
(1997) 07 AHC CK 0071

In the Allahabad High Court

Case No : Writ Petition No's. 313 (SS) and 331 (S/S) of 1995, 67 (SS) , 2341 (SS) , 2997 (SS) , 3061 (SS) and 3169 (SS) of 1996

State of U.P.

APPELLANT

Vs

Shyam Behari Lal Gupta

RESPONDENT

Date of Decision : 07-07-1997

Acts Referred:

Constitution of India, 1950 — Article 141

Citation : (1998) 2 UPLBEC 1397

Hon'ble Judges : Sobha Dikshit, J

Bench : Single Bench

Advocate : C.S.C, for the Appellant; Pradeep Kant, D.S. Choubey and S.P. Singh, for the Respondent

Final Decision : Allowed

Judgement

Sobha Dikshit, J.—These bunch of writ petitions arise out of the judgment and order dated 27.10.1994 and subsequent order dated 27.11.1995, 30.4.1996, 22.4.1996 and 31.5.1996, passed by the U.P. Public Services Tribunal (hereinafter referred to as the Tribunal) in a claim petition No. 81/F/IV/95 filed by one Sri S.B.L. Gupta respondent herein. Writ Petition No. 313 (SS) of 1995 and 3061 (SS) of 1996 have been filed by the State Government challenging the judgment and order dated 27.10.1994 and order dated 29.5.1996 passed by the Tribunal, whereas writ petition Nos. 67 (SS) of 1996, 2341 (SS) of 1996, 2997 (SS) of 1996 and 3169 (SS) of 1996 have been filed by one Sri B.S. Rai being aggrieved by the same impugned judgment and order dated 27.10.1994 and 27.11.1995 and subsequent orders passed by the Tribunal in the same proceedings.

2. The controversy centres round the selection/appointment to the sole post of Engineer-in-Chief (Mechanical) (hereinafter referred to as E.I.C. (M) in the department of Irrigation, State of Uttar Pradesh. This is a top administrative post controlling the entire department of Irrigation. Both Sri B.S. Rai petitioner herein

and Sri S.B.L. Gupta, the respondent in these writ petitions are the main contenders for this post. The post in question is a selection post based on merit. During the pendency of these writ petitions, the Departmental Promotion Committee met and considered all the eligible candidates for this post including the petitioner and the respondent and found both of them of equal merit. In such a situation, the determination of intense seniority between these two contenders became imperative as per Rules. This Courts, therefore, directed the State Government to finalise the seniority list of Assistant Engineers (M) in the Irrigation Department on the basis of principles laid down by the Hon"ble Supreme Court in the case Baleshwar Dass, reported in 1980 S.C.C. (L&S) 531 , and P.D. Aggarwal and Others Vs. State of U.P. and Others, , followed by a decision of a Division Bench of this Court in the case of S.N. Misra v. State of U.P. and Ors., in writ petition No. 6191 of 1983 and other connected writ petitions, wherein the judgment was rendered on 4.7.1994. The said judgment of the Division Bench has been duly affirmed by Hon"ble Supreme Court also. Pursuant to the directions of this Court, the State Government issued the final seniority list of the Assistant Engineers of Irrigation Department dated 26.4.1996, wherein the name of Sri B.S. Rai, petitioner, finds place at serial No. 1 and that of respondent Sri S.B.L. Gupta below him, for all practical purposes at serial No. 2. Since Sri B.S. Rai was senior to Sri S.B.L. Gupta in the seniority list, hence he was appointed Engineer-in-Chief (M) by the State Government on 28.4.1996 subject to the result of these writ petitions. Sri B.S. Rai as per records placed before this Court, took over the charge of this post on 28.4.1996 itself. The seniority list dated 26.4.1996 however has not been challenged by any of the parties in the present proceedings.

3. All the writ petitions were heard together and are being disposed of by this common judgment.

4. I have heard the learned Counsel for all the parties at great length and have perused the record of all the writ petitions including the affidavits exchanged between them and various decisions of the Apex Court and this Court referred and relied upon by them in support of their respective contentions.

5. The admitted facts of the case are that Sri B.S. Rai and Sri S.B.L. Gupta both appeared before the U.P. Public Service Commission in the year 1962 and were selected against 51 vacancies of temporary Assistant Engineers (M) advertised in that year. The U.P. Public Service Commission by conducting Interviews alone vide its letter dated 18.10.1962 recommended the names of 32 Assistant Engineers (Mechanical) against the aforesaid vacancies. In the year 1962, 6 permanent posts of Assistant Engineers were also advertised by U.P. Public Service Commission and regular examination was also held but none of the candidates could be selected against the said vacancies. Therefore, in the subsequent year 1963, 10 permanent and 50 temporary vacancies of Assistant Engineers (Mechanical) were advertised and following four candidates were selected by the Public Service Commission in the aforesaid examination held in

November/December, 1963:

1. S.B.L Gupta
2. Rajendra Prasad Gupta
3. Budhi Sagar Rai
4. Anand Kumar Gupta

6. The State Government accepted these recommendations of the Public Service Commission also regarding the selection of aforesaid four candidates and letter of appointment was issued dated 17.4.1965 appointing them to the permanent post of Assistant Mechanical Engineer and they were placed on probation. It was however subsequently noticed by the State Government that Sri S.B.L. Gupta, Sri Rai and A.K. Gupta have already been working as temporary Assistant Mechanical Engineer as a result of the recommendation of the Public Service Commission sent by its letter dated 18.10.1962 in the selection held in 1962. Sri B.S. Rai and Sri S.B.L. Gupta pursuant to the aforesaid earlier selection had already been placed on probation as Assistant Mechanical Engineer with effect from 1.3.1965 vide notification dated 30.3.1965 which is prior to the appointment letter dated 17.4.1965 issued pursuant to the subsequent selection against permanent post issued in the year 1963. Pursuant to subsequent modification of the above noted Co., Sri Budhi Sagar Rai was subsequently confirmed on the post of Assistant Mechanical Engineer with effect from 1.3.1964 against a permanent vacancy fallen vacant and Sri S.B.L. Gupta was similarly confirmed with effect from 1.3.1966 after completion of probation period of one year against a permanent vacancy fallen vacant after 1.3.1965. The necessary annexures to this affidavit have been annexed in writ petition No. 313 of 1995 alongwith the supplementary affidavit filed on behalf of the State Government as per directions of this Court dated 19.5.1995. Calling upon the State Government to furnish necessary information as to whether the State Government ever declared two vacancies in the select list on the assumption that these two contestants were being adjusted against their earlier recruitment against temporary posts. According to the State Government, as stated in para 14 of this affidavit, the date of confirmation of the concerned Assistant Mechanical Engineers is as follows:-

