

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

Present: Hon'ble Mr. Justice U.C.Dhyani

----- Chairman

Hon'ble Mr. A.S.Nayal

-----Member (A)

CLAIM PETITION NO. 58/DB/2018

Satish Kumar, aged about 50 years, s/o Shri Hari Singh, r/o 62/1, IRI Colony, Roorkee, presently working as *Mistri*, Administration Division, Irrigation Research Institute, Roorkee.

.....Petitioner

vs.

1. State of Uttarakhand through its Secretary Department of Irrigation, Civil Secretariat, Subhash Road, Dehradun.
2. Superintending Engineer, Research Circle, Irrigation Research Institute, Roorkee, District Haridwar.

.....Respondents.

Present: Sri L.K.Maithani, Ld. Counsel for the petitioner.

Sri V.P.Devrani, Ld. A.P.O., for the Respondents.

JUDGMENT

DATED: APRIL26 , 2019

Justice U.C.Dhyani(Oral)

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

- “(i) To quash the impugned order dated 21.08.2018 and issue an order or direction to the concerned respondents to grant/ sanction the pay and pay scale of the post of Junior Engineer (Mechanical) viz pay

bond Rs.9300-34800 with grade pay 4600 w.e.f. 01.09.2008 in place of pay scale 5200-20200 grade pay 2400 as a first ACP and further granted pay and pay scale of the next promotional post of A.E. viz pay bond Rs.9300-34800 grade pay 5400 since 19.09.2013 in place of pay scale 5200-20200 grade pay 2800 as a benefit of 2nd ACP and further accordingly pay the arrears of difference of salary to the petitioner together with interest @ 12% per annum for the date of accrual till the actual date of payment.

- (ii) To issue any other order or direction which this Court may deem fit and proper in the circumstances of case in favour of the petitioner.”

2. Facts, giving rise to the present claim petition, are as follows:

Petitioner was initially appointed on the post of *Beldar*, a Group- ‘D’ post, under the respondent department on 17.11.1984. On 19.09.1997, petitioner was promoted to Group- ‘C’ post of *Mistri/* Technician. One similarly situated employee Ghanshyam Singh Jainer filed a writ petition (being W.P. No. 2561/1996) before Hon’ble High Court of Judicature at Allahabad, who, *vide* judgment and order dated 27.07.1999, held that the petitioner cannot be overlooked for promotion to the post of Junior Engineer (Mechanical) simply on the ground that he was in the Research Institute of Irrigation Department. The respondents did not challenge the said judgment of Hon’ble High Court of Judicature at Allahabad and, therefore, the same has attained finality. Sri Jainer was not promoted on the ground of his not passing test provided under Rule 5 (4) of the U.P. Irrigation Department Mechanical Engineers (Subordinate) Service Rules, 1992 (for short, Rules of 1992). This was challenged by Sri Jainer in W.P. No. 30311/2000. Hon’ble High Court held that criteria for promotion to the post of Junior Engineer (Mechanical) shall be ‘seniority subject to rejection of unfit’ and not ‘merit-cum-seniority’.

A Government Order No. 872 was issued by the State Government on 08.03.2011. The same relates to Assured Career Progression (ACP) Scheme, which became effective on 01.09.2008. An employee, on completion of 10 years, 16 years and 26 years’ continuous satisfactory service, according to such Government order, is entitled to get 1st, 2nd and 3rd financial up-gradation to his promotional

post. The promotional post of the petitioner is Junior Engineer (Mechanical).

As per Govt. Order dated 08.03.2011 and Govt. Order dated 25.02.2014, the petitioner was entitled and eligible for the benefit of 1st and 2nd ACP of the promotional post of Junior Engineer in grade pay of Rs.4600/- and Assistant Engineer grade pay of Rs.5400/- since 01.09.2008 and 19.09.2013 respectively. Instead, respondents department granted ACP grade pay of Rs.2400/- and grade pay Rs.2800/-, as benefit of 1st and 2nd ACP respectively, as per general pay scale/ grade pay, mentioned in the list of enclosure of G.O. dated 17.10.2008.

