

GAHC040004092024

2024:GAU-AP:1161



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/132/2024

Nani Pussang
Son of Late Nani Nipa, Reru Village, Lower Subansiri District, Arunachal Pradesh,
Ziro, PO and PS Ziro, Arunachal Pradesh

VERSUS

The State of AP and 3 Ors
represented by the Chief Secretary, Govt of Arunachal Pradesh, Itanagar

2:The Commissioner (Power) Age: 0 Occupation :
Department of Power Govt of Arunachal Pradesh Itanagar

3:The Chief Engineer (CEZ) Age: 0 Occupation :
Department of Power PO and PS Itanagar Govt of Arunachal Pradesh
Itanagar

4:The Chairperosn Age: 0 Occupation : Departmental Promotion committee
C/o The Chief Secretary Govt of Arunachal Pradesh Itanagar
PO and PS Itanagar

Advocate for the Petitioner : Hage Lampu, D Doley, Joram Sanjay, Khyoda Moses
Advocate for the Respondent : GA (AP), SC(Power), Lissing Perme

BEFORE
HONOURABLE MR. JUSTICE N. UNNI KRISHNAN NAIR

Date of Hearing : 09.12.2024

Date of Judgment: 19.12.2024

Judgment & Order (CAV)

Heard Mr. H. Lampu, learned counsel for the petitioner. Also heard Ms. P. Sangeeta, learned Government Advocate for the respondent nos. 1 & 4 and Mr. L. Perme, learned Standing Counsel for the Power Department representing the respondent nos. 2 & 3.

2. The challenge in the present proceedings, is to the minutes of the Departmental Promotion Committee (DPC) dated 27.05.2022, recommending the promotion of the petitioner w.e.f. the date of the DPC meeting. The grievance of the petitioner is that his officiating promotion as Assistant Engineer (Electrical) w.e.f. 26.09.2019 was not reckoned and seniority came to be assigned to him, in the cadre of Assistant Engineer (Electrical) only from the date of the meeting of the DPC.

3. The facts requisite for consideration of the issue arising in the present proceeding are noticed as under:-

The petitioner, who is a diploma holder in Electrical Engineering, was appointed as a Junior Engineer (Electrical) in the Power Department, vide order dated 21.01.1994. In terms of the Rules holding the field, the next promotional avenue available for an incumbent in the post of Junior Engineer (Electrical) are the posts figuring in the cadre of Assistant Engineer (Electrical). It is the case of the petitioner that he had attained eligibility for promotion to the post of Assistant Engineer (Electrical) in the year 2004 but, his case was not so considered for promotion.

In the year 2009, vide an order dated 12.05.2009; the petitioner came to be promoted to the cadre of Assistant Engineer (Electrical) on officiating basis, against a post belonging to the Direct Recruitment quota. In the said order, it was categorically mentioned that such officiating promotion will not bestow upon him

any claim for regular promotion as Assistant Engineer (Electrical) and his officiating service would not be so reckoned for counting his seniority, confirmation etc., unless his officiating promotion is regularized by a regular DPC in conformity with the provisions of the Recruitment Rules. It is projected that the respondent authorities, vide an order dated 12.05.2009, proceeded to withdraw the officiating promotion so effected in the case of the petitioner vide the order dated 27.02.2018. It is contended that the petitioner, being aggrieved by the order dated 12.05.2009, had approached this Court by way of instituting WP(C) No. 67(AP)/2009. In terms of the directions passed by this Court, the respondent authorities vide order dated 24.06.2009, proceeded to reinstate the petitioner in the post of Assistant Engineer (E) on officiating basis, against a vacancy arising on the incumbent therein proceeding on deputation.

It is further projected that the persons who had proceeded on deputation and against which vacancies, the petitioner was so allowed to officiate on promotion as Assistant Engineer (E) vide order dated 24.06.2009, came to be absorbed as Executive Engineer (E) in the Department of Hydro Power Development, Government of Arunachal Pradesh.

It is further projected that in the meanwhile, the respondent authorities had circulated a final seniority list of the incumbents in the grade of Assistant Engineer (E), vide a Memorandum dated 01.08.2011, however, in the said list; the name of the petitioner was not so included. It is stated that the persons junior to the petitioner and also officiating in the post of Assistant Engineer (E) came to be so included therein. It is further contended that cases of the person junior to the petitioner in the cadre of Junior Engineer (E) and officiating in the post of Assistant Engineer (E), came to be considered by a DPC held on 27.07.2012 and they were given retrospective promotion to the cadre of Assistant Engineer (E) i.e. w.e.f. the date of their officiating promotion in the post of Assistant Engineer (E).