Sri Budhi Sagar Rai 1.3.1966 Sri S.B.L. Gupta 1.3.1966

7. The State Government replied to the aforesaid query that these two permanent vacancies against which Sri B.S. Rai and Sri S.B.L. Gupta were selected/appointed and placed on probation vide G.O. dated 17.4.1965 were subsequently carried over and filled in the year 1966. It has further been stated on affidavit by the State Government that even otherwise, the relative position of Sri B.S. Rai and Sri S.B.L. Gupta in respect of initial appointment and further promotions and confirmations though provisional on various posts is as here under.

-----				Sl. N.	Post	Sri
B.S.	Rai	Sri	S.B.L			Gupta
-----				1.	Assistant	
Engineer (Mech.) (a) Provisional Appointment G.O. No. 545A/-XXIII-				G.O. No.		
545A/- IA/dated 16.2.65 (Name XIII-IA/dated at Sl. No. 1.)				16.2.62 (Name at		
Sl. No. 5) (b) Selection by U.P.P.S.C. (Name at Sl. No. 1.) (Name at Sl. No.						
against vacancies of 1962- 7.) P.S.C.'s letter No. 1201/RB /62- 63 dated						
18.10.62 (c) Regular appointment on G.O. No. 4852A/1962				G.O. No.		
temporary post. dated 30.8.63 6137/62 dated 31.10.62. (d) Confirmation as						
Assistant G.O. No. 1708A/23 G.O. No. Engineer (Mech.) w.e.f. 1.3.65 dated						
30.3.65 (Name at 1708A/23 dated Sl. No. 6) 30.3.65 (Name at Sl. No. 8) (e)						
Tentative Seniority as Name at SL. No. 2 Name at Sl. No. 8 circulated vide G.O.						
No. 8469/27.1.90/88 dated 31.12.1990				2. Executive Engineer (Mech.) (a)		
Promotion G.O. No. 5/3/68-sin-Ka G.O. No. 5/3/68- dated 25.10.68 sin-Ka						
dated 27.11.68 (b)Confirmation as executive G.O. No. 2497F/74 G.O. No.						
Engineer (Mech.) dated 12.4.79 (w.e.f. 1838/78 dated 1.4.76) 7.4.83 (w.e.f.						
1.4.76) 3. Superintending Engineer (Mech.) (a) Promotion G.O. No. 4597/23						
G.O. No. dated 1.8.80 w.e.f. 3997/23-1/-83 12,11.79 (G.O. No. dated						
23.6.83 6743/88 dated 5.11.82) w.e.f. 12.11.79 G.O. No. 2667/23.10.85						
dated 29.4.85 (b) Confirmation w.e.f. 1.4.87 G.O. No. 6291/23/87 G.O. No.						
dated 30.9.87 (Name at 6291/23/87 Sl. No. 4.) dated 30.9.87 (Name at Sl.						
No. 5.) 4. Chief Engineer (Mech.) Level-II (a) Promotion G.O. No. 8255 (ii)/88						
G.O. No. dated 19.12.89 w.e.f. 8255/88 dated 19.12.89. 19.12.89 w.e.f.						
19.12.89. -----						

8. The respondent by filing his counter-affidavit has attempted to contradict this position by filing his own chart but no reason has been given as to why the records maintained by the State Government be disbelieved and why the same are incorrect.

9. In the aforesaid background, both the contestants are claiming seniority over each other and there has been lot of litigation by and between them in this regard which shall be referred to whenever necessary.

10. The present litigation between the petitioner Sri B.S. Rai and Sri S.B.L. Gupta commenced soon after the post of Engineer-in-Chief (M) fell vacant on 31.1.1993. Sri Rai filed a claim petition No. 48/IV/93 before the Tribunal stating his claim for this coveted post being senior most as per then existing tentative seniority list dated 31.12.1990 of the Assistant Engineers of this Department. The Tribunal passed on exparte interim order dated 16.2.1993 in the following terms:

"I hold and direct the opposite parties that on the basis of the seniority list dated 31.12.90 which is Annexure-10 to the claim, the petitioner being the seniormost among the Chief Engineers Level-2 (M) be considered and promoted to the post of Engineer-in-Chief (M)."

11. It appears that Sri S.B.L. Gupta was not impleaded as a respondent in this claim petition. He, therefore, filed an independent claim petition No. 81/IV/93 before the Tribunal claiming inter alia that he is the right candidate for the post in question which is to be filled on the basis of merit and not seniority. He further contended in the said claim petition that even otherwise the seniority list dated 31.12.1990 relied upon by Sri Rai in his claim petition is only a tentative seniority list. It was also contended by him that seniority list dated 31.12.1990 is also not a list of Engineers who belong to Group A service. Sri S.B.L. Gupta placed reliance on his appointment order dated 17.4.1965 as Assistant Engineer (Mechanical) on substantive post where his name finds place at serial No. 1 followed by Sri B.S. Rai. Sri S.B.L. Gupta also placed reliance on a G.O. dated 7.4.1983 wherein it was provided that the