Hon'ble High Court of Uttarakhand allowed the Writ Petition No. 86/2001 of Sri Jainer and permitted him to draw the pay scale of Junior Engineer (Mechanical) *vide* order dated 19.10.2011. In compliance of the same, respondents allowed Sri Jainer pay scale of Junior Engineer (Mechanical), Assistant Engineer and Executive Engineer on completion of 14 years, 24 years and 26 years of continuous satisfactory service respectively. In another W.P. (SS) No. 1575/ 2011, Hon'ble High Court of Uttarakhand directed *vide* judgment and order dated 07.10.2013 to treat all Tube Well Technicians, Section *Mistri* and *Mistri* at par. On 11.11.2013, Hon'ble High Court of Uttarakhand decided W.P. (SS) No. 1187 of 2013 in terms of W.P. (SS) No. 1575/2011. When benefit of promotional post of Junior Engineer (Mechanical) was given to Sri Jainer, then the petitioner filed W.P. SS No. 1128/2013 before Hon'ble court for the selfsame benefit. Hon'ble High Court, *vide* judgment dated 31.08.2013, directed the respondents to decide the representation of the petitioner. *Vide* office order dated 13.11.2013, respondent no.2 dismissed the representation of the petitioner on 25.04.2016. The petitioner again requested the respondents to allow him the benefit of ACP of promotional post of Junior Engineer, but respondent no.2, *vide* letter dated 25.04.2016,

replied that the matter will be considered on completion of his 20 years of service.

Thereafter, petitioner filed claim petition No. 25/DB/20-16 before this Tribunal for the following reliefs:

“Quash the impugned order dated 13.11.2013 and issue an order or direction to the concerned respondents to grant/sanction the pay and pay scale of the post of Junior Engineer (Mechanical) viz pay band Rs.9300-34800 with grade pay 4600 w.e.f. 01.09.2008 in place of pay scale 5200-20200 grade pay 2400 as a first ACP and further granted pay and pay scale of the next promotional post of A.E. viz pay band Rs.93-34800 grade pay 4800 since 19.09.2013 in place of pay scale Rs.5200-20200 grade pay 2800 as a benefit of IInd ACP and further accordingly pay the arrears of difference of salary to the petitioner together with interest @ 12% per annum for the date of accrual till the actual date of payment.”

Claim petition No. 25/DB/2016 was disposed of *vide* order dated 28.06.2018 as follows:

“Petitioner is, accordingly, directed to move fresh representation indicating therein that he is entitled to the benefit of G.O. dated 06.11.2013 (Annexure: A 16), before Respondent No.2, within two weeks. Respondent No.2, thereafter, is directed to decide such representation of the petitioner, strictly in the light of G.O. dated 06.11.2013, by a reasoned and speaking order, at an earliest possible, but not later than eight weeks of presentation of certified copy of this order, along with copy of representation, enclosing a copy of G.O. dated 06.11.2013.”

Such representation of the petitioner was dismissed by Superintending Engineer, Respondent No.2, *vide* Office Memorandum dated 21.08.2018 (copy: Annexure- A 1). Hence, present claim petition.

3. C.A./W.S. has been filed on behalf of respondents. It has been averred, in the W.S., that the petitioner does not fulfill the eligibility criteria of educational qualification for recruitment by promotion to the post of Junior Engineer (Mechanical), as per Uttarakhand Subordinate Engineers (Mechanical) Irrigation Department Service Rules, 2018 (for short, Rules of 2018) (Copy: Annexure-1), which became effective on 02.04.2018. Rules of 1992 are not applicable for the relief sought in present claim petition. Criteria for recruitment by promotion to the post of Junior Engineer (Mechanical) is governed by the Rules of 2018, and not by any other Rules.

4. The petitioner has passed the High School Examination in 1990 and also possesses wireman permit given on 26.02.2005 for carrying out electrical wiring only with the restriction that he cannot supervise the work. Since the petitioner does not possess the required educational qualification mentioned above, therefore, he is not eligible for being considered for recruitment by promotion to the post of Junior Engineer (Mechanical) in terms of Rule 8; part 4 of the Rules of 2018. The Uttarakhand Government *vide* G.O. dated 08.03.2011 started Assured Career Promotion Scheme for the State Government servants of all categories *w.e.f.* 01.09.2008 for employees holding posts up to grade pay Rs.4800/- in pay band 7500-12000/- and *w.e.f.* 01.01.2006 for posts of grade pay Rs.5400/- in pay band 8000-13500/- and higher. Under this scheme, the employees serving on the post of direct recruitment were to be given three financial up-gradation benefits after 10,18 and 26 years of continuous satisfactory service from their first regular appointment. Later, the benefits were modified in terms of service period *vide* G.O. dated 01.07.2013, whereby the benefits were to be given after 10,16 and 26 years of continuous service, instead of 10,18 and 26 years, as was done earlier.

