent.

By the impugned order the learned Tribunal directed the respondents- authorities/ respondent nos. 1 and 2 not to make any promotion on the basis of the impugned seniority list dated 04.04.2022 till the next date of posting.

The claim petition is now listed on 28.09.2022.

We are not inclined to interfere with the impugned order at this stage considering the fact that the Tribunal has fixed further hearing in the matter on relatively short date i.e. 28.09.2022.

Learned counsel for the petitioner expresses urgency in the matter on the ground that they would retire in the next couple of months.

Keeping in view the aforesaid, we request the Tribunal to proceed early in the claim petition on the date fixed i.e. 28.09.2022. Neither party shall seek nor be granted any adjournment on the next date.

The petition stands disposed of in the above terms."

8. In the hearing on 28.09.2022 before this Tribunal, learned Counsel for the respondent No. 3 argued that the petitioner has retired on 31.07.2022 and, therefore, his claim petition has become infructuous after this date. The learned Counsel for the petitioner objected to the same stating that the petitioner has filed the petition on 11.05.2022 when he was in service and the impugned seniority list is dated 04.04.2022 when he was in service which shows him much junior to the respondent No. 3, therefore, his grievance exists and needs to be adjudicated by this Tribunal. While the Tribunal was inclined to agree to such contention of the learned Counsel for the petitioner, learned Counsel for the respondent no. 3 stated that he will file rulings of Hon'ble Courts on this issue for supporting his contention.

9. Learned A.P.O. has filed supplementary affidavit on behalf of respondent no. 1 enclosing copies of certain documents in pursuance of this Tribunal's order dated 27.07.2022.

10. We have heard learned Counsel for the parties and perused the record.

11. Learned Counsel for respondent no. 3 has filed copy of the judgement dated 08.03.2022 of Hon'ble Supreme Court of India in Civil Appeal Nos. 517-518 of 2017, Union of India and another vs. Manpreet Singh Poonam etc., 2022(2) SLJ 61, in support of his contention that after retirement of the petitioner on 31.07.2022, his claim petition has become infructuous, according to para 16 of this judgement, which is extracted as below:

"16. It is trite law that once an officer retires voluntarily, there is cessation of jural relationship resorting to a "golden handshake" between the employer and employee. Such a former employee cannot seek to agitate his past, as well as future rights, if any, sans the prescription of rules. This would include the enhanced pay scale. The Respondent in Civil Appeal No. 517 of 2017 was rightly not considered in the DPC in 2012 since he was no longer in service at the relevant point of time. The High Court has committed an error in relying upon a circular, which has got no application at all, particularly in the light of our finding that we are dealing with a case of promotion simpliciter as against upgradation of any nature."

Learned Counsel for respondent no. 3 has also filed copy of the judgement dated 19.12.2014 of Hon'ble Kerala High Court in OP(KAT). No. 173 of 2014 (Z), K. Vijayan vs. Jacob Job and others, 2015(1) Ker L.J. 308, drawing our attention to para 34 of the same, which reads as below:

"34. The expression, 'person aggrieved' takes within its sweep one, those whose right or interest has been adversely affected or jeopardised. Further, the existence of a legal right is the foundation of the exercise of the jurisdiction by the Court and such right must ordinarily be that of the person who complains of infraction of such legal right and approaches the Court for relief as regards the same. Going by the decision of the Apex Court in Lakhi Ram's case (supra) the applicants have locus standi to challenge Annexure A7 Government Order dated 19.8.2010 and they would fall under the category of 'person aggrieved' by that order. Therefore, we find absolutely no grounds to interfere with the finding of the Tribunal to that effect in its order dated 30.4.2014."

The Tribunal observes that the reference made in para 16 of the above judgement of Hon'ble Supreme Court is in a case where the officer has retired voluntarily, which is not the case in

the present claim petition. The Tribunal also observes that para 34 of the judgement of Hon'ble Kerala High Court does not go against the petitioner and he is very well an 'aggrieved person' as by the impugned seniority list dated 04.04.2022, he has been made junior to the respondent no. 3 on the basis of the notional promotion granted to respondent no. 3 w.e.f. 11.01.2003 vide Govt. order dated 01.11.2021. The petitioner, even after his retirement, is still entitled to be considered for notional promotion on the vacancies of the post of Deputy Labour Commissioner existing before his date of retirement and consequential benefits thereof. Seniority position is vital in such consideration and therefore the claim petition needs to be adjudicated by this Tribunal on merits.