name of Sri S.B.L Gupta shall be placed next below one Sri Giriraj Singh. In fact, Sri Gupta claims procedure over Sri Rai and prayed for selection and promotion to the post of Engineer-in-Chief. The then Chairman of the Tribunal (Sri Indu P. Aron) admitted this claim petition also on the very next day, i.e. 17.2.1993 and again passed another interim order in this claim petition directing the opposite parties to consider the candidature of the claimant Sri S.B.L Gupta first for appointment to the post in question. . 12. Sri B.S. Rai challenged the aforesaid interim order dated 17.2.1993 by filing writ petition No. 1385 (SS) of 1993 which it appears was disposed of by order dated 24.3.1993. This order refers to another writ petition No. 7843 of 1991 filed by the petitioner Sri B.S. Rai seeking direction for his consideration for the post of Chief Engineer Level-I and Engineer-in-Chief ((M). By an interim order dated 11.2.1993 his prayer was granted by a Division Bench. However, thereafter, this writ petition also was dismissed as withdrawn. Be that as it may, a learned Single Judge of this Court in the aforesaid writ petition No. 1385 (SS) of 1993 vide orders dated 24.3.1993 directed the opposite parties/State Government to consider the petitioner and the respondent both alongwith other eligible candidates in accordance with Government Orders and rules, on merit for the post of Engineer-in-Chief (M). It is at this stage that the claimant/respondent Sri S.B.L. Gupta added a new dimension to the pending dispute by filing an application for grant of fresh interim relief issuing directions to the State Government to determine the inter se seniority/merit position assigned to both Sri B.S. Rai and Sri S.B.L. Gupta by the U.P. Public Service Commission (hereinafter referred to as Commission for brevity) in the merit list dated 6.12.1964 furnished by it. A copy of this merit list was annexed as Annexure-4 to the claim petition and it was further prayed that the previous select list dated 18.10.1962 also furnished by the Commission be not taken into consideration for the said purpose as the same is not meritwise.

13. In spite of the fact that the admitted case between the parties was that the selection in question was to be made on merit alone and seniority was only relevant for the purpose of determining eligibility or candidates for consideration, but all the same, since there was only one post, therefore, both the contenders were persistently claiming seniority over the other by placing reliance on various

judgments and orders passed by the Tribunal earlier in claim petitions filed by both the parties or some Government Orders issued in this regard. However, the undisputed position which prevailed throughout these years was that the intense seniority between the direct recruits never attained finality Seniority lists which were issued by the State Government from time to time remained provisional and were never finalised. In spite of aforesaid factual position, both of them indulged into frequent litigation by approaching the Tribunal and this Court again and again right from 1980 onwards. It is indeed difficult if not impossible to give details of each and every claim petition/writ petition that they had filed. Justice Krishna Iyer, an Hon'ble Judge of Supreme Court (as he then was) rightly observed in his judgment in the case of Baleshwar Dass (supra), as follows:-

"But national dedication, so vital to poverty eradication, is subject to one rider in our society, viz., Charity begins at home. And so, for their own justice-oriented survival, the groups are fighting in Courts while the demands of developmental justice to the people need their presence in the country side."

14. Reverting back to the sequence of facts relevant to this case, the Tribunal vide its order dated 5.9.1994 at the preliminary stage itself accepted the case set up by Sri S.B.L. Gupta in his aforesaid application that the list furnished by the Public Service Commission dated 18.10.1962 (against temporary post of Assistant Engineers) showing the name of Sri B.S. Rai above Sri S.B.L. Gupta is not meritwise, but it merely contained the recommendations of the O.P. Public Service Commission whereas the list dated 6.5.1964 (Annexure-A4 to the claim petition) (for permanent posts of Assistant Engineers) was meritwise where the name of Sri S.B.L. Gupta is above the name of Sri B.S. Rai. However, since this Court vide its order dated 24.3.1993 had directed the State Government to consider both the contenders for the post in question alongwith other eligible candidates, therefore, the Tribunal inspite of its aforesaid view directed the opposite parties to consider the petitioner also:

"The position which emerges from Annexure Nos. 5 and 4 is that the petitioner's name is at serial No. 1 while that of Sri Rai is at serial No. 3. Since the Hon'ble High Court in its order dated 24.3.93 has directed that the petitioner be also considered alongwith others eligible candidates for promotion on higher post. So in the meantime, the opposite parties are directed to consider the petitioner as well as other eligible candidates for promotion on the post of Engineer-in-Chief by the date fixed in accordance with G.Os. and Rules, keeping in view the order dated 6.5.64 Annexure A4 determining the position of the petitioner in the merit ignoring merely the approved list Annexure A3 dated 18.10.62."

15. The claim petition was thereafter heard final Sri B.S. Rai though was not a party-respondent in this claim petition filed by Sri S.B.L. Gupta but all the same he filed the objections to the aforesaid interim relief application denying the claim made by Sri S.B.L. Gupta and asserted that the list dated 18.10.1962 forwarded by the Public Service Commission was meritwise and not merely an approved list as alleged. In support of his contention, Sri Rai placed reliance on

the judgment of the Apex Court followed by this Court in writ petition No. 10961 of 1989, Virendra Kumar Agarwal and D.C. Jain etc. v. State of U.P. as also S.N. Misra v. State of U.P., dated 4.7.1994. He also filed several other documents in support of his stand. Sri B.S. Rai In the alternative pleaded that the claim petition filed by Sri S.B.L. Gupta is liable to be rejected for non-joinder of necessary party as the claimant has sought relief to the prejudice of the applicant (Sri B.S. Rai without impleading him a party-respondent. The stand of the State Government in the written statement filed by it opposing the claim petition was that the G.O. dated 7.4.1993 relied upon by Sri S.B.L Gupta for the purpose of seniority did not exist any more as the same was amended by a subsequent G.O. dated 21.10.1994 whereby the portion relating to the determination of his placement/seniority has duly been expunged. The learned Tribunal though rejected the application of Sri S.B.L. Gupta for impleadment but all the same it considered his objections and after hearing the matter finally, allowed the claim petition by the impugned judgment holding that the list dated 18.10.1962 cannot be held to be meritwise list as it is a list merely recommending the names forwarded by the Public Service Commission and, therefore, the list dated 6.5.1964 which is the meritwise list shall prevail over the list dated 18.10.1964. It further held that even otherwise the question of seniority of Sri S.B.L. Gupta as per placement in the merit list dated 6.5.1964 stands determined finally and conclusively on the basis of the G.O. dated 7.4.1983 as held by the Tribunal in its earlier decision dated 23.9.1983 and 18.9.1994 passed in claim petition Nos. 219F/IV/90 and 224F/IV/90. In the view of the Tribunal, these judgments attained finality maintaining Sri S.B.L. Gupta senior to Sri B.S. Rai as per list dated 6.5.1994 and for last 30 years, State Government itself has promoted Sri Gupta on the basis of the said list, to the post of Executive Engineer, Superintending Engineer and Chief Engineer Level-H. The Tribunal further held that the judgments dated 6.12.1993 and 4.7.1994 passed by this Court (High Court) in the case of D.C. Jain and others and S.N. Misra are of no avail in the light of the finding recorded by it. Reference has also been made to a letter wherein the Public Service Commission itself has expressed its inability to furnish its opinion on the query made by the State Government for clarification as to whether the list dated 18.10.1962 is a merit list or not. The Tribunal by the impugned judgment directed the State Government to comply its judgment within one month from the date of the presentation of a certified copy. A perusal for the following extract from the impugned judgment would show the manner in which the Tribunal has dealt with the whole issue:

