

**BEFORE THE UTTARAKHAND PUBLIC SERVICES
TRIBUNAL AT DEHRADUN**

Present: Sri V.K. Maheshwari

----- Vice Chairman (J)

&

Sri D.K. Kotia

----- Vice Chairman (A)

CLAIM PETITION NO. 08/2012

Bhagwati Prasad Nautiyal, S/o Late Sri Daya Ram Nautiyal,
presently working as Assistant Engineer and posted at the office of
Chief Engineer Level-I, P.W.D., Yamuna Colony, Dehradun,

.....Petitioner

VERSUS

1. State of Uttarakhand through Secretary, P.W.D., Secretariat,
Subhash Road, Dehradun,
2. Chief Engineer Level-I, Yamuna Colony, Dehradun,
3. State of U.P. through Secretary, P.W.D., Lucknow,
4. Engineer in Chief, P.W.D., Lucknow, U.P.

.....Respondents

Present: Sri M.C.Pant & Sri L.K.Maithani, Counsel
for the petitioner

Sri Umesh Dhaundiyal, A.P.O.
for the respondents no. 1 & 2

JUDGMENT**DATE: AUGUST 31, 2015****DELIVERED BY SRI D.K.KOTIA, VICE CHAIRMAN (A)**

1. This claim petition has been filed for seeking the following relief:

“(i) To quash the impugned order dated 7.3.2011 (Annexure A-1) and issue an order or direction to the respondents to grant the notional promotion on the post of Assistant Engineer from the date on which vacancy arose for the selection year 2001-2002 and further fixed the seniority of the petitioner accordingly after calling the entire records from the respondents.

(ii) Any other relief which the Court deem fit and proper in the circumstances of the case.

(iii) Cost of the petition be awarded to the petitioner.”

2. The relevant facts in brief are that the petitioner was initially appointed as Junior Engineer (Technical) in the Public Works Department (PWD), Uttar Pradesh in 1981. He was granted first promotional scale in 1995 after completion of 14 years of satisfactory service and after completion of 24 years of satisfactory service, he was granted second promotional scale in 2005.

3. It has been stated in the claim petition that the vacancies for the post of Assistant Engineer occurred in 1999 and 2000 and the petitioner was eligible and senior enough to be promoted but no exercise of promotion was made by the respondents. He was given charge of the Assistant Engineer in 2004 on purely temporary basis.

The petitioner was promoted to the post of Assistant Engineer on adhoc basis in 2005.

4. The Department of Public Works, Government of Uttarakhand made regular promotions from the post of Junior Engineer to Assistant Engineer in 2010 for selection years from 2001-02 to 2009-10 together and on the basis of the recommendation of the Uttarakhand Public Service Commission, the promotion order was issued on 02.08.2010 (Annexure: A-11).

5. The petitioner was also promoted to the post of Assistant Engineer as per order dated 02.08.2010 above. He was promoted w.e.f. 02.08.2010 against the vacancies for the Selection Year 2001-02.

6. The petitioner has claimed the relief that he should have been granted notional promotion to the post of Assistant Engineer from the date when vacancy had arisen in Selection year 2001-02.

7. With the notional promotion as above, the petitioner has also claimed the seniority on the post of Assistant Engineer from the year 2001-02.

8. The contention of the petitioner in the claim petition is that he was fully eligible and entitled for promotion to the post of Assistant Engineer in 1999-2000 when vacancies also existed but the respondents did not promote him at that time and bunching the vacancies of several years and after a lapse of more than 10 years, the respondents promoted the petitioner against the vacancy for the year 2001-02 but without any notional promotion and seniority. The delay in promotion is not due to the fault of the petitioner but due to

the inaction of the respondents and, therefore, he cannot be deprived of the notional promotion and seniority.

9. The petitioner submitted a representation to the respondents on 27.08.2010 (the copy of which has not been filed with the claim petition) for granting notional promotion from the date when vacancy had arisen in the Selection Year 2001-02. The representation of the petitioner was rejected on 07.03.2011 (Annexure: A-1). Hence the petition.

10. Respondents no. 1 and 2 in their joint written statement have opposed the claim petition. It has been stated that the final allocation of Engineers between Uttar Pradesh and Uttarakhand States was made by the Government of India (under the Uttar Pradesh Re-organization Act, 2000) on 31.07.2008. After the final allocation, the seniority list could be prepared. Thereafter, the promotion proceedings were initiated in consultation with the Uttarakhand Public Service Commission as per Rules. The meeting of the DPC was held by the Commission on 21.07.2010 and on the basis of recommendation of the Commission, the promotions were made from Junior Engineer to Assistant Engineer for Selection years from 2001-02 to 2009-10. The petitioner was selected against the vacancy for the year 2001-02. The promotion order was issued on 02.08.2010 (Annexure: A-11).

