

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

CLAIM PETITION NO. 47/SB/2023

Rajesh Pratap Singh, s/o Sri Shailendra Pratap Singh, aged about 49 years, presently working and posted on the post of Executive Engineer, in the office of Engineer-in-Chief, Public Works Department, Uttarakhand, Yamuna Colony, Dehradun.

.....Petitioner

VS.

1. State of Uttarakhand through Secretary, Public Works Department, Govt. of Uttarakhand, Secretariat, Subhash Road, Dehradun.
2. Engineer-in-Chief and Head of the Department, Public Works Department, Uttarakhand, Yamuna Colony, Dehradun.

.....Respondents.

Present: Sri L.K.Maithani, Advocate, for the petitioner.
Sri V.P.Devrani, A.P.O., for the Respondents (online).

JUDGMENT

DATED: FEBRUARY 05, 2024

Justice U.C.Dhyani (Oral)

By means of present claim petition, the petitioner seeks the following reliefs:

“a) To quash the impugned order dated 03.09.2021 (Annexure No. A-1) of the respondent No. 1 with its effects and operation.

b) To declare that the delay in the appointment of the petitioner and appointment of the junior persons prior to the appointment of

petitioner on the post of Assistant Engineer is due to the wrong, fault and illegal acts of the respondents, therefore petitioner is entitled to stepping up his pay at par with the pay of his juniors on the day of his appointment.

c) To issue an order or direction to the respondents to stepping up the pay of the petitioner at par with the pay of his juniors since the date of his appointment and accordingly refix pay of the petitioner and make payment of the arrear of difference of pay to the petitioner.

d) To issue any other suitable order or direction which this Hon'ble Tribunal may deem fit and proper in the circumstances of the case.

e) To award the cost of the petition to the petitioner.”

2. As per the claim petition, the petitioner is presently working as Executive Engineer in the office of Engineer-in-Chief, Public Works Department, Dehradun. A notification was issued by the Uttarakhand Public Service Commission (for short, P.S.C.) in the year 2002, for appointment to the posts of Assistant Engineer. The examination was conducted by the P.S.C. in February, 2003 and the result was declared on 17.06.2003. The names of the candidates were placed as per merit, in the result. Petitioner was selected as Assistant Engineer (Civil) and on merit of the examination, his name was placed at Sl. No. 42 in the notification dated 17.06.2003 (Copy: Annexure- A 2).

2.1 Appointment to the selected candidates was not given according to the merit list issued by the P.S.C. *Vide* notification dated 20.02.2004, appointments were given to 61 selected candidates on the post of Assistant Engineer. Many persons, who were below the petitioner in the merit list, were given appointment (Copy of notification dated 20.02.2004: Annexure- A 3). Thereafter, Respondent No.1 issued appointment orders for remaining 25 selected candidates *vide* notification dated 29.07.2005 (Copy: Annexure- A 4), in which name of the petitioner also figured.

2.2 Thereafter, seniority list of Assistant Engineers was issued *vide* Office Order dated 01.04.2011, in which name of the petitioner was placed above the persons who were below the petitioner in the merit list of the P.S.C. and who got appointment prior to the petitioner *vide* order dated 20.02.2004, on the post of Assistant Engineer. (Copy of seniority list/ office order dated 01.04.2011: Annexure- A5).

2.3 Seniority list dated 01.04.2011 was challenged by the Assistant Engineers, who were appointed *vide* order dated 20.02.2004 and were juniors to the petitioner, before the Hon'ble High Court of Uttarakhand in WPSB No. 270/2009, Chandan Singh Negi and others vs. State of Uttarakhand and others. The writ petition was dismissed by the Hon'ble High Court *vide* judgment dated 05.07.2013 (Copy: Annexure- A-6).

