

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

Present: Hon'ble Mr. Ram Singh

-----Vice Chairman (J)

Hon'ble Mr. Rajeev Gupta

-----Vice Chairman (A)

CLAIM PETITION NO. 21/DB/2020

Subhash Dandriyal.

.....Petitioner.

vs.

1. State of Uttarakhand through its Secretary, Horticulture, Uttarakhand Secretariat, Dehradun.
2. Director, Sericulture Directorate, Premnagar, Dehradun.
3. Mahendra Kumar Arya, presently posted as Inspector, Sericulture through H.O.D., Directorate, Premnagar, Dehradun.
4. Devendra Kumar, presently posted as Inspector, Sericulture through H.O.D., Directorate, Premnagar, Dehradun.

.....Respondents.

Present: Sri Sunil Dhyani and Sri Manoj Raturi, Advocates, for the Petitioner.

Sri V.P.Devrani, A.P.O., for the Respondents No. 1 & 2.

Sri Moin Hyder and Mohd. Muzammil, Advocates, for Respondents No. 3.

JUDGMENT

DATED: APRIL 07, 2021

Hon'ble Sri Rajeev Gupta, Vice Chairman (A)

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

“(A). To issue an order and direction to quash/to set aside the impugned final seniority list dated 14.12.2017 (Annexure A1) to the claim petition and impugned order dated 17th July 2018 (Annexure No. A2) to the claim petition issued by the respondents No. 1 & 2 respectively declaring the same null & void along with all consequential orders.

(B) To direct the respondents/department to modify/ correct/ redraw the impugned seniority list dated 14.12.2017 so far it relates to the inter-se seniority of the petitioner vis-à-vis private respondents No. 3 & 4 who are shown senior in the impugned seniority list dated 14.12.2017 at serial no. 1 & 8 by treating the petitioner senior to these private respondents as per principle of

catch-up seniority Rules by placing the name of the petitioner above the names of respondents No. 3 & 4 in the impugned seniority list further keeping in view the provision of service Rules 2016 with special emphasis Rule 6 and its explanation of U.K. Govt. Seniority Rules, 2002.”

2. The claim petition briefly states as follows:

The petitioner belonging to the General Category was initially appointed on the post of Demonstrator Sericulture, in the pay scale of Rs. 3050-4590, in the Sericulture Department of erstwhile State of U.P. He joined the service on the said post on 08.12.1987. The seniority list of Demonstrator cadre was issued after creation of State of Uttarakhand, in which, petitioner's name was placed above the names of private respondents No. 3 & 4. Private respondents No. 3 & 4 belonging to S.C. category, were initially appointed as Demonstrator Sericulture, much after appointment of the petitioner on 27.06.1990 and 28.04.2000 respectively. Hence, the petitioner was senior to them in the feeding cadre of Demonstrator Sericulture.

The services of the petitioner as well as of the private respondents No. 3 & 4 are governed by the Rules known as 'Uttarakhand Sericulture Development Subordinate (Technical) Service Rules, 2016' (hereinafter called as Service Rules of 2016). As per Rule 5 of the Service Rules of 2016, the posts of Inspector Sericulture are filled 50% by promotion from the eligible Demonstrators who have completed 5 years' satisfactory service and the rest 50% are filled by the recruitment through Public Service Commission.

On the basis of the above criteria, the private respondents No. 3 & 4, due to reservation policy, got accelerated promotion on the next higher promotional post of Inspector Sericulture on 23.01.2006 and 21.01.2008 respectively under Schedule Caste quota from the initial feeding post of Demonstrator. The petitioner got promotion on the post of Inspector Sericulture under General Category vide order dated 02.11.2012 and he joined this post on 04.11.2012. Under Rule 5 of the Service Rules of 2016, there was a single feeding cadre for promotion i.e. Demonstrator to

the next higher promotional post i.e. Inspector Sericulture, to which, petitioner as well as private respondents No. 3 & 4 belonged. The provision of Rule 6 and its explanation (proviso) of the Uttaranchal Government Servant Seniority Rules, 2002 (hereinafter referred to as 'Seniority Rules of 2002') are applicable for fixation of *inter-se* seniority of petitioner *vis-à-vis* private respondents No. 3 & 4, which has been totally ignored by the respondent department in preparation/issuance of final seniority list dated 14.12.2017. According to this Rule, the petitioner will regain his seniority over Respondents No. 3 & 4 after his promotion to the post of Inspector Sericulture.