11. While disposing of the representation of the petitioner, it has also been stated by the respondent No.1 that as per Government Order of the Department of Personnel No. 387/Karmik-02/2003 dated 11.06.2003, it is not obligatory to make promotion from the date of the vacancy and the notional promotion is given only when any junior has been promoted and in that case the notional

promotion to the senior employee is given from the date of promotion of the junior. Since no junior has been promoted earlier to the petitioner, it was not possible to allow notional promotion to the petitioner and, therefore, respondent No.1 did not find any force in the representation and the same was rejected (Annexure: A-1).

12. Respondents No. 1 and 2 have stated in the last in their written statement that according to Rules, the petitioner is not entitled to get notional promotion (and consequential seniority) from the date of vacancy and, therefore, the claim petition is liable to be dismissed.

13. Despite sufficient service, none appeared on behalf of respondents No. 3 and 4 and, therefore, it was decided to proceed ex-parte against respondents no. 3 & 4.

14. Petitioner has also filed rejoinder affidavit and the averments made in the claim petition have been reiterated. It has been emphasized that the respondents have not considered the 'Service Rules' and 'Seniority Rules' while making the promotions to the post of Assistant Engineer and the petitioner is entitled to get notional promotion and seniority from 2001-02.

15. We have heard learned counsel for the petitioner and learned APO on behalf of the respondents No.1 and 2 and also perused all the record carefully.

16. **The only question to be adjudicated upon is whether the petitioner is entitled to get notional promotion and seniority from the date of vacancy or from the date of promotion order.**

17. Learned counsel for the petitioner has argued that the petitioner was eligible in all respect and vacancies also existed and,

therefore, while promoting him assigning 2001-02 as Selection Year, he is entitled to get notional promotion and seniority from 2001-02. The respondents did not make promotions timely. The promotions were delayed and there is no fault of the petitioner in this delay. Learned APO contended that the promotions could be made only after the final allocation by the Government of India under the U.P. Re-organization Act, 2000 in 2008 and only after that the seniority list and vacancies could be finalized. The promotions were made in 2010 in consultation with the Uttarakhand Public Service Commission in accordance with the Rules. Learned APO also contended that as per Rules promotions (and seniority) are effected from the date of substantive appointment on the post of promotion. He also stated that no junior to the petitioner has been promoted before the petitioner and, therefore, the petitioner is not entitled for notional promotion and seniority from 2001-02.

18. It would be appropriate to mention the Rule position first.

19. The petitioner has filed “उत्तरांचल लोक निर्माण विभाग सहायक अभियंता (सिविल) सेवा नियमावली, 2003” (hereinafter referred to Service Rules of 2003) as Annexure: A-7 to the claim petition. The Rule 3(छ) of the Rules defines the member of service as under:

“परिभाषायें.....

3(छ) “सेवा का सदस्य” का तात्पर्य सेवा के संवर्ग में किसी पद पर इस नियमावली या इस नियमावली के प्रारम्भ होने के पूर्व प्रवृत्त नियमों या आदेशों के अधीन मौलिक रूप से नियुक्त व्यक्ति से है।”

Rule 21 deals with the determination of seniority. It reads as under:

“ज्येष्ठता 21— पद पर मौलिक रूप से नियुक्त व्यक्तियों की ज्येष्ठता समय-समय पर यथा संशोधित उत्तरांचल सरकारी सेवक ज्येष्ठता नियमावली, 2002 के अनुसार अवधारित की जायेगी।”

20. It is thus provided in the Service Rules of 2003 that the seniority of those who are appointed substantively will be governed by the Uttarakhand Government Servants Seniority Rules, 2002 (hereinafter referred to as Seniority Rules of 2002. Rule 4(h) of the Seniority Rules of 2002 defines the ‘substantive appointment’ as under:-

“4(h) “substantive appointment” means an appointment, not being an ad hoc appointment, on a post in the cadre of the service, made after selection in accordance with the service rules relating to that service;”

The Rule 8 of the Seniority Rules of 2002 reads as under:

“8.(1) Where according to the service rules appointments are made both by promotion and by direct recruitment, the seniority of persons appointed shall, subject to the provisions of the following sub-rules, be determined from the date of the order of their substantive appointments and if two or more persons are appointed together, in the order in which their names are arranged in the appointment order:

Provided that if the appointment order specifies a particular back date, with effect from which a person is substantively appointed, that date will be deemed to be the date of order of substantive appointment and, in other cases, it will mean the date of order :

Provided further”

21. It would be relevant to mention here that before the Seniority Rules of 2002, the U.P. Government Servants Seniority Rules, 1991 were applicable in Uttarakhand and Rule 8 above of the Seniority Rules of 2002 is exactly same as it was under the said Rules of 1991.