5. According to the respondents, the petitioner, who was appointed on the post of *Mistri* (pay band Rs.5200-20200/- grade pay Rs.1900, in Group-‘C’ Services in the Irrigation Department on 19.09.1997, has

misinterpreted the provisions of G.O. dated 08.03.2011 and dated 06.11.2013 for his own vested interest and has wrongly claimed for him the 1st ACP benefit for the post of Junior Engineer (Mechanical) since 01.09.2008, i.e., pay band Rs.9300-34800/- grade pay Rs.4600/- and subsequently thereafter, the 2nd ACP benefits for the post of Assistant Engineer (mechanical) since 19.09.2013, i.e., grade pay Rs. 5400/-. The petitioner does not fulfill the criterion of educational qualification for recruitment by promotion to the post of Junior Engineer (Mechanical), prescribed in Rule 8; Part 4 of the Rules of 2018, which requires a candidate to hold Diploma/ National Certificate in Mechanical/ Electrical Engineering from a recognized University or institute for recruitment by promotion to the post of Junior Engineer (Mechanical) besides having other eligibility criteria. The petitioner having only passed High School examination, is not eligible for being considered for recruitment by promotion to the post of Junior Engineer (Mechanical) in terms of Rule 8; Part 4 of the Rules of 2018 and for this reason, the petitioner is not eligible to claim consequential benefits of ACP.

6. Thus, as is clear from the above, as per respondents' W.S., for recruitment by promotion to the post of Junior Engineer (Mechanical), educational qualification as prescribed in Rule 8; Part 4 of the Rules of 2018 is required to be fulfilled and, as such, the post of Junior Engineer (Mechanical) cannot be considered as the promotional post for the purpose of giving ACP benefit to the employees working on the post of *Mistri* (pay band Rs.5200-20200/- grade pay Rs.1900/) in Group-'C' Service in the Irrigation Department. Therefore, the petitioner, who had been working on the post of *Mistri* since 19.09.1997, where no promotional post was available in the cadre, was eligible for getting the financial up-gradation benefits under the ACP scheme as per the provisions of Government Orders dated 08.03.2011, dated 01.07.2013, dated 06.11.2013 (Copy: Annexure- 4) and dated 28.11.2017 (Copy: Annexure-5). Consequentially, the petitioner *Mistri's*, grade pay was increased from Rs.1900/- to Rs.2400/- , i.e., the next grade pay level in

the pay band Rs.5200-20200/- after completion of 10 years' service on 01.09.2008. Similarly, after completion of 16 years' service as *Mistri* on 19.09.2013, his grade pay was increased to next higher level from Rs.2400 to Rs.2800 in the pay band of Rs.5200-20200/-. Thus, the petitioner has been given all the ACP benefits, as were due to him, according to the rules and his demand of grade pay Rs.4600/- in the pay band of Rs.9300-39800/- for the post of Junior Engineer (Mechanical) to be given w.e.f. 01.09.2008, and thereafter grade pay Rs.5400/- of the post of Assistant Engineer (Mechanical) since 19.09.2013 as the 1st and 2nd ACP benefits respectively, are completely unjustifiable and hence, vehemently denied by the respondents.

7. The representation of the petitioner has been properly decided by the respondents *vide* their orders dated 13.11.2013 and 21.08.2018 in terms of law, but the petitioner's incessant demands for claiming undue benefits from the respondents is based on mutilated facts and misinterpretation of Service Rules and Government Orders regarding ACP. The petitioner's claim for giving him ACP benefits equivalent to the post of Junior Engineer (Mechanical) and Assistant Engineer (Mechanical) is untenable in the eyes of law, according to respondents.
8. The recruitment for the post of Junior Engineer (Mechanical) in the Irrigation Department, Uttarakhand is done by two sources, i.e., direct recruitment and promotion. As mentioned in Rule 5(1); Part 3 of the Uttarakhand Subordinate Engineers (Mechanical) Irrigation Department Service Rules, 2018, 65 percent direct recruitment on the post is done through the Uttarakhand Public Service Commission, while 10 percent recruitment from the promotion of Group-'C' Service employees of Irrigation Department Uttarakhand, 1% recruitment from the technicians working in the Irrigation workshop and rest 24% recruitment from Tube Well *Mistris*. In all the recruitment sources through promotion, the basic eligibility criterion of educational qualification is Diploma/ National Certificate in Mechanical/ Electrical Engineering from a recognized University or institute as mentioned in