2.4 It is pertinent to mention here that petitioner and the juniors, who were appointed prior to the petitioner *vide* notification dated 20.02.2004, were appointed on the same pay scale, but, as the junior persons were appointed on the post one year and half month before the petitioner, therefore, they were getting higher pay scale than the petitioner. They are getting higher pay due to grant of annual increment. Most of the persons, appointed *vide* notification dated 20.02.2004, were junior to the petitioner. Thus, on the date of joining of the petitioner, his pay was to be fixed on the pay which his juniors were getting on that day.

2.5 Petitioner, *vide* representation dated 21.07.2020, prayed that his pay be fixed equivalent to the pay of junior persons by awarding one additional increment (Copy of representation dated 21.07.2020: Annexure- A 7). The Chief Engineer (Establishment) *vide* letter dated 10.09.2020, forwarded the representation of the petitioner with his recommendation to Respondent No.1 (Copy: Annexure- A 8). The Engineer-in-Chief/ HOD also wrote letter dated 01.06.2021 (Annexure: A-9) to the Respondent No.1. The Respondent No.1, *vide* impugned order dated 03.09.2021 (Annexure: A-1) informed Respondent No.2 that in the case in hand, pay anomaly has not arisen as a result of initial pay fixation under Rule 22 B(1) of Financial Hand Book Vol. II Part 2 to 4, but it has arisen due to late joining of service (of the petitioner). The case of the petitioner was, therefore, not covered by Rule 22 B(1) of F.H.B. Vol. II Part 2 to 4.

2.6 Impugned order dated 03.09.2021 (Annexure: A-1) has been challenged by the petitioner in this claim petition, as has been noted above in the inaugural paragraph of this judgment. Petitioner has filed affidavit and relevant documents in support of his claim petition.

3. When the claim petition was taken up for the first time on 01.03.2023, for hearing on admission, Ld. A.P.O. objected to the maintainability of the claim petition, *inter alia*, on the ground that the same is barred by limitation. In reply, Ld. Counsel for the petitioner submitted that the impugned order was passed by the State Government on 03.09.2021, therefore, the claim petition is within time.

4. Respondents have contested the claim petition by filing written statement (through Ld. A.P.O.). Counter Affidavit has been filed by Sri Upendra Singh Rawat, Senior Staff Officer, office of Engineer-in-Chief & HOD, Public Works Department, Dehradun, Uttarakhand.

4.1. In the C.A., it has been stated that after creation of State of Uttarakhand, a combined advertisement for vacancies of various departments was issued in the year 2000. 89 vacant posts of Assistant Engineer (Civil) and 03 vacant posts of Assistant Engineer (E/M) were advertised by P.W.D. Out of these posts, 55 posts were for general category, 18 posts of Scheduled Caste category, 03 posts were reserved for Scheduled Tribes candidates and 12 posts were reserved for Other Backward Classes candidates.

4.2 According to Rules, then prevalent, 58.34% quota was fixed for direct recruits (Assistant Engineer). Subsequently, Assistant Engineer Service Rules, 2003 (for short, Rules of 2003) were framed, wherein quota for direct recruitment on the post of Assistant Engineer was fixed at 50%. After the Rules of 2003 came into force, UPSC sent recommendation for 89 successful candidates on the post of Assistant Engineer to the Govt. At that time, 36 Assistant Engineer (Civil) were serving in the P.W.D. 33 Assistant Engineers were direct appointees and 03 were option holders for the State of Uttarakhand (form State of Uttar Pradesh).

4.3 After Rules of 2003 came into force, quota for direct recruit Assistant Engineer was reduced to 50%. Govt. decided to appoint only 61 Assistant Engineers out of 89 candidates recommended by P.S.C. *vide* order dated 20.02.2004. Hence, petitioner was not issued offer for appointment (Annexure: CA-1).

4.4 After issuance of order dated 20.02.2004, writ petition No. 45/SB/2004, Deepak Kumar and others vs. State of Uttarakhand and others was filed by remaining selected candidates before the Hon'ble High Court of Uttarakhand at Nainital, and as per Hon'ble Court's order, Office Memorandum No. 1477 dated 20.07.2005 was issued by the Govt. in respect of appointment of remaining 25 candidates (Copy: Annexure- C.A.-R-2). Seniority list of Assistant Engineers from Sl. No. 52 to 228 has been updated by P.W.D. *vide* Office Memorandum dated 01.04.2011 in accordance with the merit list prepared by the P.S.C.

