

(2000) 01 DEL CK 0084
In the Delhi High Court
Case No : CW. No. 5434 of 1997

Rajinder Tiku

APPELLANT

Vs

Union Public Service Commission Delhi Vidyut Board

RESPONDENT

Date of Decision : 21-01-2000

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2000) 3 AD 73 : (2000) 84 DLT 369 : (2000) 53 DRJ 110

Hon'ble Judges : K. Ramamoorthy, J

Bench : Single Bench

Advocate : Mr. Rakesh Tiku, for the Appellant; Ms. Anjana Gosain, Mr. Rakesh Tiku and Mr. S.C. Vats, for the Respondent

Judgement

K. Ramamoorthy, J.—The writ petitioner presented the writ petition on the 5th of December, 1997 praying for the following reliefs:-

"That in view of the submissions made above, it is most respectfully prayed as under:-

(a) that your lordship may be pleased to issue a writ of prohibition thereby restraining the respondents, its officials etc., from in any manner making promotions to the post of Superintending Engineer at respondent No. 2 except in accordance with the seniority as given in the Office Order dated 15.07.93 (Annexure P-5 to the writ petition) and your lordship may also be pleased to issue a writ of mandamus thereby directing the respondents to forthwith regularise the services of the petitioners and other likewise situated at the level of Executive Engineer."

2. Later on, the writ petition was amended and in the amended writ petition, the petitioner had prayed for the following reliefs:-

"That in view of the submissions made above, it is most respectfully preyed as under :-

(a) That your lordship may be pleased to issue a writ of prohibition thereby restraining the respondents, its officials etc., from in any manner making promotions to the post of Superintending Engineer at respondent No.2 except in accordance with the seniority as given in the office order dated 15.7.1993 (Annexure P-5) to the writ petition and your lordship may also be pleased to issue a writ of mandamus thereby directing the respondents to forthwith regularise the services of the petitioner and other likewise situated at the level of Executive Engineer.

b) Without prejudice to the aforesaid prayer, Your Lordship may be pleased to hold that while fixing the seniority at the level of Executive Engineers, the respondent No. 2 is bound to consider the inter-se seniority position of the petitioner and the respondent No.3 at the entry/feeder level of Assistant Engineer and it be held that in that regard the respondent No.3 cannot take advantage of any alleged accelerated promotion from the post of AE to AEE, which accelerated promotion purported to have been done in, is otherwise illegal, non-est and arbitrary."

3. The petitioner and the third respondent claim to be considered for the post of Superintending Engineer. While the petitioner claims that he is senior to the third respondent the third respondent claims that he is senior to the petitioner. The third respondent claims that he is senior to the petitioner. The third respondent claims that he belongs to a Scheduled Caste category.

4. A few facts, relevant for the discretion, can be noticed in the following terms.

5. In the Delhi Vidyut Board, which was previously under the control of the MCD, there was a cadre of Assistant Engineers. The next promotion post was the cadre of Assistant Executive Engineers. The next higher post is Executive Engineer. The officers holding the posts of Executive Engineers are eligible to be considered for promotion to the post of Superintending Engineer. After the formation of the Delhi Vidyut Board, the officers working in the erstwhile DESU were taken over by the second respondent Delhi Vidyut Board.

6. On the 21st of November, 1975, the petitioner joined the DESU (now Delhi Vidyut Board) as Assistant Engineer. On the 14th of August, 1980, the petitioner was regularised in the post of Assistant Engineer. As per the rules then in existence, the post of Assistant Engineer was classified as a post in Group "B". The post of Assistant Executive Engineer was classified to come in Group "A". In the year 1982, when there was a dissolution of the Municipal Council, the Commissioner of MCD, exercising power u/s 490(2)(b) of the DMC Act, 1957, issued proceedings u/s 96 of the MCD Act, 1957 bringing amalgamation of the two cadres, i.e., Assistant Engineers and Assistant Executive Engineers. The order issued by the Commission of MCD was of 22.6.1982 and the same reads as under :-

"The Commissioner, MCD, exercising the Powers of the Corporation u/s 490(2)(b) of the DMC Act, 1957 vide item No.2525 dated 21.6.1982 has approved as

under:-

(1) The Scale of pay of the Employees/Officers be revised w.e.f. 1.1.1978 as detailed below.

(a) Group "C" and "D" employees is in Annexure-I.

(b) Engineers/ Technical Officers as in Annexure-II.

(c) Non-technical officers as in Annexure-III.

(ii) Dearness allowance shall be payable to the officers/employees at the rates specified by the Central Government from time to time subject to the condition that the element of Additional Dearness Allowance merged in the pay at 320 points of price index as shown in column 4 of the Annexure-IV shall be excluded from pay for the purpose of payment of DA/ADA.

(iii) The post of Dy.Chief Engineer be upgraded as Additional Chief Engineer with immediate effect. (With this upgrading the cadre of Dy. Chief Engineer will cease to exist).

2. That basis of the pay fixation in the revised scales will be the pay drawn by an employee in Sivasankar Committee scales of pay in the case of Engineers/ Generation Engineers and Supervisors and the Departmental Committee's scales of pay in the cases of other officers/employees.(Details given in Annexure-V).

3. In cases where the existing scale is different from those mentioned above, the scale corresponding to the above mentioned scale will be notionally devised for purposes of fixation of pay in the revised scale.

4. In case an employee has opted for the Third Pay Commission scale, the presumptive pay that he would have drawn in the Sivasankar Committee scale would form the basis. In case, however, where employees are drawing their pay in the Third Pay Commission Scales of which the Sivasankar Committee Scales of Pay/Departmental Committee's scales of pay do not exist, scales of pay corresponding to the above mentioned scales would be notionally devised for purposes of fixation of pay in the revised scales.

5. The payment already made with reference to the Third Pay Commission scales or the payment which is still to be made for the period 1.1.1973 to 30.6.1981 shall not be affected in any way by revising the scales of pay w.e.f. 1.1.1981. Excess amount, if any, paid or payable w.e.f. 1.1.1981 on this account will, however, be adjusted against the arrears which might become, payable in the revised scales of pay w.e.f. 1.7.1981.