12. Perusal of the copies of the documents attached with the supplementary affidavit filed on behalf of respondent no. 1 shows that Labour Commissioner (respondent no. 2) vide his letter dated 10.08.2021 wrote to the Secretary, Labour, Govt. of Uttarakhand (respondent no. 1), forwarding the application of respondent no. 3 for promotion on the post of L.E.O. w.e.f. 11.01.2003 and consequential benefits and stating that the opinion of the department is that if the promotions had been made as per rules only from the Uttarakhand Hill Sub-Cadre and from the personnel allotted to the Uttarakhand state then the respondent no. 3 would have got promotion from 11.01.2003 on the post which fell vacant after the death of Sri R.C. Awasthi.

12.1 The order dated 13.06.2013 of Labour Commissioner, vide which the seniority list of L.E.O. dated 13.06.2013 was issued and objections against the interim seniority list were disposed of, has also been enclosed with this supplementary affidavit. Against that interim seniority list, the respondent no. 3 had raised the objection that the name of the petitioner is at serial no. 7 while his name is at serial no. 8. The petitioner has assumed charge on the post of L.E.O. on 01.06.2010 while he

has assumed charge on such post on 02.03.2010. The person who assumed the charge earlier should be senior and as such he should be shown senior in seniority list. This order states that the respondent no. 3 had made similar objection earlier vide his representation dated 18.02.2011 which has been disposed of vide order dated 26.07.2011 whose copy has been sent to respondent no. 3 and the objection of the respondent no. 3 is not maintainable under the Uttarakhand Government Servants Seniority Rules, 2002.

12.2 Copies of the notings of the file of the Labour Department of the Govt. have also been filed with the supplementary affidavit, according to which the Joint Secretary of Labour Department has put up a proposal for giving the benefits of the post of L.E.O. from 11.01.2003 to respondent no. 3 on 18.08.2021, which has been forwarded by the Additional Secretary, Labour and approved by the Secretary, Labour. Subsequently, when the Joint Secretary has put up the draft for approval, the Secretary has desired discussion on the same and recorded that the matter has financial implications and consultation with the Finance Department be also done. After discussions, the Secretary has directed the draft to be issued by the Joint Secretary and for clarifying that there will be no financial benefit admissible by this order and it will be better that undertaking is taken in this regard so that the matter is not taken to Court subsequently. After these orders of the Secretary, the Joint Secretary has recorded that the respondent no. 3 vide his letter dated 26.10.2021 has given his consent for no financial benefits and the Joint Secretary has signed the draft letter which was issued as the impugned Govt. order dated 01.11.2021. The Tribunal observes that it is clear from these notings that no inter-departmental consultation or meeting of Departmental Promotion Committee (D.P.C.) has been held before issuing the impugned order dated 01.11.2021.

12.3 Copies of letters dated 05.01.2022 (which is wrongly mentioned as 09.01.2022 in the Govt. letter dated 31.03.2022) and 08.03.2022 of the Labour Commissioner have also been filed with the supplementary affidavit. The letter dated 05.01.2022 is addressed to the Secretary, Labour, stating that the proposal for promotion of respondent no. 3 on the post of L.E.O. from the year 2003 has been rejected by the Personnel Department according to letter dated 16.12.2011 and if the respondent is promoted from 2003, taking this as an example, other employees will also request for promotion, which shall lead to situation of conflicts on seniority and financial burden on the Govt. will also increase and request has been made to consider the matter again. The letter dated 08.03.2022 of the Labour Commissioner has been addressed to Dr. N.K. Pant, Advocate, regarding his notice dated 15.02.2022 about granting seniority to respondent no. 3 on the post of L.E.O. in accordance with Govt. order dated 01.11.2021 and providing the benefit of reservation on further posts and determination of seniority on those posts. Labour Commissioner has also endorsed a copy of this letter to the Secretary, Labour. This letter states that according to Govt. letter dated 16.12.2011, the Personnel Department had rejected the proposal to promote the respondent no. 3 from the year 2003 and information of the same has also been sent to respondent no. 3. This letter further states that pursuant to the Govt. order dated 01.11.2021, a letter has been sent to the Govt. for reconsideration of the matter. On these letters, noting has been put up in the Govt. file of Labour Department by the Section Officer on 21.03.2022 for reviewing the order dated 01.11.2021 on which the Deputy Secretary has recorded in his note that it is proper to have reconsideration on the order dated 01.11.2021 and if found proper, the Personnel and Law Department can also be consulted on the matter. This note has been forwarded by the Additional Secretary on which the Secretary has directed the Joint Secretary to put up self explanatory note after studying the file. Subsequently, the Joint Secretary, in his note dated