"Reliance was also placed on Annexure-7 dated 7.4.83, according to which the petitioner was to be kept below Sri Giri Raj Singh. In para 18 of the CA/WS, it is alleged that the order dated 7.4.83 has been cancelled. One Sri B.S. Rai, who is not a party to the claim petition filed with his. application dated 18.10.94 a copy of the G.O. 1750-27.1.94-176/78 dated 21.3.1994, which says that from order Annexure-7 to the claim petition, the lines "Sri Gupta ki Jyeshthta shasnadesh

shankhya 8903-F/77-23-Si-1-277/74 dated 2.1.78 mein ulikhit adhikaraion mein Sri Giri Raj Singh ke theek niche rakkhi jayegi" were expunged. The rest of the portion was allowed to remain as it is. Thus, the petitioner's confirmation stood confirmed w.e.f. 1.4.76 on the post of Executive Engineer. It may be mentioned here that the judgment Annexure-A 1 filed with the interim relief application was delivered on 23.9.83, which judgment was also followed in the judgment Annexure A2. The G.O. dated 21.2.94 does not over rule the judgment Annexure-A2 aforesaid, which has become final between the parties. The document No. 6 filed with the application 18.10.94 by Sri Rai is thus of no avail to him. In Annexure-A4 also Sri B.S. Rai stands above Sri Anand Kumar Gupta. Annexure/document No. 8 dated 30.3.65 shows that the seniority of promoted Engineers was left upon. The learned Counsel for Sri B.S. Rai also placed reliance upon the instructions regarding direct recruitment through Public Service Commission. It may be mentioned here that the arrangement made by Annexure-A3 was by way of temporary measure for a year only and it was specifically mentioned in Annexure-A3 that the candidates appointed as a temporary measure, should take regular examination in July/August next. Thereafter, on the basis of the competitive examination the list Annexure-A4 was issued. Thus, the judgment delivered in writ petition 10961/1989, Virendera Kumar Agrawal v. State of U.P. and Ors. and also other connected writ petitions delivered on 6.12.93 do not hold Sri B.S. Rai senior most in any way. The State Government has written to the U.P. Public Service Commission for clarifying whether the list dated 18.10.62 is a merit list, but the U.P. Public Service Commission expressed its inability to furnish the opinion as desired by the State Government in this connection. The judgment delivered by the Hon'ble High Court in S.N. Mishra v. State of U.P. is also of no avail to Sri Rai for the reasons mentioned above.

The list Annexure-A3 does not show that the Public Service Commission has drawn this on the basis of merit of the respective candidates after holding an interview. No interview marks have been mentioned in the said list like the marks mentioned in Annexure-A4. Thus, for the reasons aforesaid, the position which emerges is that the list Annexure-A4 is the merit list and it will prevail over the list Annexure-A3 which is merely an approval list. Annexure-5 also shows likewise. The list contained in Annexure-A4 has been acted upon. Continuously for nearly 30 years.

The claim of Sri B.S. Rai that the claim petition be dismissed on account of non-joinder, is not maintainable. The claim of Sri Rai which he has put in detail, though he is not a party to the claim petition, has been found untenable. He placed all the facts relating to him in his objections. He has also filed a detailed objection. The application of Sri Rai for dismissing the claim petition is not maintainable and is dismissed."

16. Sri B.S. Rai also had earlier filed a claim petition bearing No. 11/F/IV/80 impleading one Madan Mohan Sinha as respondent No. 3 claiming his confirmation to the post of Executive Engineer and promotion to selection grade

of Executive Engineer as well as Superintending Engineer from the date the said respondent No. 3 was promoted on the basis that there are no service rules in respect of cadre of Assistant Engineers. Executive Engineers, etc. in the Irrigation Department of the State of Uttar Pradesh. This claim petition was decided vide judgment and order dated 10.2.1992 wherein the learned Tribunal passed the following order:

"But to avoid further litigation and to provide clarity, it would be just and proper to direct the opposite-parties to give due consideration to the claim of the petitioner pertaining to his confirmation on various posts and consequent promotions as per the U.P. Service of Engineers (Irrigation Department) Group "A" Rules, 1990 as notified on 27.9.90. It is but natural that, the opposite parties shall be guided by the Inter-se seniority as drawn up and circulated both vide order dated 31.12.90."

17. This judgment was not challenged by any of the parties not it but when the same was not implemented Sri B.S. Rai initiated execution proceedings through Execution Case No. 33 of 1993 pursuant to certificate issued by the Tribunal u/s 5(7) of the Tribunals" Act, 1976. Sri B.S. Rai yet moved another application under Rule 24 of U.P. Service Tribunals Enforcement Rules, 1992 for compliance of the aforesaid judgment on 10.6.1993. The Tribunal therefore, directed the State Government vide its order dated 3.7.1993 to comply the judgment dated 10.2.1992. The State Government in the aforesaid facts and circumstances being in a fix as to how to comply all the orders issued by the Tribunal and the High Court from time to time in different proceedings, moved an application for recall of the order dated 3.7.1993. Learned Tribunal rejected this application and took cognizance suo motu for initiating contempt proceedings under Rule 47 (1) of the aforesaid 1992 Rules. While these proceedings were pending, the prevailing situation became more difficult and complicated after the final judgment dated 27.10.1994 was rendered, out of which present proceedings have arisen. Sri S.B.L. Gupta, therefore, submitted an application for impleadment in the above noted proceedings to which Sri B.S. Rai filed objections. This application of Sri S.B.L. Gupta for impleadment was however rejected for application for leave to be hear was allowed. The learned Tribunal took suo motu cognizance for initiating contempt proceedings for non-compliance of the judgment dated 27.10.1994 also.