Rule 8; Part 4 of the Service Rule, 2018, which is compulsory. As the recruitment by promotion to the post of Junior Engineer (Mechanical) requires eligibility/ higher educational qualification/ merit along with seniority-cum-suitability, therefore, the post of Junior Engineer (Mechanical) (pay band Rs.9300-39800/- grade pay Rs.4600/-) in the Irrigation Department of Uttarakhand is not a post of promotion for the post of *Mistri* (pay band Rs.5200-20200/- grade pay Rs.1900) in Group- 'C' Service and for the purpose of seeking ACP benefits to be given to *Mistris*, the post of promotion is not available for them due to the conditions imposed in Rule 5(1); Part 3 of the Service Rules, 2018 and as per the eligibility criterion of Rule 8; Part 4 Service Rules, 2018, as also the provisions stipulated in G.Os. dated 06.11.2013 and dated 28.11.2017. The petitioner, having only passed High School, is not eligible for being considered for recruitment by promotion to the post of Junior Engineer (Mechanical) in terms of Rule 8; Part 4 of the Uttarakhand Subordinate Engineers (Mechanical) Irrigation Department Service Rules, 2018 and, for this reason, the petitioner is not eligible to claim any consequential benefit of ACP as per clarifications made in this regard in the G.O. dated 28.11.2017. However, the petitioner, getting grade pay Rs.1900/- in pay band Rs.5200-20200/- since his recruitment to the post of *Mistri* on 19.09.1997, is entitled to get next grade pay Rs.2400/- in the pay band Rs.5200-20200/- after completion of 10 years' service on 01.09.2013. The petitioner has already been given all the ACP benefits, as were due to him, according to the Rules of 2018, G.Os. dated 06.11.2013 and dated 28.11.2017. That is why, demand of grade pay Rs.4600/- in the pay band Rs.9300-39800/- of the post of Junior Engineer (Mechanical) to be given since 01.09.2008 as the 1st ACP benefit and thereafter grade pay Rs.5400 of the post of Assistant Engineer (Mechanical) since 19.09.2013 as the 2nd ACP benefit is irrational and hence, vehemently denied by the respondents.

9. The gravamen of respondents' pleading and submissions, as projected by Ld. A.P.O., is that the U.P. Irrigation Department Mechanical Engineers (Subordinate) Service Rules, 1992 (for short,

Rules of 1992) are not applicable to the petitioner. Defending departmental action, the submission of Ld. A.P.O. is that the Uttarakhand Subordinate Engineers(Mechanical) Irrigation Department Service Rules, 2018 (for short, Rules of 2018) are in force *w.e.f.* 02.04.2018. The petitioner is still in service, and therefore, Rules of 2018 are applicable on him. Ld. A.P.O. has gone a step further by arguing that the petitioner does not fulfill the eligibility criteria of educational qualification for recruitment by promotion to the post of Junior Engineer (Mechanical).

10. According to Ld. A.P.O., this Tribunal, *vide* ordered dated 28.06.2018, in claim petition No. 25/DB/2016, had directed the respondent no.2 to decide the representation of the petitioner strictly in the light of G.O. dated 06.11.2013 (Copy: Annexure- A16 of claim petition no. 25/DB/16), by a reasoned and speaking order. It is the submission of Ld. A.P.O. that the respondent no.2 has dismissed the representation of the petitioner by a reasoned and speaking order *vide* office order dated 21.08.2018 (Annexure: A 1). According to Ld. A.P.O., the grounds for dismissing the representation of the petitioner have been enumerated at Page No. 2 of the above order, which is under challenge in present claim petition.

11. Ld. A.P.O. also submitted that the decisions of Ghanshyam Singh Jainer and office orders relating to Ram Kishan and Sushil Kumar (Copies of orders enclosed as Annexure- A 22) have no bearing on the merits of present claim petition, and therefore, the claim petition should be dismissed with costs.