6. In cases where promotions were made from Class III to Class II/class I posts during the period 1.1.1973 to 30.6.1981 and pay fixation has been pending because of non-availability of Third Pay Commission scales of pay for Class III post, the official will have to opt either:

(i) Third Pay Commission scale, in which case his pay will be fixed initially in the

corresponding Third Pay Commission scale of the lower post and pay fixed in the Third Pay Commission scale of the promotion post; or

(ii) to draw pay in the Sivasankar Committee scale attached to the promotion post.

7. Actual benefit of revision of scales will be given from 1.7.1981. However, increment in the revised scales as per the pay fixation formula will be allowed after the initial pay fixation as on 1.1.1988. Increased emoluments would thus be payable only with effect from 1.7.1981 and non-arrears for the period 1.1.1978 to 30.6.1981 shall be paid.

8. Although the pay scale of Assistant Engineer/Assistant Executive Engineer is the same, separate cadres of Assistant Engineer and of Assistant Executive Engineer will be maintained, but no increment will be granted at the time of promotion as the promotion would be in the same pay scale.

9. Selection Grade in various cadres as mentioned in Annexure-II & III will be created with effect from 1.1.1978.

10. Fixation of pay and other matters connected with the revision of pay scales will be dealt with according to DESU Pay Revision Orders as at Annexure-V.

11. There shall be a ban on fresh recruitment (including creation of fresh posts) for a period of 2 years. With the imposition of this ban, fresh recruitment at the level of labourers, inspectors, Junior Clerks, Assistant Engineers as well as in such other cadres where the vacancies which existed on 19.4.1982 or where vacancies may occur thereafter, will not be made for a period of two years from that date. However, the ban will not be applicable to the creation of posts required in compliance of statutory requirements and for filling up of such vacancies/posts as existed on 19.4.1982 by promotion which do not require fresh recruitment nor to filling up of existing vacancies/posts by deputation.

The option to elect the existing scale or Third Pay Commission scale or the revised scale shall be exercised by the Employees in writing in the prescribed form within two months of the date of issue of this office order as per para 6 of the "DESU Pay Revision Order" as at Annexure-V."

7. On the 14th of October, 1982, the predecessor of the Delhi Vidyut Board wrote to the Union Public Service Commission, whether those who had come under revised scale could be come under Group "A". On the 12th of January, 1983, the Union Public Service Commission expressed the view that those who get the scales as mentioned in the proceedings dated 22.6.1982 should be put in Group "A". The same reads as under :-

"I am directed to refer to your letter No.2(5)/A& G/PRC/44 dated 14th October, 1982 on the above subject. The Delhi Electric Supply Undertaking have stated that the question as to whether the employees who have started drawing Rs. 700/ or more at the initial stage in the revised pay-scales, which have become

effective from 1.1.78, would fall in Category "A" posts was referred to the Legal Adviser, Delhi Electric Supply Undertaking, who has observed that since the revised pay scales are interim and notional, there is no need to treat the above categories of employees as falling Category "A".

2. The matter has been examined. According to Section 90(8) of the DMC Act, 1957, Category "A" posts means any post with a minimum monthly salary (Exclusive of allowances) of not less than seven hundred rupees and includes any other post which the Central Government may having regard to the nature of the duties attached thereto, by orders, declare to be a Category "A" post. The criteria laid down is thus very precise and any post falling within it has to be categorised as "A" irrespective of whether the pay-scale is interim and notional. Thus the criteria laid down is very precise and any post falling within it has to be categorised as Category "A".

3. Therefore, unless the above provision in the DMC Act, 1957 is amended suitably, the categorisation of posts has to be in accordance with criteria laid down without taking into consideration the position that the pay scale now revised are interim and notional."

8. On the 13th of January, 1983, a provisional seniority list of Assistant Engineer was issued. It is annexed as Annexure P-1. The petitioner is shown at S.No.49 and the third respondent is shown at S.No.143. On the 24th of June, 1983, Assistant Engineers were promoted as Assistant Executive Engineer on ad-hoc basis up to 31.3.1984. The office order dated 24.6.1983 issued by the second respondent/DESU reads as under :-

"Delhi Electric Supply Committee has in its meeting held on 23.6.1983 approved vide item No.183-B the promotion of following officers to the post of Asstt. Executive Engineer (Elect./Mech.) on ad-hoc basis for a period up to 31.3.1984 or till such time the posts are filled up on regular basis whichever is earlier subject to the approval of U.P.S.C.

1. Sh. P.K. Ray. A.E.I.P. Sation. 2. Sh. Satwant Singh. A.E. System Operation. 3. Sh. Roshan Lal. A.E. (PS) Distt. NJF. 4. Sh. Subhash Chander. A.E. C & A, Distt. KRN. 5. Sh. S.P. Angurwala. A.E. P.S., Distt. NHP. 6. Sh. R.K. Sabharwal. A.E. P.S., Distt. CVL. 7. Sh. N.R. Dinkar. A.E. C&A -(SRD). 8. Sh. R.S. Rath. A.E. Zone No. 402(D-CVL).

The above officers on promotion are directed to report for duty to AGM(T) for further posting.

Relieving/joining reports of the above officers may be sent to all concerned with a copy to the undersigned.

The pay of the above officers will be fixed by A.P.O. (B) concerned."

9. On the 24th of June, 1993, the Delhi Electric Supply Committee of the second respondent approved the promotion of Shri Ashok Kumar to the post of Assistant

Engineer (Elect. & Mech.) on ad-hoc basis. The order dated 24.6.1983 reads as under :-

"Delhi Electric Supply Committee has in its meeting held on 23.6.1983 approved vide item No.183-B the promotion of Sh. Ashok Kumar, Asstt. Engineer(Elect & Mech.) Const. North (Employee No. 20366) to the post of Asstt.Executive Engineer (E&M) on ad-hoc basis for a period up to 31.3.1984 or till such time the posts are filled up on regular basis whichever is earlier subject to the approval of U.P.S.C.

Shri Ashok Kumar on promotion is directed to report for duty to AGM(T) for further posting.