4.5 Ld. A.P.O. submitted, on the basis of para J (brief facts) of the C.A. that annual increment is admissible only on completion of one year's satisfactory service. In respect of the candidates who were appointed through P.S.C., seniority would be determined in accordance with the merit list prepared by the P.S.C. At that time, 33 Assistant Engineers (Civil) direct recruits and 03 Assistant Engineers, option holders from Uttar Pradesh, were working. As per Rules of 2003, 61 posts of Assistant Engineer were required to be filled up by the State of Uttarakhand. Ld. A.P.O. further submitted that a candidate has no vested right for appointment, but petitioners were given appointment on 30.07.2005 only with the intervention of Hon'ble High Court. The petitioner did not agitate the matter in the Hon'ble High Court to grant the benefit *w.e.f.* 20.02.2004 and such decision attained finality. Ld. A.P.O. also submitted that there is no provision for giving benefit of additional increment if junior was getting more salary. The comments of the Finance Department, Govt. of Uttarakhand, have been extracted in the later part of para M of the C.A., as below:

The discrepancy in the case in hand has not arisen as a result of fixation of initial pay under Rule 22 B(1) of F.H.B. Vol. II part 2 to 4 but has arisen from contribution made later in the service. Therefore, the case is not covered by Rule 22 B (2) of F.H.B. Vol. II part 2 to 4. Please return the letter to the P.W.D., if agreed.

Rule 22 B(1) and Rule 22 B(2) of F.H.B. Vol. II part 2 to 4 read as below:

“22 B (1) Notwithstanding anything contained in these rules, where a Government servant holding a post in substantive, temporary or officiating capacity, is **transferred** to another post, the duties and responsibilities of which are related to the post held by him, is more important than the duties and responsibilities, is

promoted or appointed in any form, whether Substantive, temporary or officiating, his initial pay in the time scale of the higher post shall be fixed at the **next stage of the pay** in respect of the lower post. **An increment has been worked out in principle at the stage at which it has so accrued:**

Provided that (1) If a Government servant who in a substantive, temporary or officiating capacity, draws pay in the scale of pay not exceeding 1st April 1965, 1st August 1972, Rs.900 p/m to Rs.1,720 p/m (Rs.2,050 p/m w.e.f. 1st January 1984) or Rs.4,500 p/m respectively, in the scale in force from 1st July 1979 or 1st January 1986 respectively, substantively in the post carrying higher duties or responsibilities. If appointed on a Temporary or officiating basis, the provisions of this rule shall not apply, and (2) the provisions of Fundamental Rule 22 B(1) shall apply to any pay with effect from 1st January, 1988, shall be deemed to apply without limitation.

Provided further that the provisions of sub-rule (2) of Fundamental Rule 31 shall not apply in any case where the initial pay is fixed under this rule.

Provided also that **if a Government servant, after his promotion or appointment to a higher post, withdrawal of maximum pay in the time scale of the post immediately preceding his initial pay in the time scale of the higher post shall be fixed at the next stage of that pay which has been increased in principle by giving an amount equal to the last increment in the time scale of the lower post:-**

Provided that if a Government servant is either

(1)(i) in the same office or

(ii) in a permanent or permanent post in the same time scale or

(iii) on a permanent post other than a tenure post or on a temporary post in the corresponding time scale, has previously held the post in a substantive manner, or has officiated thereon yes; or

(2) any other tenured post which he had previously held substantively or on which he has previously worked in officiating capacity, in the same time scale be appointed to a fixed term post as so the proviso to Fundamental Rule 22 for fixation of initial pay and increment shall apply in the case of counting of past service.