25.03.2022 has proposed that the tentative seniority list dated 02.12.2021 issued by the Labour Commissioner be finalized and issued with immediate effect; on the basis of final seniority list, proposal be provided to the Govt. for promotion on the vacant posts of Deputy Labour Commissioner; and the letter dated 05.01.2022 of the Labour Commissioner for reconsideration be rejected. The Secretary has desired the draft of the order on this note and then has approved the draft put up before him, according to which the Govt. Letter dated 31.03.2022 has been issued. This letter sent by the Joint Secretary to the Labour Commissioner is annexed as Annexure C.A.-9 to the C.A. of respondent no. 2, which simply states that request made vide Labour Commissioner's letter dated 09.01.2022 (05.01.2022) has not been found justified and directs that the tentative seniority list dated 02.12.2021 be finalized and issued with immediate effect after studying the application dated 15.02.2022 of the respondent no. 3 and all other facts. This letter also directs that proposal for promotion on the vacant posts of Deputy Labour Commissioner on the basis of final seniority list be also provided to the Govt. immediately. The subsequent file notings of the Labour Department attached with Supplementary Affidavit filed on behalf of the respondent no.1 show that for granting notional promotion to respondent no. 3 on the posts of Assistant Labour Commissioner and Deputy Labour Commissioner from the dates, when his junior (Sri Umesh Rai according to the final seniority list of LEO issued on 04.04.2022) has been promoted to the posts of Assistant Labour Commissioner and Deputy Labour Commissioner, the file has been referred for the opinion of the Personnel Department in June, 2022.

13. The Tribunal observes that the notional promotion of respondent no. 3 w.e.f. 11.01.2003 on the post of LEO should have been done after consultation with the Personnel Department (specially when the Personnel Department had earlier rejected such request) and by conducting a

Departmental Promotion Committee (DPC) in which suitable decision should have been taken after perusing the ACRs and other service records of the eligible persons. Therefore, the impugned order dated 01.11.2021 (Annexure no. 1 to the claim petition) needs to be kept in abeyance till such date, when after consultation with the personnel department, DPC is held and suitable decision is taken for the notional promotion of respondent no. 3 on the post of L.E.O. from an earlier date.

14. Even if, the respondent no. 3 is granted notional promotion on the post of L.E.O. from an earlier date, he cannot be placed above the petitioner in the seniority list of LEOs, notwithstanding any interpretation of the Uttarakhand Government Servant Seniority Rules, 2002 or the relevant Service Rules. The Tribunal has been informed that there is no provision for 'consequential seniority' in the State of Uttarakhand in any class or cadre and even if reserved category candidates are promoted to a post earlier than general category candidates senior to them, such general category candidates will regain their seniority after their promotion to that post. This Tribunal has held the same after studying constitutional provisions and examining the relevant judgments of the Hon'ble Supreme Court of India, in its judgment dated 28.07.2020, passed in Claim Petition No. 42/DB/2018, Kailash Chandra Peinuly vs. State of Uttarakhand & others. Relevant extracts of this judgement are reproduced below:

“31.

**Mandate of Hon'ble Apex Court:
(through precedents)**

The following are the landmark judgments of Hon'ble Apex Court on the subject:

- (1) S. Panneerselvam and others vs. Government of Tamilnadu and others, (2015) 10 SCC 292
- (2) M. Nagraj and others vs. Union of India and others, (2006) 8 SCC 212.
- (3) Union of India and others vs. Veerpal Singh Chauhan and others, (1995) 6 SCC 684

- (4) Ajit Singh Juneja and others vs. State of Punjab and others, (1996) 2 SCC 715
- (5) R.K.Sabharwal and others vs. State of Punjab and others, (1995) 2 SCC 745
- (6) Ajit Singh and others (ii) vs. State of Punjab and others, (1999) 7 SCC 209.

32. Let us turn to the decision of Hon'ble Supreme Court in *S. Panneerselvam and others vs. Government of Tamilnadu and others*, (2015) 10 SCC 292, which appears to have settled the controversy, like the one which this Tribunal is seized with as present:

Common issues involved in the bunch of SLPs/ Appeals, before Hon'ble Apex Court were:

“(i) In the absence of policy decision taken by the State/rules framed pursuant to the enabling provision of Article 16 (4A) of the Constitution of India whether a reserved category candidate promoted on the basis of reservation earlier than his senior general category candidate in the feeder category can claim consequential seniority in the promotional post; (ii) In the absence of policy decision taken by the State with regard to Tamil Nadu Highways Engineering Service Rules, whether Division Bench was right in holding that Article 16(4A) of the Constitution of India by itself would give consequential seniority in addition to accelerated promotion to the roster- point promotees”.