12. *Per contra*, Ld. Counsel for the petitioner submitted the following:

- i. Rules of 1992, and not Rules of 2018 are applicable to present claim petition. The petitioner was granted benefit of 1st ACP on completion of 10 years of satisfactory service *w.e.f.* 01.09.2008 and he was given benefit of 2nd ACP since 19.09.2013. Since the petitioner is claiming benefit of ACP of

promotional post *w.e.f.* 01.09.2008 and 19.09.2013, on which date Rules of 1992 only were applicable, therefore, Rules of 2018 will not be applicable to the petitioner's case. It has been indicated in Rule 1 of the Rules of 2018 itself that such Rules shall come into force with immediate effect, i.e., the date of order, which is 02.04.2018, which means that the same would operate prospectively, and not retrospectively.

- ii. Petitioner and Sri Jainer, both were working in the same department as *Mistris* in Irrigation Research Institute. Both had similar technical qualification, as mentioned in Rule 5(4) of Rules of 1992. Whereas, Sri Jainer has been granted benefit of ACP for promotional post of Junior Engineer (Mechanical) with the intervention of the Hon'ble Court, the petitioner has been denied such relief.
- iii. Ld. Counsel for the petitioner further pointed out that Annexure: A 22 would reveal that similarly placed *Mistri* Ram Kishan has been granted benefit of 3rd ACP on 21.01.2016 of grade pay Rs.4600/- of promotional post of Junior Engineer (Mechanical). Similarly placed another *Mistri* Sushil Kumar has been given benefit of ACP of grade pay Rs.4600/- on 21.12.2017. It is the submission of Ld. Counsel for the petitioner that the petitioner should not be deprived of the benefit which has been granted to similarly placed *Mistris* in the Irrigation Department, may be of different Divisions.
- iv. Although a direction was given by this Tribunal, on 28.06.2018 that the representation of the petitioner shall be decided strictly in accordance with Government Order dated 06.11.2013, but the said G.O. has not been applied, in case of the petitioner, in proper perspective. Ld. Counsel or the petitioner submitted that although it is mentioned in the order impugned that no post of promotion of *Mistri* is available in the department, yet, in fact, promotion has been

given to Sri Sushil Kumar, *Nalkoop Mistri* on the post of Junior Engineer (Mechanical), which fact has been expressively mentioned in the order dated 21.12.2017 of the department. Thus, according to Ld. Counsel for the petitioner, there is contradiction in the contents of the documents of the department itself.

- v. Although a ground has been taken, while dismissing the representation of the petitioner, that criteria for promotion on the post of Junior Engineer (Mechanical) is merit-cum-seniority, but Government Order dated 17.06.2010 (Annexure: A 21) issued by Joint Secretary to the Government in Irrigation Department and addressed to Chief Engineer/HOD, would reveal that the criteria for promotion to the post of Junior Engineer (Mechanical) is 'seniority subject to rejection of unfit', under the Rules of 1992. There is a reference of departmental examination in Rule 5(4) of the Rules of 1992. The petitioner had undertaken such an examination in 2010, result of which was declared on 22.03.2014, in compliance of the orders of Hon'ble High Court, in which the petitioner was declared successful (Copy of office order enclosed as Annexure: A23).

13. First and foremost, the question which arises for consideration of this Court is— whether Rules of 1992 or Rules of 2018 will be applicable to the claim petitioner? Whereas, Ld. Counsel for the petitioner would argue that the Rules of 2018 would be applicable on fresh cases, and not on those cases which were dealt with earlier under the Rules of 1992, it is the submission of Ld. A.P.O. that the Rules of 2018 would be applicable to present claim petitioner. An indication has been given in the Rules of 2018 that the same will come into force with immediate effect, which means the same will have future operation and would run prospectively. Annexure: R-1 would reveal that the Rules of 2018, would come into effect on 02.04.2018. Present claim petitioner was

inducted into service earlier. He was given benefit of 1st ACP on completion of 10 years of satisfactory service w.e.f. 01.09.2008. He was given benefit of 2nd ACP since 19.09.2013. He has been claiming benefit of ACP for promotional post of Junior Engineer (Mechanical) under the Rules of 1992. Since then he has been harnessing his cause continuously under the old Rules. Had he been pursuing his remedy when new Rules came into force, the situation would have been different. In such a situation, the question would be, whether the petitioner would be governed by the Rules of 2018? It may be noticed here that the Rules of 1992 have been changed in the year 2018. The petitioner has been playing the game under the Rules of 1992. He has been granted benefit of two A.C.Ps. earlier. He has been claiming benefit of ACP for promotional post of Junior Engineer (Mechanical) much before the Rules of 2018 came into force. The petitioner should, therefore, be governed by the Rules of 1992, in so far as the grant of benefit of ACP for promotional post of Junior Engineer (Mechanical) is concerned, in the considered opinion of this Court.