(2) (i) If as a result of fixation of initial pay under sub-rule (1) there arises an anomaly, namely, that the rate of pay admissible to a government servant on the higher post would exceed that of another government servant senior to him in the lower grade or scale and promoted earlier to another identical post the pay of the latter shall with effect from the date of promotion or appointment of the former be stepped up by the Government to an amount admissible to the former as pay fixed under sub-rule (1) subject, however, to the following conditions:

(a) the junior and the senior government servants belong to the same cadre and the posts to which they have been promoted or appointed are identical and in the same cadre;

(b) the time-scale of pay for the lower and higher posts in which the junior and the senior government servants are entitled to draw their pay is identical;

(c) the anomaly referred to above must have arisen as a direct result of the application of sub-rule (1) and not for any other reason;

Explanation—(1) If the government servant is allowed a higher pay to start within a time-scale regard being had to his having been previously in any other employment under government, and subsequently upon his promotion or appointment to the higher post, there is fixation made of initial pay under sub-rule (1), the anomaly resulting vis-a-vis the rate of pay admissible to the senior Government servant on the higher post shall not be deemed for purposes of this sub-rule to arise as a direct result of the application of this rule.

Explanation—(2) **If a government servant has, on account of getting advance increment in his lower post, received more pay from time to time, than the senior government servant appointed or promoted earlier to the higher post and subsequently there is fixation of pay under sub-rule (1) in the case of the former, then also the initial fixation of pay under sub-rule (1) shall not be deemed, for purposes of this sub-rule to arise as a direct result of the application of sub-rule (1).**

(d) the senior government servant shall draw his next increment on completion of the requisite qualifying service with effect from the date of such stepping up of his pay.

(ii) The provisions of this rule shall apply also in case of promotion to an ex-cadre post if the government servant has been appointed in the time-scale of pay pertaining to the higher ex-cadre post without any condition being attached to the effect that while working on the higher ex-cadre post he shall draw any deputation allowance or special pay in addition to the pay in the time-scale for the lower post;

NOTE—1. The provisions of this rule shall not apply to cases of appointment from an ex-cadre post to a cadre post.

NOTE—2. In cases of appointment/promotion from one ex-cadre post to another ex-cadre post where the official opts to draw pay in the scale of the ex-cadre post, the pay in the second or subsequent ex-cadre posts should be fixed under F.R. 22-B (1) with reference to pay in the cadre post only.

(iii) The pay of a government servant on reversion to his old lower post or to some other post in the same time-scale of pay shall be such as he will have actually drawn if he had not been promoted to the higher post. If the pay of a government servant has already been fixed under Fundamental Rule 27, then, on reversion, his pay will be re-fixed under Fundamental Rule 27 giving to him also, the benefit of his service rendered in the higher post according to Fundamental Rule 26 (c);

(iv) If a government servant is reverted from a higher post to such lower post, the time-scale of pay of which is higher than that of the post in which he drew his pay before being appointed to the higher post, then, in that case, the pay admissible to him on such intermediary post shall be fixed according to this rule.”

4.6 Ld. A.P.O. also submitted, on the strength of para N (brief facts) of the C.A., that it is trite law that antedating of increment is applicable in case where junior is getting more pay and senior is getting lesser pay. This provision is applicable where senior has joined earlier and junior joined later. In the case in hand, if petitioner's name was above the name of his junior, it does not mean that he has joined such post along with the junior or before his junior.

Difference in pay scale is not on account of pay fixation under Rule 22 B(1) of F.H.B. Vol. II part 2 to 4, but due to rendering satisfactory service on the post of Assistant Engineer by the junior. Petitioner cannot claim benefit of antedating of increment in respect of the period when he was not in service.

4.7 Relevant documents have been filed on behalf of the respondents in support of the Counter Affidavit.

5. Assailing the order dated 03.09.2021 (Annexure: A-1), Ld. Counsel for the petitioner, *inter alia*, submitted that the Government in P.W.D. has taken an incorrect decision by applying Rule 22 B(2) of F.H.B. Vol. II part 2 to 4 to the facts of present claim petition. In fact, petitioner's claim is covered by Rule 27 of F.H.B. Vol. II part 2 to 4 read with the observations of Hon'ble High Court of Uttarakhand in WPSB No. 270/2009, decided on 05.07.2013.