Relieving/joining report of the officer be sent to all concerned with a copy to the undersigned.

Pay of Shri Ashok Kumar will be fixed by A.P.O.(B) concerned."

10. On the 23rd of June, 1983, the General Manager, DESU wrote to the Secretary, MCD to approve the ad-hoc promotion of 10 officers, including the third respondent in the instant case, as Assistant Engineer.

11. On the 27th of March, 1984, four Assistant Engineers presented the writ petition No. 939/84 challenging the order promoting ten officers, and for the issuance of a writ of mandamus forbearing MCD from extending the period of promotion of ten officers. On the 10th of July, 1985, the DESU wrote to the UPSC about the regularisation of officers in the cadre of Assistant Executive Engineer in DESU. On the 12th of September, 1985, the Recruitment and Promotion Rules for the cadre of Executive Engineer was issued.

12. On the 25th of September, 1985, the respondents 1 to 3 in CWP. 939/84 filed the reply to that writ petition. At page 147 of the paper book in that writ petition, it is stated :

"Contents of this paragraph, as stated, are not correct and hence denied. The Recruitment & Promotion Regulations for the post of Assistant Executive Engineer(Elect./Mech.) were notified in accordance with the provisions of Delhi Municipal Corporation Act, 1957 on 4th December, 1978. At the time when these regulations were notified, the pay scale of this post was Rs. 500-1100 (Shiva Shanker scale) which had been revised to Rs.700-1300 w.e.f. 1st January, 1973 vide office order. This change in the pay scale in the Recruitment & Promotion Regulations was also got amended and notified on 18th November, 1980. The Recruitment & Promotion Regulations for the post of Assistant Engineer (Elect./Mech.) were notified on 14th August, 1980. This post was in the scale of pay of Rs.650-1200 and was class-II post. However, it is correct that the pay scale of all the posts including the categories of Assistant Executive Engineer (Elect./Mech.) and Assistant Engineer (Elect/Mech) were revised w.e.f. 1st January, 1978 vide office order dated 22nd June, 1982. With this revision of the pay scales of the posts of Assistant Executive Engineer (Elect./Mech.) (Rs. 700-1300) and the post

of Assistant Engineer (Elect./Mech.) (Rs. 650-1200) were revised to one scale of Rs.1000-1850 after including the amount of Dearness Allowance/Additional Dearness Allowance up to 320 points of price index as on 1st January, 1978. So with this revision of the category of Assistant Executive Engineer (Elect./Mech.) and Assistant Engineer (Elect./Mech.) become one and the same."

13. At page 148, of the paper book in CWP. 939/84, it is stated :

"According to the notified Recruitment & Promotion Regulations for the post of Assistant Executive Engineer, vacancies are required to be filled by promotion from amongst Assistant Engineer (Elect/Mech) with three years regular service in the grade. Regular promotions to the grade are required to be made on the recommendations of the DPC presided over by Chairman/Member of the UPSC. DPC for considering regular promotion to the post of Assistant Executive Engineer (Elect/Mech) on regular basis was last held in 1981 and 1982 and on the recommendations of the DPC/UPSC, the Delhi Electric Supply Committee vide item No. 743-B approved on 12th May, 1982 the promotion of 78 officers on regular basis (Annexure "A"). It was provided that 27 officers belonging to general category included in the list of 78 officers will hold the post of Assistant Executive Engineer (Elect/Mech) for the period till Scheduled Castes/Scheduled Tribes Officers for whom vacancies were reserved became available and were promoted to the post. Earlier, 40 posts of Assistant Executive Engineers (Elect/Mech) were filled on regular basis on the recommendations of the DPC in 1978. None of the above-mentioned 118 officers promoted to the post of Assistant Executive Engineer (Elect/Mech) on regular basis belonged to Scheduled Castes/Scheduled Tribes category, due to non-availability of eligible Scheduled Castes/Scheduled Tribes officers in the feeder grade. Normally, reservation in promotion from one class-I to another class-I post is not applicable. However, the issue of reservation came up for consideration before the Division Bench of Delhi High Court in the case of Shri S. Raju Vs. D.E.S.U. (Civil Writ No. 21/1983), wherein Hon"ble Mr. Justice Rajinder Sachar and Hon"ble Mr. Justice R.N. Agarwal, inter alia, decided as under:-

".....Obviously, prior to the order of 22nd June, 1982, the pay scales of the petitioner was one of class-III. Vacancies arose during the earlier period and it would be nothing but doing sheer injustice to the Scheduled Castes personnel in not giving them reservation which is permitted to them in law..... The post having fallen vacant prior to 22nd June, 1982 must necessarily be filled up on the basis that the petitioners post were in class-III."

Accordingly, the above mentioned nine officers were promoted to the post of Assistant Executive Engineer (Elect/Mech) on ad-hoc basis for a period up to 31st March, 1984 or till such time the posts are filled up on regular basis, whichever is earlier subject to approval of the UPSC. After promotion of these officers in same pay scale, this case was referred to UPSC for advice in the matter. The UPSC advised that since the pay scales of the post of Assistant Engineer (Elect/Mech) (pre-revised scale Rs. 650-1200) and Assistant Engineer (pre-revised scale

Rs.700-1300) have been granted an integrated pay scale of Rs. 1000-1850, both the posts had become at par and that two cadres of Assistant Engineer and Assistant Executive Engineer have been merged into one, i.e. Assistant Engineer/Assistant Executive Engineer. Accordingly, the post of Assistant Engineer now become equivalent to Assistant Executive Engineer will be no more a feeder post for promotion to the post of Assistant Executive Engineer. In accordance with the above advice of the UPSC, necessary amendment in the Recruitment & Promotion Regulations for the post of Assistant Engineer/Assistant Executive Engineer have been approved by the UPSC and is at present under consideration of Delhi Electric Supply Committee/MCD.. After this approval by the DESU/MCD, necessary notification in accordance with the provision of the DMC Act will be issued. In view of this position, the proposal for continued ad hoc appointment of the Respondents No. 5 to 14 beyond 31st March, 1984 is under consideration."