14. The respondent department seems to have considered the representation of the petitioner on the principal premise, among others, that the Rules of 2018 only would be applicable on present petitioner. In the order impugned, it has been indicated that no post of promotion of *Mistri* is available in the department, but the documents brought on record would reveal that one Sushil Kumar, Nalkoop Mistri has been granted promotion on the post of Junior Engineer (Mechanical), *vide* order dated 21.12.2017. There appears to be contradiction in the documents of the department itself. It appears that the respondent department has misdirected/ misapplied itself while deciding the representation of the petitioner, in accordance with law.

15. Like cases should be decided alike. Petitioner, in the given facts of the case, seems to be victim of discrimination, which is anathema to Article 14 of the Constitution of India. The decision to apply Rules of 2018 on the petitioner appears to be arbitrary. The respondents have

discriminated against the petitioner by according the same benefit to similarly situated persons but denying the selfsame benefit to the petitioner. Equals cannot be treated unequally. The recommendations for grant of benefits of ACP for promotional post of Junior Engineer (Mechanical) are to be applied uniformly without any discrimination. There cannot be any pick and choose policy, on the same facts and amongst similarly placed employees. Benefit that has accrued under the existing rules, cannot be presumed to be taken away by an amendment with retrospective effect and no statutory rule or administrative order can be interpreted to whittle down or destroy any right which has become crystallized. No rule is presumed to be framed under the proviso to Article 309, which affects or impairs the vested rights. [R.S.Ajara vs. State of Gujrat, (1997) 3SCC 641 (Para 16); Chairman Railway Board vs. C.R. Rangadhamaiah, (1997) 6 SCC 623 (Para 20 and 24)].

16. History of discrimination meted out to the petitioner can be traced back from the date of filing of Writ Petition No. 25611 of 1996 by Sri Jainer, parity with whom is claimed by present claim petitioner. In Jainer's decision dated 27.07.1999, Hon'ble High Court of Judicature at Allahabad directed as under:

“In such circumstances, in case the petitioner fulfills the prescribed qualification and comes within the scope and ambit of Sub-rule(4) of Rule 5 in that event, in case of vacancy exists, the petitioner's case shall be considered against 1% quota within the scope of and ambit of Sub-rule (4) of Rule 5 or such consideration may also be made in future if there is no existing vacancy, as soon such vacancy is available against such 1% quota and in either case having regard to all other similarly situated candidates in the Irrigation Department.”

17. The aforesaid decision remained unchallenged and, therefore, the same was complied with by the respondent department on 25.04.2000. In other words, Annexure: A-7 received due compliance *vide* Annexure:

A-8. The selfsame petitioner filed another writ petition (WPSS No. 86/2001) in Hon'ble High Court of Uttarakhand at Nainital, in which a direction was given on 19.10.2011 (Annexure: A-9), as below:

“For what has been stated above, it is clear that the order dated 24.07.2000 passed by the Allahabad High court had attained finality and that the impugned orders have been passed against the principles of natural justice and fair play as the petitioner was not given any opportunity before recalling the order, granting promotional pay scale to the petitioner. Therefore, the impugned orders are liable to be set aside.

The writ petition is allowed. The impugned orders are set aside. The respondents are directed to pay to the petitioner the promotional pay scale as per Order dated 04.12.2000. Costs easy”.

18. In W.P.SS No. 1575/ 2011, the question came up before Hon'ble High Court of Uttarakhand as to whether Section *Mistri* and *Nalkoop Mistri* are two different posts and whether there are available channels of promotion for Section *Mistri*? In Counter Affidavit, the respondent department submitted that the persons who were promoted as *Nalkoop Mistri*, but were shown as Section *Mistri/ Mistri*, are to be treated as *Nalkoop Mistri*. A direction was, therefore, given *vide* order dated 07.10.2013 (Annexure: A 10) to treat all *Nalkoop Mistris/ Section Mistris* and *Mistris* at par. In another writ petition being WPSS No. 1187 of 2013, decided on 11.11.2013 (Annexure: A-11), the same question, which cropped up before Hon'ble High Court of Uttarakhand, was answered in the same manner, in which it was replied in WPSS No. 1575/11.