The respondent department violated the mandatory provisions of Rule 6 and its explanation for fixation of seniority by placing Respondents No. 3 & 4 above the petitioner in the final seniority list dated 14.12.2017 of Inspector Sericulture. However, Respondent department has followed Rule 6 and its explanation for fixation of seniority between Shri Arjun Singh shown at Sl. No. 23 and Shri Manoj Singh Jungpangi, shown at Sl. No. 25 in the final seniority list dated 14.12.2017. Petitioner's representation dated 09.07.2018 in this regard was rejected by the Respondent No. 2 vide his letter dated 17.07.2018 (Annexure: A2). The petitioner again made representation dated 19.09.2018 to the respondents for fixation for his seniority above Respondents No. 3 & 4, on which, Respondent No. 1 vide his letter dated 09.10.2018 (Annexure: A9) directed the Respondent No. 2 for examination of the matter and providing report to the concerned/Government. Respondent No. 2 has not taken further necessary action as per Rule and law. Apprehending that respondents are going to promote Respondents No. 3 & 4 to the next higher promotional post of Assistant Director Sericulture, the petitioner has filed this Claim Petition seeking the above mentioned reliefs.

3. Learned A.P.O. objected to the maintainability of the claim petition on the ground inter-alia that the same is barred by limitation. This pointed of limitation was left open to be decided at the time of final hearing.

4. In Counter Affidavit filed on behalf of the respondents No. 1 & 2, it has been submitted that the final seniority list of the post of Inspector Sericulture dated 14.12.2017 is correct and has been prepared by following the procedure as mentioned in Rule 9 of the Seniority Rules of 2002. When the tentative seniority list was issued, the petitioner filed no grievances/objections to the same and, therefore, the petitioner is barred by 'doctrine of waiver' from challenging the final seniority list at this highly belated stage. Rule 6 of the Seniority Rules of 2002 is applicable when the post of promotion is filled from single feeding cadre which is not the case in the present matter as the source of filling the post of Inspector Sericulture is 50% by direct recruitment and 50% by promotion and the final seniority list dated 14.12.2017 has been rightly prepared in accordance with Rule 8 of the Seniority Rules of 2002. The representation of the petitioner dated 09.07.2018 was also rightly decided by the respondent authority vide its speaking order dated 17.07.2018 against the petitioner. According to Rule 8 of the Seniority Rules of 2002, the seniority to the post be determined from the date of 'substantive appointment'. Respondent Nos. 3 and 4 were appointed as Inspector Sericulture on 23.01.2006 and 21.01.2008 respectively, while the petitioner was appointed as Inspector Sericulture on 04.11.2012. The experience and efficiency of the private respondents is superior as compared to those of the petitioner. The judgments of Hon'ble Supreme Court passed in Civil Misc. Writ Petition No. 46258/1991 decided on 12.01.1994, Vinod Sareen vs. Additional Director of Education & others, and another judgment in J.C. Gupta vs. N.K.Pandey & others, AIR 1998 SC Pg. 268 & 654, have held that if seniority is continuing for a long time, it should not be disturbed. The principle laid down in these judgments is very much applicable in the present matter as well. Regarding Shri Arjun Singh's case as mentioned in the Claim petition, it is mentioned in this Counter Affidavit that Shri Arjun Singh's case for promotion was considered in the DPC held in the year 2015-16. But matter of financial irregularity was ongoing against him at that point of time therefore, his sealed cover result of DPC was not opened. Later, Arjun Singh was discharged from charges against him, and then his case for promotion was again considered in the

DPC held on 23.12.2016. Seniority to Arjun Singh was given from the back date when the DPC of 2015-16 was conducted. He was also granted notional promotion from the date, his junior Manoj Singh Jungpangi was promoted. Thus, the facts in the case of petitioner and Arjun Singh are different and not identical. In view of this fact, the benefits of this particular matter cannot be extended to the petitioner.

5. The petitioner has filed Rejoinder Affidavit in respect of the Counter Affidavit filed on behalf of Respondents No. 1 & 2 stating that before finalization of the seniority list dated 14.12.2017, no tentative seniority list has ever been communicated to the petitioner so that he could have put forth objections against the same. Moreover, Respondents have not enclosed proof of the said tentative seniority list to have been received by the petitioner. Thus, the 'doctrine of waiver' is not applicable in his case.