14. At page 150, of the paper book in CWP. 939/84, it is stated :

"The nine respondents have been promoted as Assistant Executive Engineer against those vacancies which had occurred prior to 22nd June, 1982, i.e. the date on which the pay scale of the various categories of posts were revised and on the basis of which it is now being pleaded by the petitioners that the post of Asstt. Engineer and Assistant Executive Engineer both fall in category 'A' post and hence no reservation is allowed in promotion from category 'A' post to another category 'A' post. The above submission have been supported in the judgment of this Hon'ble Court cited above. It may also be added that the pay scale of Assistant Engineer and Assistant Executive Engineer w.e.f. 22nd June, 1982 is the same, i.e. Rs.1000-1850. It is in this background that the two cadres of Assistant Engineer and Assistant Executive Engineer have now been merged and a common seniority formed. It is in this context the writ is infructuous because no element of promotion is now involved. Even after their appointment on ad hoc basis as Assistant Executive Engineer, respondent No.5 to 14 would continue to be placed on their original seniority list of Assistant Engineer. At present, they are also drawing salary in the same scale as the petitioners. Therefore, after the formation of a common cadre, virtually no element of promotion is involved."

15. In view of the stand taken by the respondents in CWP. 939/84, the writ petition No.939/84 was withdrawn. The effect of it was that there was no promotion of any officer to the post of Assistant Executive Engineer when the cadre of Assistant Engineer and the cadre of Assistant Executive Engineer had been merged by virtue of the order passed on the 22nd of June, 1982 by the Commissioner of MCD.

16. On the 30th of December, 1985, the UPSC wrote to the DESU the following;

"Sub: Regularisation of officers in the post of Asstt. Executive Engineer (E/M) in DESU.

Sir,

I am directed to refer to the correspondence resting with your letter No. F. 2(6)/A&C/83/761 dated 10.7.85 on the above subject and to say as follows.

2. The proposal of the Undertaking for regularisation of ad hoc Assistant Executive Engineers including SC/ST officers is not covered under any provision of the Recruitment Regulations.

3. The Commissioner, however, observe that the recruitment regulations for the post of Asstt. Executive Engineer (E/M) in DESU have been revised and notified w.e.f. 12.9.85. The Commission have recently decided, in the light of the legal advice and judgment of the Supreme Court, that the vacancies are to be filled in accordance with the recruitment regulations in force at the relevant point of time when the vacancies arose. Thus, the vacancies which occurred between 22.3.82 (the date on which 1st DPC met) and 12.9.85 when the revised recruitment regulations were notified, have to be filled in the light of pre-revised recruitment regulations. The Commission also observe that after the last DPC met to consider promotions to the post of Asstt. Executive Engineer i.e. 22.3.82, the scales of pay have got merged and the separate cadres of Asstt. Engineer and Asstt. Executive Engineer have been merged into one. If the old regulations are operated for filling up the vacancies up to 12.9.85, it has to be deemed that the merger of pay scale did not in fact take place. In the circumstances, the commission advise that the Undertaking may consider sending DPC proposals for promotion to the vacancies in the grade of Assistant Executive Engineer (E/M) in DESU for the vacancies which occurred after 22.3.82 and up to 12.9.85 on the basis of the then existing recruitment regulations. While sending the said proposals, the reservation position may also be indicated.

4. It is observed that in the office order dated 1.3.82 issued by the Undertaking Asstt. Engineers were promoted to the grade of Asstt. Executive Engineer, inter alia, that 27 officers mentioned at S.No. 52 to 78 will hold the post of Asstt. Executive Engineer (E/M) for the period till the SC/ST officers become eligible and are promoted. This may also be kept in view while sending the DPC proposals."

17. On the 31st of December, 1987, on the recommendations of the DPC, the DESU, in its meeting, approved the promotion of the petitioner and other officers as Executive Engineer. On the 11th of January, 1988, the DESU issued an office order, which reads as under:-

"On the recommendations of DPC, the Delhi Electric Supply Committee vide its issue No. 347-E in its meeting held on 31.12.1987 has approved the promotion of the following officers as X.E.N. (Elect/Mech) on ad hoc basis for a period up to 31.3.1988 or till such time the posts are filled up on regular basis, whichever is earlier.

S.No. Name of the Officer (1) Shri A.K. Gupta (2) Shri V.K. Videh (3) Shri N.K. Sawhney (4) Shri V.P. Dutta (5) Shri P.C. Jain (6) Shri J.V. Singh (7) Shri A.K. Kaul (8) Shri S.C. Sharma (9) Shri V.K. Matrey (10) Shri A.K. Bansal (11) Shri

Raj Bhartiya (12) Shri Rajinder Tikku (13) Shri V.K. Kuba

The officers mentioned at S.No. 2 to 13 have already been promoted as X.E.N. (Elect./Mech.) ON AD HOC BASIS IN ANTICIPATION OF THE APPROVAL OF DESC vide office order No.F.2(8)/A&G/Tech/87/46 dated 25.11.1987, F.2(8)/A&G/Tech/87/47 dated 30.11.1987 and F.2(8)/A&G/Tech/87/158 dated 23.12.1987.

Shri A.K.Gupta, mentioned at S.No.1 is directed to report for duty to A.C.(E) for further posting.

The pay of Shri Gupta will be fixed by A.P.O.(B) concerned as per rules.

The relieving/joining report of Shri Gupta may be sent to A.P.O.(B) and other officer concerned, under intimation to this office."

18. On the 9th of June, 1988, an office order was issued by the second respondent approving the promotion of 36 officers as Assistant Executive Engineers.

19. On the 7th of December, 1988, an office order approving the promotion of officers were issued by the DESU/second respondent. The same reads as under:-

"On the recommendation of the DPC., General Manager, in anticipation of approval of the DESC., has approved promotion of the following officers to the post of Executive Engineer (Elect/Mech) on ad hoc basis in the pay scale of Rs.3000-4847 for a period up to 31.3.89 or till the posts are filled on regular basis, whichever is earlier:-

S.No. Name Designation Degree holders 1. Sh. Satwant Singh Asstt.XEN(E/M) 2. Sh. Satya Pal Asstt.XEN(E/M) 3. Sh. Roshan Lal Asstt. XEN (E/M) 4. Sh. Subhash Chander Asstt. XEN (E/M) Diploma holder 5. Sh. T.D. Kathuria Asstt.XEN(E/M)

The postings of these officers will be decided later on, they are required to report to the undersigned for their further posting.