In para 3 of the said decision, background facts were mentioned. On the concept of ‘catch- up rule’ and ‘consequential seniority’, in para 9, the Hon'ble Apex Court observed thus :

“9. The concept of ‘catch-up rule’ and ‘consequential seniority’ is judicially evolved concepts to control the extent of reservation. The question of reservation and the associated promotion and the consequential seniority have been the matter of discussion in various decisions of this Court. The matter regarding reservation in promotions was considered by a nine Judge Bench of this Court in *Indra Sawhney And Ors. vs. Union of India And Ors.*, (1992) Supp. 3 SCC 217 and this Court held that the reservation under Article 16(4) of the Constitution of India is confined only to initial appointment and cannot extend to reservation in the matter of promotion. In order to nullify the effect of the aforesaid dicta, there was an amendment to Article 16 by Constitution (Seventy-seventh Amendment) Act with effect from 17.06.1995. Vide this Amendment, after Clause (4), Clause (4A) was inserted in Article 16 of the Constitution.”

Hon'ble Apex Court reproduced Article 16(4) and (4A) of the Constitution and commented upon the same as below:

“10. Clause (4) and Clause (4A) of Article 16 of the Constitution of India read as under:-

“Clause 4. Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

Clause 4A. Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.”

11. Article 16 (4) of the Constitution of India enables the State to make a provision for reservation for appointments or posts in favour of any backward class of citizens which in its opinion is not adequately represented in the services under the State. The constitutional position on the insertion of Clause (4A) in Article 16 is that the State is now empowered to make provision for reservation in the matter of promotions as well, in favour of SCs and STs wherever the State is of the opinion that the SCs and STs are not adequately represented in the service under the State. Clause (4A) of Article 16 of the Constitution is only an enabling provision which empowers the State to make any provision for reservation for SC and ST candidates in the matter of promotion as well.”

Hon’ble Apex Court took us to the principles enunciated in a catena of decisions thus:

“12. In Union of India And Ors. vs. Virpal Singh Chauhan And Ors., (1995) 6 SCC 684, a question had arisen as to whether a person in SC or ST category who gets accelerated promotion because of reservation would also get consequential seniority in the higher post if he gets that promotion earlier than his senior in general category and this Court held that such an employee belonging to SC/ST category on promotion would not get consequential seniority and his seniority will be governed by the panel position. It was held as under:-

“24. ...In short, it is open to the State, if it is so advised, to say that while the rule of reservation shall be applied and the roster followed in the matter of promotions to or within a particular service, class or category, the candidate promoted earlier by virtue of rule of reservation/roster shall not be entitled to seniority over his senior in the feeder category and that as and when a general candidate who was senior to him in the feeder category is promoted, such general candidate will regain his seniority over the reserved candidate notwithstanding that he is promoted subsequent to the reserved candidate. There is no unconstitutionality involved in this. It is permissible for the State to so provide...”

13. The decision in Virpal Singh Chauhan case led to another Constitution Amendment and the Parliament enacted Constitution (Eighty- fifth Amendment) Act 2001 whereby Clause (4A) of Article 16 was further amended enabling the State to make a provision for reservation in matters of promotion with consequential seniority. Amended Clause (4A) reads as under:-

“4A. Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion with consequential seniority to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.” Eighty-fifth Amendment was made effective retrospectively from 17.06.1995, that is, the date of coming into force the original Clause (4A) of Article 16 of the Constitution of India.

14. In Ajit Singh Januja And Ors. vs. State of Punjab And Ors., (1996) 2 SCC 715, by placing reliance on the principle laid down in Indra Sawhney case and also the Constitution Bench judgment in R.K. Sabharwal And Ors. vs. State of Punjab And Ors., reported in

(1995) 2 SCC 745, a three Judge Bench accepted the principle of ‘catch-up rule’ as laid down in Virpal Singh Chauhan case observing that the balance must be maintained in such a manner that there was no reverse discrimination against the general category candidates and that any rule/circular or order which gives seniority to the reserved category candidates promoted at the roster-point would be violative of Articles 14 and 16 of the Constitution of India.

15. In Jagdish Lal And Ors. vs. State of Haryana And Ors., (1997) 6 SCC 538, another three Judge Bench opined that seniority granted to the Scheduled Caste and Scheduled Tribe candidates over a general category candidate due to his accelerated promotion does not in all events get wiped out on promotion of general category candidate.