22. On the scrutiny of the Rules in para 20 above, it is clear that the seniority of a candidate is to be determined from the date of order of substantive appointment unless otherwise stipulated in the letter of appointment.

23. In the case at hand, it is beyond any doubt that the date of substantive appointment of the petitioner is 02.08.2010 (Annexure: A-11). The selection year of the petitioner is, undoubtedly, shown as 2001-02 in the promotion order dated 02.08.2010 but there is nothing in the promotion order to indicate that in terms of proviso to Rule 8 of the Seniority Rules of 2002 that the promotion has been given with reference to an earlier date. The proviso to Rule 8 clearly states that ‘if the appointment order specifies a particular back date, with effect from which a person is substantively appointed, that date will be deemed to be the date of order of substantive appointment and, in other cases, it will mean the date of order’. Thus, mere reference of to the selection year 2001-02 in the promotion order cannot entitle the petitioner to claim the notional promotion and seniority w.e.f. 2001-02. The appointment order has not specified any back date and, therefore, the promotion can be given from 02.08.2010, the date of order of the promotion.

24. Respondents have also relied on a G.O. of the Government of Uttarakhand dated 11.06.2003 which reads as under:

“उत्तराखण्ड शासन
कार्मिक अनुभाग-2
संख्या: 737/कार्मिक-2/2003
देहरादून: दिनांक 11 जून, 2003

कार्यालय- ज्ञाप

शासन के समक्ष यह प्रश्न आया है कि क्या किसी कार्मिक का रिक्ति घटित होने की तिथि से पदोन्नति पाने का अधिकार है तथा क्या किसी सेवा निवृत्त अथवा दिवंगत कार्मिक को किसी ऐसे पूर्वगामी तिथि से नोशनल पदोन्नति दी

जा सकती है, जिस तिथि को वह कार्मिक न तो स्वयं पदोन्नति से सम्बंधित पद पर कार्यरत था और न ही उसका कोई कनिष्ठ पदोन्नति से सम्बंधित उक्त पद पर कार्यरत था।

2- पूर्व में यह स्पष्ट किया गया था कि पदोन्नति हेतु विलम्ब से चयन सम्पन्न किये जाने की दशा में ऐसे सेवानिवृत्त/दिवंगत कार्मिकों के नाम भी पात्रता सूची में शामिल किये जायं जिनके नाम संगत सेवा नियमावली के अन्तर्गत पात्रता सूची में होते, यदि चयन समय से कराया गया होता, भले ही चयन के समय उसमें से कुछ कार्मिक सेवा निवृत्त हो चुके हों अथवा उनकी मृत्यु हो चुकी हो। मृत्यु एवं सेवानिवृत्त सरकारी सेवकों को, उपयुक्त पाये जाने पर संबंधित वर्ष(दिनांक) से नोशनल पदोन्नति दिये जाने पर विचार के लिए कहा गया है।

3- उपरोक्त के संबंध में अधोहस्ताक्षरी को यह कहने का निदेश हुआ है कि लोक सेवा आयोग सपरामर्श चयनोन्नति प्रक्रिया नियमावली के नियम-8 तथा लोक सेवा आयोग की परिधि के बाहर के पदों पर चयनोन्नति पात्रता सूची नियमावली के नियम-2 के अनुसार प्रत्येक वर्ष के संबंध में पृथक-पृथक पात्रता सूची तैयार करने का प्रावधान है। इसका आशय यह है कि संबंधित वर्ष में जो कार्मिक पात्रता सूची में रखे जायेंगे, भले ही चयन के समय कार्मिक की मृत्यु हो चुकी हो अथवा वह सेवानिवृत्त हो चुका हो। परन्तु जहां तक नोशनल पदोन्नति का प्रश्न है रिक्ति की तिथि से पदोन्नति दिये जाने की कोई बाध्यता नहीं है। सम्प्रति नोशनल पदोन्नति सदैव कनिष्ठ की पदोन्नति की तिथि से विचारणीय होती है, प्रतिबन्ध यह है कि कनिष्ठ की पदोन्नति से नोशनल पदोन्नति प्रदान किये जाने हेतु संबंधित सरकारी सेवक को चयन समिति द्वारा उपयुक्त पाय गया हो।

4-अतः अनुरोध है कि कृपया ऐसे मामलों में उपरोक्तानुसार कार्यवाही की जायं।

सुरेन्द्र सिंह रावत
अपर सचिव।”

25. The above office memorandum makes it clear that the promotion/notional promotion cannot be given from the date of vacancy. Notional promotion to an employee can be considered only from the date of the promotion of an employee junior to him. In the case before us, no junior to the petitioner has been given the promotion on the post of Assistant Engineer before promotion was given to the petitioner and therefore, the petitioner is not entitled for promotion from the date of vacancy according to the office memorandum dated 11.06.2003.