18. After hearing the parties, the Tribunal vide its order dated 27.10.1995 (under challenge in writ petition No. 67 of 1996) took the view that since the directions contained in the judgment dated 10.2.1995 are of limited nature and those contained in judgment dated 27.10.1994 are of commanding nature and binding on both the State Government as a party respondent as well as Sri B.S. Rai, an active impleader resembling a third party, therefore, the then Principal Secretary, Irrigation Department, Sri S.N. Shukla was directed to give effect to the judgment dated 27.10.1994 and consider Sri S.B.L. Gupta for the post of E.I.C. (M) placing him senior to Sri B.S. Rai within one month from the date of the

judgment and submits its compliance report.

19. It is at this stage that the above noted writ petition No. 67 of 1996 and 313 of 1996 were filed and this Court vide its interim order dated 4.1.1996 and 11.1.1996 though permitted the State Government to proceed to finalise the inter se seniority of the Assistant Engineers of the Irrigation Department on the principles laid down by a Division Bench of this Court in the case of S.N. Misra (supra), as also to proceed with the process of selection for the post in question, but it was restrained from giving the charge of the post to the selected incumbent. While this Court was seized of the matter and had issued the aforesaid interim directions to the State Government, the Tribunal undeterred by the fact that the judgment passed by it in the claim petition was under the scrutiny of this Court, continued to pass order after order dated 30.4.1996, 22.5.1996 and 31.5.1996 as if conducting parallel proceedings. Though, I shall discuss these orders at a later stage, but I am constituted, to observe here they that the Tribunal acted in the most improper and arbitrary manner against well-established norms of judicial propriety and discipline.

20. The State Government has challenged the impugned judgment and order dated 27.10.1994 primarily on the ground that the findings recorded by the learned Tribunal and consequential directions issued by it are clearly contrary to the law laid down by Hon''ble Supreme Court in the case of Baleshwar Dass, P.D. Agarwal (supra), followed by S.N. Misra's case (supra), hence the judgment is wholly perverse, illegal and arbitrary and is liable to be set aside.

21. Sri B.S. Rai has also challenged the impugned judgment on more or less the same grounds. It has seriously been contended by both, the State Government and Sri B.S. Rai that the finding given by the learned Tribunal that the list dated 6.5.1964 forwarded by the Public Service Commission shall supersede or prevail over the list dated 18.10.1962 is not only erroneous but contrary to the law laid down by the Apex Court, thereafter followed by this Court. It has also been contended very strenuously that the seniority of the Assistant Engineers of Irrigation Branch was never finalised earlier and since all the seniority lists issued by the State Government from time to time were quashed either by this Court or by the Apex Court, therefore, the only seniority lists were dated 15.12.1990 and 31.12.1990 which were admitted provisional and tentative seniority lists, that the G.O. dated 17.4.1983 to the extent of fixing seniority position in favour of Sri S.B.L. Gupta could not be relied upon by the Tribunal as the same stood amended by a subsequent G.O. dated 20.3.1994. It has further been urged that the finding that the seniority as per list dated 6.5.1994 was being acted upon over last 30 years is also a wholly perverse and incorrect finding contrary to the material on record including judgments of Apex Court and this Court. In support of the aforesaid contentions both the State Government as well as Sri B.S. Rai referred extensively to the judgments rendered by Hon''ble Supreme Court and, followed by this Court in the case of Sri S.N. Misra and some other cases. Both these writ petitions have been resisted by Sri S.B.L. Gupta solely on the ground

that the list forwarded by the U.P. Public Service Commission dated 18.10.1962 was not meritwise but was simply a list-making recommendations for making appointment to temporary posts whereas the main merit list was dated 6.5.1964 which was forwarded by U.P. Public Service Commission pursuant to selection held for permanent post and since the respondent Sri S.B.L. Gupta's name finds place above the name of Sri B.S. Rai, therefore, he is entitled to be treated as senior to the petitioner.

22. Since the dispute centered round the question as to whether the list dated 18.10.1962 was the meritwise list or not and it was also seriously contended that the Commission itself is doubtful as to whether it was merit-wise list or not, therefore, this Court issued notice to the U.P. Public Service Commission directing it to file a counter-affidavit on this aspect of the matter. The Commission through its Counsel filed an affidavit seating that the complete record/marksheets of 1962 selection are not available, therefore, the marks obtained by the candidates cannot be placed before the Court. However, it was not accepted by the Commission that the list dated 18.10.1962 was not meritwise. In para 10 on behalf of the Commission, it has categorically been stated as follows:-

Para 10. "That in view of the decision taken by the subject committee, it is stated that the list sent on 18.10.1962 has been sent in the order of merit."

23. The Public Service Commission as well as the State Government both placed reliance on Sub-rule (2) of Rule 2 of Uttar Pradesh Service of Engineers Class II Irrigation Branch Rules, 1936, which provides that the Public Service Commission shall place candidates whom they recommend in order of merit and submit their names to the Secretary in the Public Works Department. Irrigation Branch. It was, therefore, contended by the petitioners that once the Rules provide for the authorities to act in a particular manner then there is no reason to doubt that the said authority, Public Service Commissions herein, did not act accordingly and on the basis of wholly unfounded doubts raised after more than three decades, the settled legal and factual position cannot be unsettled, hence the Tribunal clearly acted wholly arbitrarily, illegally and without jurisdiction by passing such an order which unsettles the settled position which was prevailing for the last more than three decades According to the petitioner, Sri B.S. Rai, the stand taken by the respondent before the Tribunal in these proceedings was itself contrary to the admissions made by him in his counter-affidavit filed in writ petition No. 10476 of 1989, D.C. Jain v. State of U.P. and Ors., which has been decided vide judgment and order dated 6.12.1993 upholding that list dated 13.10.1962 was a meritwise list.