16. In Ajit Singh And Ors.(II) vs. State of Punjab And Ors., (1999) 7 SCC 209, the Constitution Bench was concerned with the issue whether the decisions in Virpal Singh Chauhan and Ajit Singh Januja case which were earlier decided to the effect upholding the ‘catch-up rule’, that is, the seniority of general category candidates is to be confirmed or whether the later deviation made in Jagdish Lal case against the general category candidates. In Ajit Singh (II) case, inter-alia, the following points arose for consideration:-

(i). Can the roster-point promotees count their seniority in the promoted category from the date of their continuous officiation vis-à-vis general candidates, who were senior to them in the lower category and who were later promoted to the same level?

(ii) Have Virpal [(1995) 6 SCC 684] and Ajit Singh [(1996) 2 SCC 715] been correctly decided and has Jagdish Lal [(1997) 6 SCC 538] been correctly decided?

(iii) Whether the “catch-up” principles are tenable?

17. The Constitution Bench held that Articles 16(4) and (4A) did not confer any fundamental right to reservation and that they are only enabling provisions. Overruling the judgment in Jagdish Lal case and observing that rights of the reserved classes must be balanced against the interests of other segments of society in para (77), this Court held as under:-

“77. We, therefore, hold that the roster-point promotees (reserved category) cannot count their seniority in the promoted category from the date of their continuous officiation in the promoted post, — vis-à-vis the general candidates who were senior to them in the lower category and who were later promoted. On the other hand, the senior general candidate at the lower level, if he reaches the promotional level later but before the further promotion of the reserved candidate — he will have to be treated as senior, at the promotional level, to the reserved candidate even if the reserved candidate was earlier promoted to that level. We shall explain this further under Point 3. We also hold that Virpal, (1995) 6 SCC 684 and Ajit Singh, (1996) 2 SCC 715 have been correctly decided and that Jagdish Lal, (1997) 6 SCC 538 is not correctly decided. Points 1 and 2 are decided accordingly.”

18. Constitutional validity of Clauses (4A) and (4B) of Article 16 of the Constitution was challenged in M. Nagaraj And Ors. vs. Union of India And Ors., (2006) 8 SCC 212. The question that came up for consideration was whether by virtue of impugned constitutional amendments, the power of Parliament was so enlarged as to obliterate any or all of the constitutional limitations and requirements upholding the validity of the said Articles with certain riders. On the concept of ‘catch-up rule’ and consequential seniority, this Court held as under:-

“79. Reading the above judgments, we are of the view that the concept of “catch-up” rule and “consequential seniority” are judicially evolved concepts to control the extent of reservation. The source of these concepts is in service jurisprudence. These concepts cannot be elevated to the status of an axiom like secularism, constitutional sovereignty, etc. It cannot be said that by insertion of the concept of “consequential seniority” the structure of Article 16(1) stands destroyed or abrogated. It cannot be said that “equality code” under Articles 14, 15 and 16 is violated by deletion of the “catch-up” rule. These concepts are based on practices. However, such practices cannot be elevated to the status of a constitutional principle so as to be beyond the amending power of Parliament. Principles of service jurisprudence are different from constitutional limitations. Therefore, in our view neither the “catch-up” rule nor the concept of “consequential seniority” is implicit in clauses (1) and (4) of Article 16 as correctly held in *Virpal Singh Chauhan*, (1995) 6 SCC 684.”

19.

20. While considering the validity of Section 3(7) of Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994, and Rule 8A of U.P. Government Servants Seniority Rules, 1991 which provided for consequential seniority in promotions given to SCs/STs by virtue of rule of reservation/roster and holding that Section 3(7) of the 1994 Act and Rule 8A of 1991 Rules are ultra vires as they run counter to the dictum in *M. Nagaraj’s case in Uttar Pradesh Power Corporation Limited vs. Rajesh Kumar And Ors.*, (2012) 7 SCC 1, in paragraph (81), this Court summarized the principles as under: “(i) Vesting of the power by an enabling provision may be constitutionally valid and yet “exercise of power” by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure the backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335.”

It may be noted here that *U.P. Power Corporation Ltd. vs. Rajesh Kumar*, (2012) 7SCC, was a case relating to a statutory body, like Jal Nigam and Jal Sansthan. Observations of Hon’ble Apex Court in Para 81 of the said case (*U.P. Power Corporation case*), therefore, assume importance.