26. The issue at hand has been considered by the **Apex Court in its judgment (2007) 1 SCC 683, State of Uttaranchal and Another versus Dinesh Kumar Sharma**). Following part of the judgment is reproduced hereunder:

“9. After a perusal of the facts involved here, we feel that the issues that need to be addressed by us in this case are:

i) Whether the respondent has the right to claim promotion and seniority from 1995-96 when the vacancy arose or whether his seniority will be reckoned from the date of substantive appointment which is in the year 1999.

ii) Whether the High Court was justified in overlooking and ignoring the provisions of the U.P. Government Servants Seniority Rules, 1991 and grant of a relief in favour of the respondents.”

“18. With regard to the issue as to whether the respondent has the right to claim promotion and seniority from 1995-96 when the vacancy arose or whether seniority will be reckoned from the date of substantive appointment which is 1999, it can be observed that an employee will be considered member of a cadre from the date of his/her substantive appointment in the cadre after selection.”

“19..... It is clear from the above that a person appointed on promotion shall not get seniority of any earlier year but shall get the seniority of the year in which his/her appointment is made. Therefore, in the present fact situation the respondent cannot claim promotion from the date of occurrence of the vacancy which is 1995-96 but can get promotion and seniority from the time he has been substantively appointed i.e. from 1999. Likewise, the seniority also will be counted

against the promotion/appointment in the cadre from the date of issuance of order of substantive appointment in the said cadre, i.e. from 19.11.1999.

*In a recent judgment of this Court in **Uttaranchal Forest Association (Direct recruit) and Ors. V. State of U.P. and Ors., 2006(9)SCALE 577**, (Dr, AR Lakshmanan and Tarun Chatterjee) this Court was of the view that seniority has to be decided on the basis of Rules in force on the date of appointment, no retrospective promotion or seniority can be granted from the date when an employee has not even been borne in the cadre. Similar view was taken by this Court in the case of **K.C.Joshi V. Union of India(1985)IILLJ416SC.**”*

*“23. Another issue that deserves consideration is whether the year in which the vacancy accrues can have any relevance for the purpose of determining the seniority irrespective of the fact when the persons are recruited. Here the respondent’s contention is that since the vacancy arose in 1995-96 he should be given promotion and seniority from that year and not from 1999, when his actual appointment letter was issued by the appellant. This cannot be allowed as no retrospective effect can be given to the order of appointment order under the Rules nor is such contention reasonable to normal parlance. This was the view taken by this Court in the case of **Jagdish Ch. Patnaik and Ors. V. State of Orissa and Ors [1998]2 SCR, 676.**”*

“24. Coming to the question of whether the High Court was justified in overlooking and ignoring the provisions of the U.P. Government Servants Seniority Rules, 1991 and grant a relief in favour of the respondents, it will be helpful to reproduce the High Court’s order:

“From the perusal of the aforesaid order, it is clear that the authority has not applied its

mind on the facts of the case as stated by the petitioner, in the representation, and has rejected the representation on the ground that since the appointment letter was issued to the petitioner on 19.11.1999, therefore he is entitled to his seniority from that date. Even if the recruitment year is changed the order of appointment cannot be made with retrospective effect. The authority has failed to appreciate that if the fact of vacancy being accrued in the recruitment year 1995-96 i.e. on 1st May, 1996 and second vacancy on 1st June 1996 had come to the knowledge of the Commission the Commission could have given the promotion to the petitioner w.e.f. these dates, as the petitioner was entitled for the same and the Commission has found him suitable, which is evidence from the promotion order dated 19.11.1999. Therefore, this could have consequently affected the consequential benefits available to the petitioner had his promotion being made w.e.f. the date of promotion of falling of vacancy. Therefore, the order dated 1st October, 2002 suffers from non application of mind and is hereby liable to be ignored.

That fact that the vacancy had fallen on 1st May, 1996 and 1st June, 1996 in the recruitment year 1995-96 are not disputed by the respondents. The petitioner cannot be made to suffer on account of delay in recommendation by the Director of Agriculture for promotion of the petitioner. The petitioner cannot be held responsible and

cannot be made to suffer as such became entitled to be considered for promotion on 1st May, 1996. Therefore, the government is directed to re-consider the matter and send it back to the Commission for appropriate orders suitable in the facts and circumstances of the case. Subject to the above, the writ petition is disposed off finally.”