24. Sri R.M. Trivedi, learned Senior Advocate appearing for the petitioner = Sri B.S. Rai in the alternative submitted that even assuming that the list dated 18.10.1962 was not meritwise, the petitioner accepts his appointment against a temporary post with effect for the date he was appointed as such and became a member of the service and he gives up his claim of being selected against a

permanent post vide recommendations of the Public Service Commission dated 6.5.1964. It was urged that as per the decision of the Apex Court, the Assistant Engineers selected against the temporary post in the selection held in the year 1962, have been directed to be placed unblock above the later selected against permanent post in the selection held in the year 1963. Therefore, even otherwise, his placement shall be above Sri S.B.L. Gupta. In support of the aforesaid contention, he referred to the decision of a Division Bench of this Court in the case of V.C. Agarwal v. State of U.P. and Ors., reported in 1989 (2) UPLBEC 477.

25. The question or the interconnected questions which fall for consideration of this Court are whether the findings recorded by the learned Tribunal in the impugned judgment are contrary/against the decision of the Apex Court and this Court and whether it was open to Sri S.B.L. Gupta to challenge the nature of the list of selected candidates forwarded by the Public Service Commission dated 18.10.1962 on the ground that it is not meritwise and whether the same can be ignored for the purpose of determination of in terse seniority of the Assistant Engineers selected by U.P. Public Service Commission in the relevant years? And whether the merit list issued by the Commission dated 6.5.1994 can prevail over the list dated 18.10.1962.

26. Before adjudicating the aforesaid questions, it would be necessary to refer to the long history of the litigation fought by the Assistant Engineers of the Irrigation Department in various Courts. The seniority of the Assistant Engineers of this Department has been the subject-matter of dispute for more than 30 years and a number of seniority list of such Assistant Engineers were issued by the Government from time to time which were challenged before this Court, and the seniority list so drawn dated 30.12.1965 and 13.5.1969 were quashed earlier. Thereafter the matter was taken to the Hon"ble Supreme Court which finally decided the same vide its judgment and order dated 19.8.1980 in the case of Baleshwar Dass (supra). Board principles for drawing seniority of these engineers .were laid down, therefore, fresh provisional seniority list was drawn by the State Government. This was again challenged by the concerned engineers by filing several writ petitions under Article 32 of the Constitution of India before Hon"ble Supreme Court of India again. During the pendency of the aforesaid writ petitions, the State Government again issued certain modified guidelines on 12.7.1982 and consequently issued two seniority lists dated 12.7.1982 and 21.8.1982. These were again challenged by filing fresh writ petitions before Hon"ble Supreme Court. While all these writ petitions were pending consideration of the Apex Court, another appeal came. up for consideration before it relating to Assistant Engineers in Public Works Department governed by identical rules, preferred by one P.D. Agarwal which was decided by Hon"ble Supreme Court on the basis of principles already laid down by it in the case of Baleshwar Dass (supra). In the aforesaid facts and circumstances, when the bunch of aforesaid writ petitions under Article 32 of the Constitution came up for consideration before the Hon"ble Supreme Court, the Apex Court remitted the same to this

Court, for determination and that is how the judgment in the case of S.N. Misra (supra), came to be rendered whereby the seniority list dated 12.8.1982 and 21.8.1982 were again quashed and directions were issued to the State Government to draw a fresh seniority list on the basis of the directions issued therein. It is pursuant to these directions that the State Government has now issued a final seniority list of Assistant Engineers dated 26.4.1996, which was aforementioned is not in challenge in the present proceedings. In the said seniority list, the name of the respondent finds place below the name of the petitioner Sri B.S. Rai.

27. To deal with the main question on ground of attack that the impugned judgment is in flagrant violation of the principles laid down by the Apex Court and followed by this Court for determining seniority in question in the case of Baleshwar Dass, P.D. Agarwal, V.C. Agarwal, V.K. Agarwal and S.M. Misra (supra), the said judgments have been perused by me. In all these decisions, in nutshell, it has been held that the seniority of persons must be reckoned from the date they became the members of service.

28. In the case of Baleshwar Das (supra), dealing with the competitive claims of seniority between three groups of Assistant Engineers of Irrigation Branch, U.P. Including graduate engineers directly recruited by the Commission Hon"ble Krishna Iyer, J. speaking for the Apex Court held as follows:-

"Substantive capacity is a fixable expression which cannot be frozen by current official else, nor by the conditions that obtained in the remote past when the rule was framed. On the contrary, its meaning must be consistent with Article 16 and must avoid the pitfalls of arbitrariness and Irrational injustice. So viewed, we hold that the appointment need not necessarily be to a permanent post. It is sufficient even if it is to a temporary post of long duration. In a department which had permanent posts and temporary posts of a quasi-permanent nature, there is not much to distinguish the equality of service as between the two Patwrdhan case and Chauhan case have primarily or in passing clarified the equal value of officiating service."

"Once we understood "substantive capacity" in the above sense, we may be able to rationalise the situation. If the appointment is to a post and the capacity in which the appointment is made is of indefinite duration, if the Public Service Commission has been consulted and has approved, if, the tests; prescribed have been taken and passed, if probation has been approved, one may well say that the post was held by the incumbent in a substantive capacity."

The general and broad principles laid down by Hon"ble Supreme Court in the above-noted case were followed by it in another case of P.D. Agarwal, dealing with Assistant Engineers of P.W.D. (same service rules being applicable). A Division Bench of this Court in the case of V.C. Agarwal 1989 (2) UPLBEC 477, while reiterating the same held as follows at page 481-482:

"The outcome of the two decisions in nut shell, therefore, is that a person

appointed against a temporary or permanent vacancy after consultation with Public Service Commission before 1961 and selected in examination conducted by commission after 1961 became member of the service from the date of appointment and his seniority shall be reckoned from that date. In other words length of service but not as adhoc or officiating became the yardstick Instead of date of confirmation or appointment against permanent post. In G.C. Gupta and Others Vs. N.K. Pandey and Others, , the Hon"ble Court reiterated it once again in respect of seniority amongst, engineers of Public Works Department. The Hon"ble Court held, "seniority of the employees in service in question will be determined from the date when an employee has become a member of the service being appointed substantively to a post in the cadre of service, no matter whether the said post is permanent or temporary."