“24. Article 16(4A) of the Constitution is only an enabling provision which specifically provides that the concerned State may make any provision for providing reservation of appointments or posts in favour of any backward class citizens which is not adequately represented in the services under the State. Articles 16(4) and 16(4A) have to be read with Article 335 of the Constitution which deal with norms of Scheduled Castes and Scheduled Tribes to services and posts and lay down that the claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State. In the absence of any policy decision taken by the State of Tamil Nadu, Eighty-fifth Amendment per se will not protect the consequential seniority granted to the respondents who were promoted to the post of Assistant Divisional Engineers following the rule of reservation.

26. The true legislative intent under Article 16 (4A) of the Constitution is to enable the State to make provision or frame rules giving consequential seniority for the accelerated promotion gained based on the rule of reservation. **Rule 12 evidently does not provide for the consequential seniority for reserved category promotees at any point of time. The consequential seniority for such reserved category promotees can be fixed only if there is express provision**

for such reserved category promotees in the State rules. In the absence of any specific provision or policy decision taken by the State Government for consequential seniority for reserved category accelerated promotees, there is no question of automatic application of Article 16 (4A) of the Constitution.”

27. Rule 12 does not protect the consequential seniority to ADEs who were promoted following the rule. The appellants belonging to the general category are not questioning the accelerated promotion granted to the Junior Engineers/Assistant Engineers by following rule of reservation but are only seeking fair application of the ‘catch up rule’ in the fixation of seniority in the category of ADEs

31. The respondents’ submission regarding inadequacy of representation of Scheduled Castes/Scheduled Tribes in the Tamil Nadu Highways Engineering Service by itself is not sufficient to uphold the inadequacy of representation of SCs/STs in the said service. Even after Eighty-fifth Amendment, the State is duty bound to collect data so as to assess the adequacy of representation of the Scheduled Caste candidates in the service and based on the same the State should frame a policy/rules for consequential seniority. No material is placed on record that the State of Tamil Nadu has ever undertaken such exercise of collecting data of adequacy of representation of the SC/ST candidates in the Tamil Nadu Highways Engineering Service. In the absence of any rule conferring consequential seniority in the State of Tamil Nadu ‘catch up rule’ is applicable even amongst Junior Engineers promoted as ADEs following rule of reservation and also for their inter-se seniority amongst AEs promoted as ADEs and JEs promoted as ADEs following rule of reservation.”

32. Respondents placed reliance on Rule 35 (aa) of Tamil Nadu State and Subordinate Service Rules (General Rules) to contend that they are entitled to consequential seniority in promotional position.....

.....Rule 35 (aa) does not specifically provide for consequential seniority to the accelerated promotees who were promoted following the rule of reservation and Rule 35 (aa) is of no assistance to the contesting respondents.

34..... Determination of seniority is a vital aspect in the service career of an employee and his future promotion is dependent on this. Therefore, determination of seniority must be based on some principles which are just and fair. In the absence of any policy decision taken or rules framed by the State of Tamil Nadu regarding Tamil Nadu Highways Engineering Service, accelerated promotion given to the respondents following rule of reservation in terms of Rule 12 will not give them consequential accelerated seniority.”

35. Appellants were appointed as Assistant Engineers directly, while the respondents were initially appointed as Junior Engineers. Hence according to the respondents, there was no common seniority between the Assistant Engineers belonging to general category and Junior Engineers belonging to reserved class and therefore promotion of JEs as ADEs applying Rule 12 is of no relevance to the appellants. This contention does not merit acceptance. Both the Assistant Engineers in the Tamil Nadu Engineering Service and the Junior Engineers in the Tamil Nadu Engineering Subordinate Service are feeder categories for filling up higher post of the Assistant Divisional Engineer in the ratio of 3:1 between them. Although, Assistant Engineers and Junior Engineers are presently two distinct categories, prior to 1993, both Assistant Engineers and Junior Engineers were in one category of service-Tamil Nadu Highways Engineering Subordinate Service. Only after G.O.Ms.No.807, Public Works (HK)

Department dated 24.05.1993, the post of Assistant Engineer was raised to the level gazetted status and they were brought in to State Service/Tamil Nadu Highways Engineering Service. For promotion, even though two separate seniority lists are prepared for each category, they are actually of the same cadre and the respondents cannot contend that if Junior Engineers are promoted as ADEs following rule of reservation applying Rule 12, it does not affect the services of the Assistant Engineers.