The petitioner has further contended that as per provision of Rule 8(2)(b) of the Seniority Rules of 2002 by virtue of 'catch up' rule, the petitioner will automatically regain his feeding cadre seniority. Petitioner's representation against the seniority list dated 14.12.2017 was firstly given to Respondent No. 2 on 09.07.2008, who rejected the same on illegal, arbitrary and *malafide* grounds and failed to consider the correct position of the law point. Hence, petitioner furnished the representation on legal ground to next higher authority i.e. Respondent No. 1, who took necessary action upon the representation and directed the Respondent No. 2 to consider and examine the case of seniority of the petitioner. Since the Respondent No. 2 has not taken necessary action in pursuance of this Government direction on the representation of the petitioner thus, there is continuing/recurring cause of action to file the present claim petition and the provisions of Limitation are not attracted here. Moreover, it is settled law that on the basis of illegal order, the lawful benefits of an employee cannot be denied. Rejoinder Affidavit further states that the Respondent No. 3, Mahendra Kumar Arya was initially appointed to the post of 'Kitpalak' i.e. post of Group-4 on 19.09.1981 in the pay scale of Rs. 750-940.

As per Service Rules, he should have been promoted to the next higher promotional post i.e. 'Head Kitpalak' in the pay scale of Rs. 775-1050 but illegally was promoted directly on the post of Demonstrator in the pay scale of Rs. 950-1500 by superseding the post of 'Head Kitpalak'. Therefore, the promotion to the post of Demonstrator of Respondent No. 3 is totally illegal, irregular and improper and same is liable to be quashed as he is not legally entitled to get the consequential benefit of seniority to the post of Demonstrator over and above as petitioner as per rule and law.

6. Respondent No. 3 in his Counter Affidavit, has opposed the petition stating that his name is at Sl. No. 1 in the seniority list of Inspector Sericulture but the petitioner who bears jealousy against him on wrong facts, has given an application to the respondents against the seniority list, whose detailed reply was given by Respondent No. 2 to the petitioner on 17.07.2018. The promotion of Respondent No. 3 to the post of Assistant Director Sericulture has been stopped due to wrong action of the petitioner and if he is not promoted before his retirement in December 2020, it will be injustice to him. The respondent No. 2 had informed the petitioner vide his letter dated 17.07.2018 that according to Rule 8(1) of the Seniority Rules of 2002, where according to the Service Rules, appointments are to be made both by promotion and by direct recruitment, the seniority of the persons appointed shall be determined from the date of their 'substantive appointments' and that seniority has been fixed according to this rule.

7. Against the Counter Affidavit of respondent No. 3, the petitioner has filed Rejoinder Affidavit reaffirming the averments of the claim petition and again taking the additional plea of the Respondent No. 3 having been initially appointed as 'Kitpalak' and having been illegally promoted to the post of Demonstrator bypassing the promotional post of 'Head Kitpalak'.

8. Respondent No. 2 has filed Supplementary Counter Affidavit clarifying the position of the direct promotion of respondent No. 3 from the post of 'Kitpalak' to the post of Demonstrator. It is stated that vide G.O. dated 12.08.1987 of the State of U.P., a separate Sericulture Directorate

was established and in the structure of this Directorate, the post of 'Head Kitpalak' was not mentioned. The post of 'Head Kitpalak' came into the structure of Sericulture Department firstly on 25.11.1994 while, Respondent No. 3 was promoted to the post of Demonstrator on 27.06.1990 before the post of 'Head Kitpalak' came in the structure of Sericulture Department. Therefore, Respondent No. 3 was legally promoted to the post of Demonstrator as this was the post available in the structure of Sericulture Department as the next higher promotional post for 'Kitpalak' at that point of time.

9. We have heard learned Counsel for both the sides and perused the record.

10. A perusal of Annexure: A2, vide which respondent No. 2 had rejected the representation of the petitioner against the final seniority list dated 14.12.2017 shows that the basis of rejection is the applicability of Rule 8(1) of the Seniority Rules of 2002 and not of Rule 6 of these Rules. It does not mention that the petitioner did not submit any objections against the interim seniority list circulated earlier. Therefore, it is believable that the interim seniority list was not made available to the petitioner for filing objections against the same. In these circumstances, it cannot lead to waiver of his right to file objections to the final seniority list. As far as the issue of limitation is concerned, we observe that the respondent No. 1 vide his letter dated 09.10.2018 (Annexure: A9) had asked Respondent No. 2 to examine the matter and provide report to the concerned/Government. Official respondents do not seem to have taken any further action, as nothing about the same has been averred in their affidavits or pleaded orally before us. It is, therefore, understandable that the petitioner was waiting beyond 09.10.2018 for the official respondents to take action in the matter and his cause of action was continuing, as the matter was still pending for consideration before the official respondents. The official respondents on the one hand have kept the petitioner waiting for their response and on the other hand, are saying that his claim petition is time barred. This is against the principles of natural justice. We hold that the