"True that by jumping the queue such persons have been able to secure permanency earlier and climb on promotional ladder as well. But that they achieved on merit and hard work. Depriving such persons of this benefit would be unjust and In equitable,"

"Therefore, from whatever angle the claim is examined it appears seniority of such temporary engineers, unlike ad hoc or officiating, who were initially appointed substantive against temporary vacancies but selected latter against permanent posts, it liable to be reckoned from date, of initial appointment."

"Reverting to intense claim between directs. Such officers can be grouped in two broad categories one those who were appointed alongwith petitioners temporary against substantive vacancies and other who were selected against permanent vacancies between the dates when petitioners were appointed against temporary vacancy substantively and selected again against permanent vacancies. Amongst such officers all those who were appointed after office memorandum of 1961 and were confirmed cannot be disturbed in view of the directions of Hon"ble Court in Agarwal"s case. But so far others are concerned their seniority shall be determined as indicated earlier. Therefore, the petitioners who were appointed substantively against temporary vacancy shall be entitled to reckoning of their seniority from that date, irrespective of their subsequent selection against permanent vacancy."

29. Another Division Bench of this Court in the case of S.N. Misra, Writ Petition No. 6191 of 1982 in its judgment dated 4.7.1993 again dealing with the same" issue of determination of inter se seniority between the direct recruits, temporary and permanent held as follows:-

"Rule 23 which deals with seniority is reproduced below:

"23. Seniority in the service shall be determined according to the date of order of appointment to it, provide if the order of appointment of two or more candidates bear the same date their seniority inter se shall be determined accordingly to the order in which their appointment has been notified."

"Advantage of Rule 23 can be claimed by only those temporary Asstt. Engineers who were appointed substantively on the temporary post. If they were appointed on provisional basis, meaning thereby that their appointment was temporary, provisional, adhoc or officiating, they cannot get the benefits of Rule 23. In nut shell seniority in the service of Assistant Engineers of Irrigation Department shall be determined from the date on which an officer becomes the member of service according to the order of appointment. Appointment can be made against a permanent as well as temporary post in the service. Appointment against a temporary post in the service, will amount to appointment to it if it is made in accordance with 1936 Rules and no otherwise."

30. From the perusal of aforesaid paragraphs, it is clear that the petitioner Sri B.S. Rai also became a member of service pursuant to his substantive appointment though against a temporary post, the State Government had accepted the recommendations of the Public Service Commission contained in the list dated 18.10.1962.

31. Now the next question raised is as to whether it is open to the State Government not to accept the recommendations forwarded by the Public Service Commission in the same year. The contention of the respondent is that the list dated 18.10.1962 was not meritwise as the Public Service Commission ha;; failed to produce the marksheets. The Division Bench in the case of S.N. Misra (supra), while dealing with almost senior argument raised before it that the State has unfettered power to appoint any person without consultation with the Public Service Commission, rejected the same on the ground that such a power to the State Government is fraught with danger and grave consequences because it would, lead to chaotic conditions where nepotism and favorites would prevail. While discussing this issue further, the Division Bench held as follows:-

"From the aforesaid precedents, it is evident that although it is open to the State Government to accept or decline to accept the recommendations made by the Public Service Commission, but once the State accepts the recommendations regarding appointment to the service, then appointments are to be made strictly in accordance with the order of merit as recommended by Public Service Commission. It is not open to the State Government to change the policy by applying the principle of pick and choose."

"It was next submitted that the Public Service Commission possess no power to prepare the list on merits of Assistant Engineers who are found suitable for employment. It was contended that it is the prerogative of the executive to drop the merit/seniority. The job of the Public Service Commission is either to approve or disapprove the appointment. When a requisition is sent to the Commission for selection, it is the duty of the Commission to decide whether an Assistant Engineer is fit to be appointed on substantive basis and hence in this regard, it is incumbent upon it, to consider the relative merit of the candidates and also the order in which substantive appointment has to be made. When the appointments are made on the basis of routine test or on the basis of interview conducted by

the Public Service Commission it has to form the opinion as to who is the best candidate. In case only one appointment has to be made, otherwise it draws a list of candidates in order of merit. Seniority depends upon the list prepared by the Public Service Commission. Unless the names are in order of merit, the Government would be in difficulty in making appointments. For example, if there are only ten vacancies and the Commission draws a panel of about 20 persons in order of merit, there would be no difficulty for the Government to fill up ten vacancies out of the first ten from the panel. The remaining ten, may await their turn for appointment, whenever the vacancy would arise within a period of one year. In that circumstances the Government in order of merit would appoint the persons whenever vacancies would arise in a year. In the case of *Jitendra Kumar and Ors. v. State of Punjab and Ors.* (supra), *Shankaran Dash v. Union of India* (supra), and *Asha Kaul (Mrs.) and Anr.* (supra), this principle has been upheld by the Supreme Court. The Government has no option, once it accepts the report of the Commission to appoint persons in order of merit and the Government cannot pick and choose candidates out of the list."

32. In these circumstances it is quite clear that as the rule provides, the list sent by the Public Service Commission is always treated to be a list meritwise and it was not open to the learned Tribunal to take a contrary view merely on the basis of some doubts raised by the claimant before it and unsettle the settled legal position. It could not have taken a contrary stand.

33. Learned Counsel for the petitioner Sri S.B. Rai, vehemently contended that the petitioner himself had admitted in his counter-affidavit filed in another writ petition No. 10476 of 1989 in para 3 that he was selected by the Public Service Commission in the year 1962 and in the merit list also, the name of the answering opposite party was placed higher than that of the petitioner of that writ petition i.e. Sri D.C. Jain. A copy of this counter-affidavit has been placed on record. This fact also finds reference in the judgment rendered in the said writ petition alongwith other connected writ petitions Nos. 10961 of 1989, 2491 (SS) of 1993, 9966 of 1989, 861 (SS) of 1992 and 9890 of 1989 vide judgment dated 6.12.1993. The averments made by Sri S.B.L. Gupta in the said counter-affidavit were accepted by this Court in the aforesaid judgment to which reference has been made. Learned Counsel for the petitioner, therefore, contended that in these circumstances, it is not open to" the petitioner to resile from the said admission and take a complete somersault by taking a wholly contrary plea in the present proceedings.