Pay of the newly promoted officers will be fixed by A.P.O(B) concerned as per rules.

Relieving/joining reports of the above officers may be sent to APO(B) concerned and other officers with a copy to the undersigned."

20. On the 9th of December, 1988, the Delhi Electric Supply Committee approved the promotions. The order reads as under :-

"The Delhi Electric Supply Committee vide Item No.281-B in its meeting held on 8.12.1988 has, inter alia, approved promotion of the following five officers notified vide Office Order No. F.2(8)/A & G/Tech/87/137 dated 7.12.1988 as Executive Engineer (Elect./Mech.) on ad hoc basis in the scale of pay of Rs.3000-4875 for a period up to 31.3.1989 or till the posts are filled on regular basis, whichever is earlier :-

1. Shri Satwant Singh 2. Shri Satya Pal 3. Shri Roshan Lal 4. Shri Subhash Chander 5. Shri T.D. Kathuria"

21. On the 1st of November, 1991, a seniority list of Assistant Executive Engineers was issued by the DESU from S.No.116 to 153. The third respondent is shown as item No.151.

22. On the 27th of August, 1992, the Recruitment and Promotion Regulation for the cadre of Superintending Engineer were issued.

23. On the 15th of July, 1993, an office order was issued by the DESU, approving the appointment of the officers mentioned therein, on substantive basis on the post of Assistant Executive Engineers from the dates mentioned against the names of officers. The petitioner is stated to have been appointed as Assistant Executive Engineer on substantive basis w.e.f. 8.9.1983.

24. According to the petitioner, the officers who were senior to him were promoted as Superintending Engineers but the case of the petitioner was not considered. On the 19th of September, 1997, the petitioner made a representation to the Chairman/second respondent for his consideration for the post of Superintending Engineer, and the representation of the petitioner is as under :-

"Sub: Officiating promotion to the post of Superintending Engineer (Elect/Mech).

Sir,

"In reference to above, I have to make the following submissions for your consideration:

(i) That according to the notified R&P Regulations, the post of SE(E/M) are to be filled up by direct recruitment with 10 years experience or by promotion on the basis of selection from departmental candidates with 5 years of regular service as Executive Engineer.

(ii) That last batch of Executive Engineers was regularised in May, 1985 and all eligible candidates of this list have been promoted to the post of S.E.(E/M).

(iii) That undersigned was promoted as Executive Engineer on ad hoc basis with effect from 23.12.87, but the services is still to be regularised by the Board in consultation with the UPSC.

(iv) That the undersigned was confirmed in the grade of AE/A.XEN(E/M) vide Office Order No.F.7(3)/A&G/ Tech/92/48 dated 15.7.93 (photocopy enclosed) and placed at SL. No. 105.

(v) That as per Clause 4.6 of Office Memorandum No.18011/1/86- Estt(D) dated 28.3.88 of Government of India, Ministry of Personnel, Public Grievance & Pension endorsed by DESU vide O.O. No. F.2/2/80-O&M/942 dated 19.5.88 that the consolidated order of seniority issued where persons are confirmed in an order different from the order of merit indicated at the time of recruitment or

promotion seniorities are followed the order of confirmation and not the original order of merit.

(vi) That it is humbly submitted in the absence of the Executive Engineers with 5 years of regular service, the seniority of the confirmed appointment in the grade of AE/A.XEN issued vide above O.O. dated 15.7.93 may be strictly followed.

(vii) That it is understood that Management is not adopting seniority list required as per law, but considering the list of A.XEN or list of selection grade.

(viii) That pay scales in the Undertaking have been revised w.e.f. 1.1.78 vide O.O. No. F.1/1/A&G/ARC-3/22.6.82 with the prerevised 3rd pay scale revision of the posts of the Asstt.Engineer and Asstt. Executive Engineer which were Rs. 650-1200 and Rs. 700-1300 respectively were revised to single scale of Rs.1000-1850 for both the posts.

(ix) That vide O.O.No.F.2(6)/A&G/Tech/83/105 dated 9.6.88, 36 Asstt. Engineers were promoted in the unified scale of A.E./A.XEN in the pay scale of Rs. 2200-4100 including 8 AEs/A.Xens of SC/ST category by virtue of the rules of the reservation.

(x) That as per Office Order No. F.6/2/91-O&M/91-95 dated 15.4.97 "Even if a SC/ST candidate is promoted earlier by virtue of rules of reservation/route than his senior general candidate and the senior general candidate is promoted later to the said higher grade, general candidate regains his seniority over such earlier promoted SC/ST candidate. The earlier promotion of the SC/ST candidate in such a situation does not confer upon him seniority over the general candidate even though the general candidate is promoted later to that category".

(xi) That as per the notified R&P Regulations for the post of AE/A.XEN(E/M) selection grade issued vide Notification No. F.9/21/85-LSG/7711 dated 18.10.85 that this is a non-selection post and promotion should be made from the relative seniority of AE/A.XEN with 10 years of regular service in the grade as on 22.6.82 with the approval of UPSC.

(xii) That as per the administrative instructions from Department of Personnel, Government of India, 40 Points Roaster to the brochure on SC/ST is not to be followed for the selection grade, as this grade is formed for removing the stagnation only.

(xiii) That the DESU have ethically appointed the officers in the selection grade of A.E./A.XEN vide Office Order Nos. F.2/55/A&G/Tech/91/57 dated 30.8.91, F.2/55/A&G/Tech/91/65 dated 13.9.91 and F.2/55/A&G/Tech/91/76 dated 30.9.91 giving the benefit of selection grade to the SC/ST against the Government of India rules, whereas this should be allowed as per seniority of officers in the grade of AE/A.XEN with the approval of UPSC and the other eligible candidates or general category like undersigned was left out.