36. **In the absence of any provision for consequential seniority in the rules, the ‘catch up rule’ will be applicable and the roster-point reserved category promotees cannot count their seniority in the promoted category from the date of their promotion and the senior general candidates if later reach the promotional level, general candidates will regain their seniority. The Division Bench appears to have proceeded on an erroneous footing that Article 16 (4A) of the Constitution of India automatically gives the consequential seniority in addition to accelerated promotion to the roster-point promotees and the judgment of the Division Bench cannot be sustained.”**

(Emphasis supplied)

In the last paragraph (para 37) of the aforesaid decision, Hon’ble Apex Court set aside the impugned judgment and allowed the appeals. State Government (Respondents No. 1 & 2) were directed to revise the seniority list of Assistant Divisional Engineers, applying the ‘catch-up rule’, within 4 months. Hon’ble Supreme Court also directed that pursuant to the impugned judgment [*V.Vivekanandan vs. S. Panneerselvam, (2011)SCC online Mad. 2241*] of the Division Bench of Hon’ble Madras High Court, if any further promotion had been granted to the ADEs, promoted from the rank of Junior Engineers, following the rule of reservation with consequential seniority, the same shall be revised. It was also directed that further promotion of ADEs shall be as per the revised seniority list.

33. A reference of *Virpal Singh Chauhan’s* decision, already finds place in the judgment rendered by Hon’ble Apex Court in its judgment in *Panneerselvam decision (supra)*. In *Virpal Singh Chauhan’s* decision, Hon’ble Apex Court held that while the reserved category candidates were entitled to accelerated promotion, they would not be entitled to consequential seniority. Seniority between the general and reserved candidate in promoted category would continue to be the same as was at the time of initial appointment, provided both belong to the same grade. Once total number of reserved posts in a cadre are filled up, roster would become inoperative. Percentage of reservation would be worked out in relation to number of posts which form the cadre strength and not in relation to number of vacancies. Such principle would be directed to be operative from the date of judgment of *R.K. Sabharwal, i.e., 10.02.1995.*

34. Constitutional amendment to Article 16 (4A) came into force *w.e.f.* 17.06.1995. It was meant to provide for consequential seniority in the case of promotion by virtue of Rule of Reservation. It was given retrospective effect, although it received assent of Hon’ble President on 04.01.2002. It will be useful to reproduce the Bill, as below:

“An act to further amend the Constitution of India

Be it enacted by Parliament in the Fifty- second Year of the Republic of India as follows:-

1. Short title and commencement.- (1) This Act may be called the Constitution (Eighty-fifth Amendment) Act, 2001.

(2) It shall be deemed to have come into force on the 17th day of June 1995.

2. Amendment of Article 16.- In Article 16 of the Constitution, in clause (4A), for the words "in matters of promotion to any class", the words "in matters of promotion, with consequential seniority, to any class" shall be substituted."

Hon'ble Apex Court has quoted the amended provision of the Constitution in Para 90 of the decision rendered in *M.Nagraja vs. Union of India and others*, (2006) 8 SCC 212, at page 264 thus:

90. Reading the Constitution (Seventy-Seventh Amendment) Act, 1995 with the Constitution (Eighty- Fifth Amendment) Act, 2001, clause (4A) of Article 16 now reads as follows:

"(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, **with consequential seniority**, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which in the opinion of the State are not adequately represented in the services under the State."

35. It will also be worthwhile to note that in *Ajit Singh Juneja and others vs. State of Punjab and others*, (1996) 2 SCC 715, Hon'ble Apex Court observed that if member of SC/ST/BC getting accelerated promotion to reserved posts on account of reservation and observation of the roster are considered against posts meant for general category candidates in the still higher grade of service, on the assumption that they have become senior on the basis of accelerated promotion, then that exercise shall amount to circumventing the judgment of the Constitution Bench of the Hon'ble Supreme Court in Sabharwal Case [R.K.Sabharwal and others vs. State of Punjab and others, (1995) 2 SCC 745], because for all practical purposes, the promotions of such candidates are being continued like a running account, although the percentage of reservation provided for them has been written and achieved. Once such reserved percentage is achieved and even the observation of reservation is stopped then it will not be permissible to consider such candidates for being promoted against general category post on the basis of their accelerated promotion, which has been achieved by reservation and roster. The accelerated promotions are to be made only against the posts reserved or as per roster prescribed. There is no question of that benefit being available when a member of Scheduled Caste/Backward Class claims promotion against general category posts and in the higher grade. This is so because such candidates who are member of Scheduled Caste/Backward Class and have got promotion on the basis of reservation and application of roster before their seniors in the lower grade belonging to general category, in this process have not superseded them because there was no *inter se* comparison on merit between them. As such, such