This observation of the High Court in our view is erroneous. The High Court while observing that, “the appellants rejected the representation of the respondents on the ground that since the appointment letter was issued to the respondent on 19.11.1999, he is entitled to his seniority from that date. The authority has failed to appreciate that if the fact of vacancy being accrued in the recruitment year 1995-96 i.e. on 1st May, 1996 and second vacancy being accrued in the recruitment year on 1st June 1996 had come to the knowledge of the Commission the Commission could have given the promotion to the petitioner w.e.f. these dates, as the petitioner was entitled for the same and the Commission has found him suitable, which is evident from the promotion order dated 19.11.1999”, has committed an error in understanding and appreciating Rule 17 and 21 of the Uttar Pradesh Agriculture Group “B” Service Rules, 1995 and Rule 8 of the U.P. Government Servants Seniority Rules, 1991, which categorically states that the date of ‘substantive appointment’ will be the date that shall be taken for determining promotion, seniority and other benefits.”

27. **In State of U.P. and others Versus Ashok Kumar Srivastava and another 2014(1) AWC 140 (SC), the Hon’ble**

Supreme Court dealt with the matter of the retrospective seniority. Following part of the judgment is worth reproducing:

*“11. The thrust of the matter is how the seniority is to be determined in such circumstances. In **Union of India V. S.S.Uppal and another. (1996) 2 SCC 168, it has been opined that the seniority of a person is to be determined according to the seniority rule applicable on the date of appointment.** It has also been observed that weightage in seniority cannot be given retrospective effect unless it is specifically provided in the rule in force at the material time.*

*12. **In State of Karnataka and others v. C.Lalitha, (2006) 2 SCC 747,** it has been observed that it is well-settled that seniority should be governed by rules and a person should not be allowed to derive any undue advantage over other employees, for concept of justice demands that one should get what is due to him or her as per law.*

13.....

*14. In **Nirmal Chandra Sinha (Supra)[Nirmal Chandra Sinha Vs. Union of India (2009)14 SCC, 29]** it has been ruled that promotion takes effect from the date of being granted and not from the date of occurrence of vacancy or creation of the post. It has also been laid down therein that it is settled in law that date of occurrence of vacancy is not relevant for the determination of seniority.*

*15. Learned senior counsel for the appellants has drawn inspiration from the recent authority in **Pawan Pratap Singh and others v. Reevan Singh and others, (2011) 3 SCC 267: 2011(3) AWC 3011(SC),** where the Court after referring to earlier authorities in the field has culled out certain principles out of which the following being the relevant are reproduced below:*

“(ii) Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a

particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Article 14 and 16 of the Constitution.

XXX XXX XXX XXX

(iv)The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even been borne in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime.”

16. In view of the aforesaid enunciation of law, the irresistible conclusion is that the claim of the first respondent for conferment of retrospective seniority is absolutely untenable and the High Court has fallen into error by granting him the said benefit and accordingly the impugned order deserves to be lanced and we so do.

17. Consequently, the appeal is allowed and the order passed by the High Court is set aside. The parties shall bear their respective costs.”

28. The counsel for the petitioner has also filed the U.P. Service of Engineers (Building and Road Branch) Class II Rules, 1936 amended upto 1987. We have gone through these Rules also and no where in these Rules, there is any provision to provide notional promotion and seniority from the date/year of vacancy. We find that these Rules are also not of any help to the petitioner.

29. Counsel for the petitioner has also filed a Case law-**State of A.P. and another Vs. C. Srivasulu Reddy W.P. No. 5772 of**

2002 decided on 22.09.2003. We have carefully gone through the case and find that the facts and circumstances in this case are entirely different than that of the case in hand and, therefore, this case law is also of no help to the petitioner.

30. The petitioner, in our clear view, has not established his right to get notational promotion and seniority from 2001-02.

31. In view of discussion in the foregoing paragraphs, we are of the clear view that as per Rule position and the legal position, the petitioner cannot be entitled to get notional promotion and seniority from 2001-02.

32. For the reasons stated above, the claim petition is devoid of any merit, and liable to be dismissed.

ORDER

The petition is hereby dismissed. No order as to costs.

V.K.MAHESHWARI
VICE CHAIRMAN (J)

D.K.KOTIA
VICE CHAIRMAN (A)

DATE: AUGUST 31, 2015
DEHRADUN

KNP