19. Further, Annexure: A-22 would indicate that fellow technician Ram Kishan was granted benefit of ACP for promotional post of Junior Engineer (Mechanical) on 21.01.2016 (Copy: Annexure- A22). The matter did not stop here. Another fellow technician Sushil Kumar,

Nalkoop Mistri was also granted the same benefit of ACP for promotional post of Junior Engineer (Mechanical), *vide* order dated 21.12.2017 by the Irrigation Department (Copy: Annexure- A 22 Colly).

20. The question, therefore is— whether petitioner can be subjected to discrimination? Whereas his colleagues, on similar facts, have been granted benefit of ACP for promotional post of Junior Engineer (Mechanical), whether he should be denied benefit of such ACP merely on the ground that the Rules of game have changed in the year 2018? Anybody who is a student of constitutional law, would reply that the petitioner should not be discriminated against, for, his colleagues, with identical facts, have been granted benefit of ACP for promotional post of Junior Engineer (Mechanical). Whereas one colleague got it with the intervention of Hon'ble Court, the others got the same through office orders. Why should the same treatment be not given to the petitioner?
21. One last point regarding the educational qualification of the petitioner. Plea has been taken in the written statement that the petitioner does not fulfill the required educational qualification. We have already indicated above that the petitioner would be governed by the Rules of 1992, in so far as grant of ACP for promotional post of Junior Engineer (Mechanical) is concerned. A Government Order dated 17.06.2010 (Annexure: A 21) was issued by Joint Secretary to the Government in Irrigation Department and addressed to Chief Engineer/ HOD, which seeks explanation regarding grant of promotional pay scale to *Nalkoop Mistris*. It has been clarified, in the said G.O., that criteria for promotion to the post of Junior Engineer (Mechanical) is 'seniority subject to rejection of unfit' and not 'merit-cum-seniority', as propounded by the respondents in the instant case. It may again be argued that Annexure: A-21 was issued on the matrix of Rules of 1992 and we uphold the spirit of such an argument that Annexure: A-21 was, indeed, issued considering the provisions of Rules of 1992 but we have already held, considering the peculiar facts of the case that the petitioner's matter would be governed by the Rules of 1992 and not the

subsequent Rules of 2018. It will not be out of place to mention here that the petitioner has requisite qualification, if his case is considered on 'seniority subject to rejection of unfit' for grant of ACP for promotional post of Junior Engineer (Mechanical).

22. This Tribunal is, therefore, inclined to hold as below:

- i. Petitioner's matter, in the given facts, shall be governed by the Rules of 1992 and not under the Rules of 2018.
- ii. Criteria for grant of promotion to the petitioner on the post of Junior Engineer (Mechanical) is 'seniority subject to rejection of unfit' and not 'merit-cum-seniority'.
- iii. The petitioner should be granted benefit on the ground of parity with similarly placed *Mistris* and Technicians.
- iv. The respondent-department has misdirected/ misapplied itself while deciding the representation of the petitioner. [In fact, the respondent department is not wholly responsible for the same. Part- responsibility lies with this Tribunal also, who, while passing the order on 28.06.2018, should have clarified that the petitioner's matter should be considered under the old Rules of 1992. This was not done probably because this Tribunal never conceived that if the same is not mentioned, it will result in miscarriage of justice to the petitioner. Even the petitioner did not pray, at that point of time that such a clarification be given, while passing the order dated 28.06.2018].

23. Order accordingly.

24. The claim petition is allowed. Impugned order dated 21.08.2018 is hereby set aside. Respondent No.2 is directed to issue fresh Office Memorandum within a period of 12 weeks from the date of presentation of certified copy of this order before the authority concerned, in the light of the above, on the premise that the petitioner would be governed by the Rules of 1992 and not under the Rules of 2018; his case would be governed by the principle of 'seniority subject

to rejection of unfit' and not 'merit-cum-seniority'; he should be granted benefit of ACP promotional pay scale of Junior Engineer (Mechanical) in the same manner in which similarly placed persons namely, Sri Ghanshyam Singh Jainar, Sri Ram Kishan and Sri Sushil Kumar were given and the petitioner holds educational qualification for such promotional post. No order as to costs.

(A.S.NAYAL)
MEMBER (A)

(JUSTICE U.C.DHYANI)
CHAIRMAN

DATE: APRIL26 , 2019
DEHRADUN

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