seniors who belong to general category, are promoted later, it cannot be said that they have been superseded by such members of Scheduled Caste/Backward Class who have been promoted earlier. While considering them for further promotion for general category posts, if the only fact that they have been promoted earlier being members of Scheduled Caste/Backward Class is taken into consideration, then it shall violate the equality clause and be against the view expressed not only in the case of *R.K. Sabharwal* but the Constitution Bench, but also by the nine Judges Bench in the case of *Indra Sawhney, 1992 (Supp.) (3)SCC 217*, where it has been held that in any cadre, reservation should not exceed beyond 50%. 50% posts already being reserved against which promotions have been made then any promotion against general category post taking into consideration that they are member of Scheduled Caste/Backward Class, shall amount to exceed the limit fixed in the case of *Indra Sawhney*. In *R.K.Sabharwal's* case, it has been said in respect of members of Scheduled Castes that if they are appointed/ promoted on their own merit, then such candidate shall not be counted towards the percentage of reservation fixed for them. On the basis of the same logic, whenever members of Scheduled Castes are to be considered for promotion for posts which are not reserved for them then they have to be selected on merit only. Right to equality enshrined in the Constitution is to be preserved by preventing reverse discrimination as well. Guarantee of equality requires maintenance of original or panel *inter se* seniority between the general category candidates and the earlier promoted reserved category candidates under the reservation policy, for promotion to the higher general vacancy.

.....

55. In the absence of any provision for 'consequential seniority' in the U.P. Palika and Jal Sansthan Water Works Engineering (Centralized) Service Rules, 1996, the 'catch-up rule' will be applicable, which is a judicially evolved concept to control the extent of reservation, and the roster point reserved category promotees cannot count their seniority in the promoted category from the date of their promotion and the senior general candidates, if later reach the promotional level, general candidates will regain their seniority. Article 16(4-A) of the Constitution of India does not automatically give 'consequential seniority' in addition to 'accelerated promotion' to the roster point promotes."

15. It is clear from the above that earlier promotion of respondent no. 3 on the post of LEO does not grant him seniority over the petitioner and the petitioner, even if, his date of promotion is after the date of promotion of the respondent no. 3 will remain senior to the respondent no. 3 according to the 'Catch-up rule', as referred to in the above judgment of the Tribunal.

16. In view of the above, the impugned seniority list dated 04.04.2022 (Annexure No.2 to the claim petition) is hereby set aside. Respondents no. 1 & 2 are required to revise the seniority of the petitioner and private respondent no. 3 by placing the name of the petitioner above the name of private respondent no. 3. The Tribunal has already observed that the impugned final seniority list of L.E.O.s has been issued on 04.04.2022, while the order, in which objections against the tentative seniority list have been decided, has been issued subsequently on 07.04.2022. A perusal of this order dated 07.04.2022 (Annexure No. 8 to the claim petition) shows that the objection of the petitioner against the interim seniority list has been decided by the Labour Commissioner stating that the petitioner has not produced any evidence about writ petition no. 2016 (S/S) of 2017 and that the objection is disposed of in continuation of the direction received vide Govt. letter dated 31.03.2022. The objections of two other retired L.E.O.s Sri Anil Kumar Agarwal and Sri Shailendra Kumar Dimri have been disposed of in this order by just stating that no benefits of the retired employee are being affected therefore, his matter is not being considered. The Tribunal holds that the objections to the interim seniority list have been disposed of without proper application of mind by the Labour Commissioner (respondent no. 2).

17. To sum-up, the Tribunal observes that the impugned Govt. Order dated 01.11.2021 shall remain in abeyance and for notional promotion of respondent no. 3 from an earlier date, consultation with the Personnel Department shall be done and DPC shall be held as per Rules. The impugned seniority list dated 04.04.2022 (Annexure no. 2 to the claim petition) is also set aside with the direction to the respondents no. 1 & 2 to start the process of revising the seniority list afresh after notional promotion from an earlier date on the post of LEO to respondent no. 3 is granted by the DPC and to ensure that in such revision, the petitioner remain senior to respondent no. 3

on the basis of the 'catch-up rule'. With these directions, the claim petition is disposed of. No order as to costs.

(RAJENDRA SINGH)
VICE CHAIRMAN (J)

(RAJEEV GUPTA)
VICE CHAIRMAN (A)

DATE: 07th DECEMBER, 2022
DEHRADUN
RS/KNP