In view of the facts mentioned above, you are requested to reconsider the entire

matter and seniority as per the confirmed list of AE/A.XEN dated 15.7.93 to be followed for promotion to the post of S.E.(E/M) alternatively the Management may also be kind enough in making the appointment of Executive Engineers on regular basis with the approval of UPSC so that the seniority of regular Executive Engineers may be followed.

Hoping for favourable consideration of the entire matter."

25. According to the petitioner, the promotion to the post of Superintending Engineer should be on the basis of officer order issued on the 15th of July, 1993. According to the petitioner, the third respondent is not in that office order, and, Therefore, without considering the case of the petitioner, the second respondent cannot, in law, consider the case of the third respondent for promotion to the post of Superintending Engineer.

26. On the 5th of December, 1997, the writ petition was presented in this Court. As I had noticed above, subsequently, the writ petition was amended.

27. At page 102 of the writ petition, it is stated:

"All the eligible senior candidates in the said list dated 15.7.1993 have been since promoted to the post of Superintending Engineer and these were senior to the petitioner."

28. At page 106 of the writ petition, about the third respondent it is stated:

"That during the pendency of the aforesaid writ petition, an application dated 8.12.98 was filed by one Shri Subhash Chander S/o Shri Megha Ram under Order 1 Rule, 10 of CPC for being imp leaded as a party. The said Shri Subhash Chander claims to be working as Executive Engineer and has alleged in the said application that he was senior to the petitioner and Therefore had a better right as A-XEN and Therefore he ought to be arrayed as a party. The petitioner herein has already filed writ to the said application which is on record. The petitioner herein had been advised that with a view to have effective adjudication to the issues involved, it is desirable and expedient to allow Shri Subhash Chander to be arrayed as respondent No.3 and as such the petitioner herein is also filing an amended memo of parties showing Shri Subhash Chander as proposed respondent No. 3."

29. At page 107 of the writ petition, reference, is made to the counter filed by the DESU in the writ petition No. 939/84. The same reads as under:-

"That it is submitted that the respondent No. 2's own stand is that vide office order dated 22.6.82 it was made clear that the post of AE and AEE had merged w.e.f. 1.1.78. The rules in this regard were also framed and changed in September, 1985. The respondent No. 2 had also made it clear that the counter filed in the writ petition No. 939/84 that there would not be any advantage of the accelerated promotion as AEE and the persons who were senior in the original seniority list of AE will continue to be placed so and as such there is no question

of any promotion of applicant and other persons at the post of AEE any time after 1982 or at the most after September, 1985."

30. At page 108 of the writ petition, the grievance is brought forth in the following terms:-

"That the facts would show that there is a deliberate attempt on the part of the respondent No. 2 to ignore the said principle of law and allow the juniors to become senior which action of the respondent is wrong and arbitrary."

31. In the ground No. B of the writ petition, it is submitted :

"BECAUSE admittedly the date of substantive appointment of the petitioner's in the Grade of Assistant Engineer is shown to be 8.9.1983. The seniority is also shown in the said list vis-a-vis the other persons. After the parity in the pay scales of Assistant Engineer and Assistant Executive Engineer w.e.f. 1.1.1978, there is no difference in the said two posts and this was also so accepted by the respondents vide Annexure P-3 to the writ petition, which shows the names of the eligible candidates whose promotion was approved as XEN vide communication dated 11.1.1988. This being the factually admitted position, it is Therefore, further promotion ought to be made on the basis of seniority as mentioned in the office order dated 15.7.1993."

32. In ground No.D of the writ petition, it is stated:

"BECAUSE, it is already on record that as per respondent No. 2's own stand the post of AE & AEE merged w.e.f. 1.1.78 Rules were also amended in September, 1985. Respondent No. 2 had also taken a stand in a counter-affidavit filed in writ petition No. 939/94 that there would not be any advantage of the accelerated promotion as AEE and that person who was senior in the original seniority list of AE will in fact be placed so. Accordingly, even as per respondent No. 2, there is no question of any promotion at the post of AEE any time after 1982 or at the most after September, 1985. Admittedly, in the instant case, the proposed respondent namely, Shri Subhash Chander, was never promoted as Executive Engineer prior to the petitioner and accordingly the attempt to create first a non-existent promotional post of AEE much after framing of the Rules is wholly misconceived, illegal and does not bind the petitioner and notwithstanding anything the said attempt is liable to be quashed as being arbitrary, illegal and mala fide and against the rule and also against the stand of the respondent No.2 taken earlier."

33. About the promotion of the third respondent it is stated in ground No. E of the writ petition:

"BECAUSE it is an admitted case on record that the petitioner was promoted as Executive Engineer on 31.12.87 which is nearly one year before the proposed respondent No. 3, namely, Shri Subhash Chander, was promoted as XEN in 1988. Accordingly, any accelerated promotion wrongly made in between at the level of Assistant Executive Engineer specially when no such post exists is wholly illegal

and not binding on the petitioner. It is submitted that there was no justification for making any promotion allegedly to the post of A. XEN in the year 1982 when no such post exists or could have existed. Even alleged approval given by the UPSC to the said promotion is legally misconceived and liable to be quashed by this Hon"ble Court."

34. On the 18th of August, 1999, the second respondent filed its counter. In the counter, at page 181, it is stated by the second respondent :

"That the contents of para 5 of the petition as stated are wrong and denied. It is submitted that the office order dated 15.7.93 is a list of officers by which they were confirmed in the cadre of AE/AXEN (E/M). As explained hereinabove, it is submitted that since the confirmation has been delinked with seniority, the list dated 15.7.93 cannot be taken into consideration for making promotion."