petitioner, after waiting for sufficient time for respondents to respond, has filed the petition within reasonable time. Further, the petitioner has also contended that in view of the Covid-19 Pandemic situation later in time and in view of the judgment of the Hon'ble Supreme Court dated 08.03.2021 rendered in Suo Motu Writ Petition (CIVIL) No(s).03/2020, on account of pandemic Covid-19, his petition should be treated in time for consideration. We are of the view that considering all the circumstances and considering the fact that the cause of action is still continuing, the petition is not hit on the point of delay and objections of the respondents in this respect are not allowed.

11. According to learned Counsel for the petitioner, Rule 6/ Rule 8(2)(b) of the Seniority Rules of 2002 will be applicable in the instant case. Learned Counsel for the respondents, on the other hand, submitted that it is Rule 8(1) of such Rules, which will be applicable in the present case. Instead of dealing with the rule position, we are of the view that this Tribunal should discuss the constitutional scheme in such scenario, as has been discussed by us in the judgment dated 28.07.2020, rendered in Claim Petition No. 42/DB/2018, K.C.Peinuly vs. State of Uttarakhand & others. The law laid down by Hon'ble Apex Court on the basis of the same shall override all other statutory interpretations.

**12. 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.

13. Let us turn to the decision of Hon'ble Supreme Court in *S. Pannerselvam 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 at 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 Juneja 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:-

(SCC P. 259, Para 79)

“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](#).”

14. The Hon’ble Apex Court has also observed thus:

“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)

15. 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.

16. 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.*

17. 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."

18. 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 members 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.

19. This Tribunal would like to reiterate the following observations of Hon'ble Apex Court in the landmark decision of *S.Panneerselvam's* case that in the absence of any provision for consequential seniority in the Rules, '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 Hon'ble Apex Court next says that the Division Bench appears to have proceeded on an erroneous footing that Article 16 (4-A) of the Constitution of India automatically gives the consequential seniority in addition to accelerated promotion to the roster point promotees and the judgment of Division Bench cannot be sustained.

20. It will be worthwhile to mention here that the Hon'ble Apex Court had framed two issues while deciding this case and those two issues were, (i)-in the absence of policy decision taken by States/ Rules framed

pursuant to the enabling provisions of Article 16 (4-A) of the Constitution of India, whether a reserved category candidate promoted on the basis of reservation earlier, then his senior general category candidate in the feeding cadre, can claim seniority in the promotional post? And the second question was, (ii)- in the absence of policy decision taken by the State with regard to Tamilnadu Highways Engineering Service Rules, whether the Division Bench was right in holding that Article 16(4-A) of the Constitution of India would give 'consequential seniority' in addition to the accelerated promotion to the roster point promotees and the Hon'ble Apex Court, as we have noted above, have decided, in no uncertain terms, that **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 candidates cannot count their seniority in the promoted category from the date of their promotion and the senior general candidates, if later reach the promotional post, general candidates will regain seniority.**

21. In view of the above, we hold that the petitioner after his promotion to the post of Inspector Sericulture regained his seniority over the Respondents No. 3 and 4 and he should have been placed above these respondents in the seniority list of Inspectors, Sericulture. In the impugned seniority list dated 14.12.2017 (Annexure: A1), the respondent No. 3 is at Sl. No. 1, Respondent No. 4 at Sl. No. 8 while the petitioner's name has been figured at Sl. No. 13. We hereby order that the petitioner be placed at the top of this seniority list so that he is placed above Respondent No. 3 as well as Respondent No. 4. Respondents No. 1 & 2 are directed to modify the impugned seniority list accordingly, within three months from today.

22. The claim petition stands disposed of accordingly. In the circumstances, no order as to costs.

(RAM SINGH)
VICE CHAIRMAN (J)

(RAJEEV GUPTA)
VICE CHAIRMAN(A)

DATE: APRIL 07, 2021
DEHRADUN
KNP