6. Ld. Counsel for the petitioner also submitted that the petitioner was promoted to the post of Executive Engineer on 13.02.2013 and one Smt. Rachna Thapliyal, junior to the petitioner was promoted to the post of Executive Engineer on 22.07.2016. Smt. Rachna Thapliyal was getting higher pay than the petitioner, as has been shown in the annual salary statement for the financial year 2023-24 of the petitioner and Smt. Rachna Thapliyal.

7. Rule 27 of F.H.B. Vol. II part 2 to 4 provides that an authority may grant a premature increment to a Govt. servant on a time scale of pay if it has power to create a post in the same cadre on the same scale of pay. Such Rule reads as under:

“ 27. An authority may grant a premature increment to a government servant on a time-scale of pay if it has power to create a post in the same cadre on the same scale of pay.

Orders of the Governor regarding rule 27

The authorities subordinate to the Government to whom power has been delegated to create temporary posts subject to certain limitations regarding rates of pay, period, etc. can under the above rule grant premature increments to holders of temporary posts created by them. Under rule 7, however, the Government have decided that such subordinate authorities as have been empowered to create temporary posts shall not grant premature increments to the holders of such posts unless they are specially authorized by the Government to do so and then only to such extent as may be specified by the Government.”

8. It will be apposite to reproduce judgment dated 05.07.2013, rendered by Hon'ble High Court in WPSB No. 270/2009, Chandan Singh Negi and others vs. State of Uttarakhand and others, hereinbelow for convenience:

“This writ petition can be disposed of by putting a question as to how the petitioners, who were below in the merit list, could be appointed before the private respondents who were higher up in the merit list prepared out of one single selection process? In the writ petition, petitioners are contending that good, bad or indifferent, they were given appointment before the private respondents were appointed and, accordingly, they started discharging their duties before the private respondents started discharging their duties and, accordingly, private respondents cannot be placed above the petitioners in the seniority list. We are astonished as to how the petitioners could be appointed ignoring the merit of the private respondents. As the petitioners were unjustly appointed before the private respondents were appointed, justice has been done by keeping the private respondents above the petitioners in the seniority list. There is no scope of interference.

The writ petition fails and the same is dismissed.”

[Emphasis supplied]

9. A combined reading of aforesaid judgment of the Hon'ble High Court read with Rule 27 of F.H.B. Vol. II part 2 to 4, prompts this Court to direct the Secretary to the Government in Public Works Department, Uttarakhand, to consider the claim of the petitioner in the light of above noted Rule and judgment. Rule 22 B(2) of F.H.B. Vol. II part 2 to 4 is definitely not applicable to the facts of present case. The Govt., in the P.W.D., in the impugned Office Memorandum (Annexure: A-1) has misdirected itself by applying Rule 22 B(2) of F.H.B. Vol. II part 2 to 4 to the facts of present case. In fact, the petitioner's case appears to have been covered by Rule 27 of F.H.B. Vol. II part 2 to 4 read with the decision rendered by Hon'ble High Court on 05.07.2013 in WPSB No. 270/2009.

10. Ld. Counsel for the parties submitted that such an order can be passed by Single Bench of the Tribunal

11. The claim petition is disposed of, by setting aside order dated 03.09.2021 (Annexure: A-1) and remitting the matter to Respondent No.1, who

is directed to consider the case of the petitioner in the light of Rule 27 of F.H.B. Vol. II part 2 to 4 read with the decision rendered by Hon'ble High Court on 05.07.2013 in WPSB No. 270/2009, and go into root cause of anomaly, as highlighted, in the peculiar facts of the case. The same may be done without unreasonable delay. No order as to costs.

(JUSTICE U.C.DHYANI)
CHAIRMAN

DATE: FEBRUARY 05, 2024.
DEHRADUN

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