35. Referring to the framing of the regulations, it is submitted by the second respondent :

"That the contents of para 10(a) of the petition are wrong and denied. It is reiterated that contention of the petitioner with regard to the Office Order dated 15.7.93 is without any merits as the same is the list of confirmation and not the seniority list. It is submitted that the post of AXEN and AE were merged in 1985 and not in 1978. The R&P Regulations have been framed in 1985. It is submitted that the petitioner was never promoted to the post of AXEN. The post of AXEN was the higher post and hence the petitioner cannot claim seniority over the AXEN's as they are senior to them. It is pertinent to mention here that in office order dated 15.7.93 the name of Shri B.B. Bhatia does not appear who is admittedly more senior to the petitioner as per the seniority list. It is submitted that Shri B.B.Bhatia who is presently Executive Engineer was appointed in DVB on 23.8.1976 as AE and was made AXEN on 13.5.1982. Hence, it is submitted that the list dated 15.7.1993 cannot be considered for giving promotions as the same is the list of confirmation and not the list of seniority. The lists of Seniority of AXEN and AE sent to UPSC are enclosed herewith as Annexure-R-II & III respectively."

36. Annexure R-II is captioned as "Final Seniority List of Assistant Executive Engineer (Elect/Mech.) In the scale of pay of Rs. 700-1300 (prerevised)". Names of 44 officers are given in Annexure. R-II. Annexure R-III, referred to in the counter, is captioned as "Final Seniority List of Asstt. Engineers (Elect./Mech.) in the pay scale of Rs.1000-1850 in continuation of Final Seniority List of 25 Asstt. Engineers (E/M) circulated vide O.O, No. N/AO (P.III)/81-82/13 dated 14.4.81". Names of 138 officers are mentioned in Annexure. R-III. In Annexure. R-II, the name of the third respondent (Subhash Chander) is shown at S.No. 40. It is mentioned that he is appointed as Assistant Engineer on the 14th of August, 1980 and he was appointed as Assistant Executive Engineer on the 6th of May, 1988. The name of the petitioner is not shown.

37. Annexure R-II does not contain any date. The counter does not state when it

was prepared. It was stated by the learned counsel for the second respondent Mr. Jayant Nath, when I put a question to him about Annexure R-II, that Annexure R-II and Annexure R-III were sent to UPSC on the 6th of November, 1996. Annexure R-III starts from S.No. 26 and ends with S.No.138. In this list, the name of the petitioner is shown at S.No. 49. Here also, no date is mentioned. How it was prepared and when it was prepared is not mentioned by the second respondent in the counter.

38. Referring to the order dated 22.6.1982, the stand taken by the second respondent in the counter is :

"That the contents of para 10(d) of the petition are misconceived, wrong and denied. It is submitted that though the post of AE and AXEN was merged in 1982, the R&P Regulation for the post of XEN(E/M) and AF/AXEN was notified on 12.9.1985. As per the said R&P Regulations, vacancies in the grade of XEN(E/M) are to be filled by promotion failing which no transfer on deputation (including short term contract) and failing both by direct requirement...."

39. It is further stated by the second respondent in the counter on the same point:

"After revision of pay in DESU now DVB w.e.f. 1.1.78 vide office order 22.6.82 the both the posts of AE(E/M) and in the pay scale of Rs. 650-1200 and AXEN(E/M) in the scale of pay of Rs.700-1300 were placed in the single unified scale of Rs.1000-1850. In the scheme of revision of pay scales, despite the same scale of pay, separate cadres of AE(E/M) and AXEN(E/M) were required to be maintained without any benefit of increment at the time of promotion."

40. This stand is contrary to what is stated in the counter filed in CWP. 939/84 in the year 1985. According to the second respondent though an order was passed on the 22nd of June, 1982, fixing the scales of pay, the merger was made only by the Recruitment and Promotion Regulations, framing of the R-98 regulation, which was notified on the 12th of September, 1985. The reason given by the second respondent for treating the third respondent as senior to the petitioner is some what interesting and the same is as under:-

"The R&P Regulation for the post of AE/AXEN(E/M) were notified on 12.9.85 which amounted to merger of the two cadres into one in the scale of Rs.1000-1850. The question of regularisation of ad hoc AXEN(E/M) was examined thereafter in consultation with Government of India, Ministry of Energy and UPSC. The UPSC observed that vacancies which occurred between 22.3.82 i.e. the date on which the last DPC met and on 12.9.85 when the revised R&P Regulations were notified, have to be filled in accordance with the pre-revised recruitment regulations. The UPSC further observed that after the last DPC met to consider, promotion to the post of AXEN(E/M) i.e. on 22.3.82 the scale of pay having got merged and separate cadres of AE and AXEN(E/M) having also been merged into one, if the old regulations are operated for filling up vacancies up to 12.9.85, it has to be deemed that the merger of pay scale did not in fact take

place. In these circumstances the UPSC vide its letter dated 30.12.85 advised the DVB to consider sending DPC proposal for the promotion to the vacancies in the cadre of AXEN(E/M) which occurred between 22.3.82 and 12.9.85 on the basis of the then existing recruitment regulations. Copy of the letter dated 30.12.1985 sent by UPSC is annexed as Annexure R-IV."

41. The petitioner filed his rejoinder to the counter filed by the second respondent. It is stated in the rejoinder :

"It is wrong and denied that in the claim of revision of pay scales, separate cadres of Assistant Engineer/Assistant Executive Engineer were required to be maintained. Once the posts have been merged, there is no question of keeping two channels open and in fact that process would be contrary to the Rules and Regulations.

42. The petitioner had attempted to meet the submissions of the second respondent that there was an accelerated promotion on account of the caste factor. It is stated in the rejoinder :

"It is submitted that it is a settled law by the Apex Court that even if a person gets accelerated promotion on account of the caste fact, still no benefit can be given to the said persons for getting promotions to the higher post on the basis of such accelerated promotion at the feeder post. The petitioner is relying on the judgment reported in JT 1995 (7) SC 231 titled Ajit Singh Januja and others Vs. State of Punjab and others, , Ajit Singh Juneja Vs. State of Punjab. Applying the ratio of the said two judgments in the instant facts, it would become crystal clear that even if one were to consider the SC/ST candidates for promotion to the post of Assistant Executive Engineer on the basis of alleged unfilled vacancies prior to the year 1985, still while making promotions to the next post of Superintending Engineer, no benefit can be taken by these accelerated promotees and while making promotions to the post of Superintending Engineer, their original seniority at the level of Assistant Engineer will have to be seen and maintained. Viewed from this angle also the petitioner is entitled to be considered for promotional post of Superintending Engineer. In this view of the matter, the purported action of the DVB in sending two separate lists is Therefore patently mala fide and they have deliberately misdirected themselves in obtaining advantage from getting endorsement from UPSC."