34. After having gone through all the decisions referred and relied by the petitioner minutely. I am of the view that the Tribunal has indeed recorded findings contrary to law laid down by the Apex Court and followed by this Court. It is quite clear that the Tribunal has recorded wholly perverse findings by holding that the list dated 18. K). 1962 is not a meritwise list and that the list dated 6.5.1964 shall prevail over it, hence the same is liable to be set aside.

35. Now coming to the next contention that the Tribunal has erred in accepting

the contention of" the claimant that some of the previous judgments rendered by the Tribunal since became final and conclusive between the parties, therefore, the promotions earned by Sri S.B.L. Gupta cannot be ignored and his seniority has also to be determined accordingly. The extract from the impugned judgment has already been quoted hereinabove to show the manner in which the Tribunal has dealt this issue. A perusal of the same leaves one with no doubt in the mind that the Tribunal's view is that seniority of Sri S.B.L. Gupta stood determined. The main judgments dealing with the issue i.e., Baleshwar Dass's case, P.B. Agarwal's case, S.N. Misra's case, all have been ignored by the Tribunal where it has already been held that the position of in terse seniority of the Assistant Engineers between the direct recruits throughout remained provisional and the same never attained finality because of the seniority lists issued by the State Government determining their seniority time, and again were quashed by the Courts of law. This fact finds a clear reference or finding in the judgment of S.N. Misra in following paragraphs:-

"Now first at all it has to be seen as to whether the petitioners were ever promoted substantively on the posts of Executive Engineer and thus, they became the member of the engineering higher service. The seniority list of Assistant Engineers selected in the year 1967 to 1962 and even later on has been under the dispute since 1959. Right from 1969, till the publication of the two seniority lists, indicated above, which were also challenged no substantive or regular appointments were made to the higher post, as the State was left only with the option to make ad hoc promotion to carry on the routine functions. Regular promotions could not be done and every promotion from the post of Executive Engineers to the Engineer-in-Chief was made on adhoc basis and it was mentioned in the orders when the promotion so made would be subject to final decision in writ petitions."

"In view of the above, the contention of the petitioners that they were substantively promoted on the post of Executive Engineers and onwards and became the members of higher service, in accordance with 1990 Rules cannot be accepted. They failed to produce any Government Order to show that their promotion were ever made in accordance with these Rules or their services were ever regularised on the post of the Executive Engineers and onwards. In view of the fact that no engineer since 1969, in the Irrigation Department has ever been regularly promoted or confirmed on the post of Executive Engineer or Superintending Engineer and onwards, it cannot be accepted, that they became the member of service under 1990 Rules. According to that Rule means a person substantively appointed under these Rules. The State Government has yet to regularise the services of such Executive Engineers and onwards in accordance with the Regularisation and Adhoc Promotion Rules, 1978. Only after the regularisation of the higher services the seniority list of the higher services under Rule 9 of the aforesaid Rules which are prospective in nature would be prepared."

"As mentioned above the Rules under challenge are prospective in nature. The

seniority or promotion of the Engineers working in the Irrigation Department on Civil as well as Mechanical side, have not been determined in accordance with the said Rules and none of the Engineers have become the Member of service under these Rules. Hence it is a futile exercise on their part to challenge the aforesaid Rules. At the most, it can be said that they as challenge the aforesaid Rules only when promotions would be made in accordance with the aforesaid Rules; At present moment, we are of the view that they have no cause of action to challenge the said Rules."

36. It is thus clear that all the promotions of Assistant Engineers which were made in the past to the higher posts of Executive Engineer, superintending Engineer, Chief Engineer etc. always remained provisional subject to the result of the pending writ petitions. In these circumstances, the Tribunal has committed manifest error by ignoring these binding precedents and acted with impropriety by taking a contrary view.

37. The Division Bench after discussing the matter at great length and quashing the seniority list under challenge in the case of S.N. Misra, laid down the principles in para 120 to be followed for drawing the seniority list of finalizing it. The principle relevant for the purpose of this case is contained in sub-para (a) which reads as follows:-

"(a) Assistant Engineers on Civil and Mechanical side working in the Irrigation Department who were directly recruited by selection through the Public Service Commission should be assigned their seniority in order of merit, assigned to them, by the Public Service Commission, from the date they became the member of service in accordance with Rule 3 of the said 1934 Rules and 1936 Rules that is from the date of their substantive appointment to the post of Assistant Engineers."

38. In the light of the aforesaid findings, the impugned judgments and the subsequent orders passed by the Tribunal are liable to be quashed being wholly arbitrary, illegal and preserves. The attempt of the respondent to challenge the seniority list dated 26.4.1996 prepared pursuant to the judgments of Hon'ble Supreme Court and this Court indirectly, therefore, must fail.

39. Before parting with this judgment, I am constrained to observe that the Tribunal while rendering the judgment has not exercised proper care and caution to maintain the judicial discipline. The Tribunal being subordinate to the High Court could not have ignored the decisions rendered by this Court as also the Supreme Court. Article 141 provides Constitutional sanction to the binding nature of the judgments of the Apex Court throughout the territory of India. The Tribunal ought to have given due attention to the case law placed before it as it was under a legal duty to have applied its mind before taking the same casually by holding that the documents placed before it are of no avail and the judgments referred and relied to were not applicable to the facts and circumstances of the case. Besides this, when this Court was seized of the matter and had passed the

interim orders, directing the State Government to proceed to draw the seniority list in accordance with the principles laid down in the case of S.N. Misra, the Tribunal should have desisted from passing any further order for implementation of its judgment. It is indeed, unfortunate that the Tribunal has acted in the aforesaid manner. It is not a case where the Tribunal did not notice the case law from superior Courts rather it is a case where the same was not followed. Such a approach is wholly perverse and against judicial propriety. It is strongly depreciated by this Court.

40. In the aforesaid facts and circumstances, Writ Petition No. 313 (SS) of 1995 and Writ Petition No. 67 (SS) of 1996 are allowed and the impugned judgment and order dated 24.10.1994 and 27.11.1995 are hereby-quashed. Writ Petition Nos. 2341 (SS) of 1996, 2997 (SS) of 1996, 3061 (SS) and 3169 (SS) of 1996 are also allowed and the impugned orders dated 30.4.1996, 22.4.1996 and 31.5.1996 are hereby quashed. No order as to costs.