43. The learned counsel for the petitioner, Mr. Rakesh Tikku, submitted that the petitioner became a regular Assistant Engineer on the 14th of August, 1980. He was promoted as Executive Engineer in 1987. The third respondent became an Assistant Executive Engineer in 1983 and he became an Executive Engineer on the 7th of December, 1988, and, Therefore, the third respondent can never claim to be senior to the petitioner. The learned counsel submitted that the second respondent is to act as per the proceedings issued on the 15th of July, 1993, and the reliance on Annexures R-II and R-III, which have absolutely no legal sanction, cannot be accepted at all and the basis has not been explained by the

second respondent: in its counter. The learned counsel submitted that there was a merger of the cadres Assistant Engineer and the Assistant Executive Engineer on the 12th of September, 1985, which is without any basis and contrary to the order dated 22.6.1982 and the specific stand taken by the second respondent itself on the 25th of September, 1985 by filing the counter in CWP. 939/84. The learned counsel submitted that in trying to deprive the petitioner of his legitimate right of being considered for promotion to the post of Superintending Engineer, the second respondent is violating his rights under Articles 14 & 16 of the Constitution of India.

44. The learned counsel for the second respondent Mr. Jayant Nath, submitted that the petitioner's service in the DESU is not in dispute, but what the learned counsel submitted was that the third respondent was appointed as Assistant Executive Engineer with reference to the vacancies that existed prior to the 22nd of June, 1982, which had to be filled in by Scheduled Caste candidates, and, Therefore, the third respondent has to be considered as senior to the petitioner. The learned counsel for the second respondent Mr. Jayant Nath, submitted that it had acted as per the advice of the UPSC in its letter dated 13.12.1985 and as per the decision of the Supreme Court in Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others, .

45. The learned counsel for the petitioner, Mr. Rakesh Tikku, submitted that the view expressed by the Union Public Service Commission, in its letter dated 13.12.1985 does not represent the correct position in law. The Union Public Service Commission had completely failed to appreciate the ratio laid down by the Supreme Court in Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others, . The filling up of vacancies prior to the merger and the seniority of persons appointed at the time when the vacancies existed and the person who was appointed subsequent to the merger to the vacancy existed prior to the merger, is distinguished and separate. The DESU might be well within its power in appointing the third respondent as Assistant Executive Engineer in 1983, but that would not clothe the third respondent with the right to be a senior to those officers who were holding the post prior to the merger.

46. The Supreme Court in Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others, , had to consider the issue in the following circumstances: The petitioners in the application, out of which the appeal had arisen before the Supreme Court, were working as Lower Division Clerks in the Department of Registration and Stamps in the State of Andhara Pradesh. As per the rules then in force, they were entitled to be considered for appointment as Sub-Registrars, Grade II, on transfer in the same Department. For that purpose, a list of approved candidates should be prepared with the consultation of the Service Commission. Such a list should have been prepared as on 1.9.1976. That was not done by the Government. On the 22nd of March, 1977, an amendment was issued by the Government taking away with a right of the Lower Division clerks for being considered to the post of Sub-Registrars. At page 853 of the judgment,

the Supreme Court dealt with this aspect. Ultimately, the Supreme Court upheld the order of the Tribunal directing the Government to prepare a list considering the case of those Lower Division Clerks. It is in that context the Supreme Court observed :

"Having heard the counsel for the parties, we find no force in either of the two contentions. Under the old rules a panel had to be prepared every year in September. Accordingly, a panel should have been prepared in the year 1976 and transfer or promotion to the post of Sub-Registrar Grade II should have been made out of that panel. In that event the petitioners in the two representation petitions who ranked higher than the respondent Nos. 3 to 5 would not have been deprived of their right of being considered for promotion. The vacancies which occurred prior to the amendment rules would be governed the old rules and not by the amended rules. It is admitted by counsel for both the parties that henceforth promotion to the post of Sub-Registrar Grade II will be according to the new rules on the Zonal basis and not on the Statewide basis and Therefore, there was no question of challenging the new rules. But the question is of filling the vacancies that occurred prior to the amended rules. We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules."

47. Therefore ,the ratio is that in spite of the merger, the vacancies existed prior to the merger could be filled by the second respondent on the basis of the rules applicable to those vacancies, and that the appointee can claim seniority or right to that post only from the date of the appoint and not from the date of the vacancy. For, it is well settled that no person can claim seniority or right to a post anterior to the date of his actual appointment in that post. Therefore, the right of the third respondent to hold the post of Assistant Executive Engineer from the date of his appointment cannot be disputed by the petitioner. The order passed by the second respondent promoting the third respondent is upheld. At once, the third respondent having been appointed in 1983 cannot be heard to say that he became senior to the petitioner to hold the post since 1980. 48. The second respondent in consenting Annexures R-II & R-III, had acted in gross violation of the Fundamental Rights of the petitioner. The respondent has not been able to explain at all on what basis Annexures R-II & R-III had been prepared when the second respondent itself had issued the officer order on the 15th of July, 1993. It is clear from the facts that the second respondent is not aware of the Constitutional mandate in Articles 14 & 16 of the Constitution of India. The stand taken in the present writ petition is quite contrary to the stand taken by the second respondent in CWP. 939/84.

49. The second respondent is directed to regularise the services of the petitioner in the cadre of Executive Engineer and issue orders fixing the seniority of the petitioner vis-a-vis the third respondent as junior to the petitioner in the cadre of Assistant Executive Engineer. The second respondent is also directed to the case of the petitioner along with other eligible candidates for promotion to the cadre

of Superintending Engineer, in accordance with law, treating the petitioner as senior to the third respondent. The process shall be completed by the second respondent on or before the 30th of April, 2000.

50. The writ petition is allowed in the above terms.

51. There shall be no order as to costs.