The petitioner being aggrieved, approached this Court by way of instituting WP(C) No. 11(AP)/2013, with a prayer for consideration of his case for promotion to the post of Assistant Engineer (E) with retrospective effect; and for inclusion of his name in the seniority list at an appropriate place.

This Court, on consideration of the matter was pleased vide Judgment and Order dated 24.09,2013, to dispose of the said writ petition by holding that no direction can be issued for inclusion of the name of the petitioner in the impugned gradation list. Such a direction came to be so issued on noticing the petitioner was not promoted to the post of Assistant Engineer (E) on regular basis. However, this Court had further provided that depending upon the eligibility and zone of consideration, the case of the petitioner be considered for promotion to the post of Assistant Engineer (E) from the due date. The respondent authorities vide order dated 11.11.2021, proceeded to assign seniority position to the petitioner in the cadre of Assistant Engineer (E). The said order was stated to have been so passed in terms of the directions passed by this Court, vide order dated 24.09.2013, in WP(C) No. 11(AP)/ 2013. Thereafter, the case of the petitioner was considered by the DPC in its meeting held on 27.05.2022 and the said Committee, on consideration, proceeded to recommend the case of the petitioner for promotion to the post of Assistant Engineer (E) w.e.f. the date of the meeting of the DPC. Accordingly, vide an order dated 03.06.2022, the petitioner came to be promoted to the post of Assistant Engineer (E) w.e.f. the date of the DPC i.e., w.e.f. 27.05.2022.

The petitioner, being aggrieved by the inaction on the part of the respondent authorities in not effecting his promotion to the cadre of Assistant Engineer (E) w.e.f. 24.06.2009, has instituted the present proceeding.

4. Mr. H. Lampu, learned counsel for the petitioner by reiterating the facts as noticed herein above, has stated that the petitioner vide the order dated

24.06.2009, was allowed to officiate against the post of Assistant Engineer (E) against the vacancy so available on account of the incumbent therein, proceeding on deputation. It is contended by the learned counsel for the petitioner that the person proceeding on deputation, having been absorbed in the Department of Hydro Power Development, a clear vacancy having arisen in the cadre of Assistant Engineer (E) in the Department of Power; and the petitioner being eligible for such promotion, his case was not considered by the respondent authorities and on account of the delay so occasioning in the matter, the petitioner was deprived of his regular promotion to cadre of Assistant Engineer (E) at the due time.

5. Mr. H. Lampu, learned counsel has further submitted that in view of the fact that the petitioner has been continuously officiating against the post of Assistant Engineer (E) w.e.f. 24.06.2009; the order dated 03.06.2022 to the extent it promotes the petitioner only w.e.f. the date of holding of the DPC i.e. w.e.f. 27.05.2022, calls for an interference from this Court, with further direction to the respondent authorities to effect his promotion to the cadre of Assistant Engineer (E) w.e.f. 24.06.2009, by reckoning his continuous officiating promotion against the post of Assistant Engineer (E) w.e.f. 24.06.2009. Mr. Lampu, learned counsel has further submitted that persons junior to the petitioner have already been promoted to the cadre of Assistant Engineer (E) and he being superseded in the matter, the respondent authorities ought to have considered his continuous officiation against the post of Assistant Engineer (E) w.e.f. 24.06.2009 and by regularizing his such officiating promotion, ought to have assigned seniority to him in the cadre of Assistant Engineer (E) w.e.f. 24.06.2009 at the appropriate place. It is further submitted that had the meeting of the DPC been convened at the appropriate time, the promotion to the cadre of Assistant Engineer (E) would have occasioned in the year 2019. Accordingly, it is submitted that the officiating promotion of the petitioner to the cadre of Assistant Engineer (E) would be now required to be directed to be regularized w.e.f. 24.06.2009.

6. Mr. H. Lampu, learned counsel for the petitioner, in support of his submission has relied upon a decision of this Court in the case of **Moli Tato & 2 Ors. Vs State of A.P. & Anr.**, [vide **Judgment and Order dated 05.07.2023** in **WP(C) No. 297/2021**], as well as reliance is also placed on the decision of **P. N. Premachandran Vs State of Kerela & Anr.**, reported in **2004 1 SCC 245**.

7. Per contra, Mr. L. Perme, learned Standing Counsel appearing for the Power Department has, by referring to the affidavits filed in the matter by the said respondents, has submitted that the DPC having not regularized the promotion of the petitioner w.e.f. 24.06.2009, the respondents cannot assign a seniority position in the cadre of Assistant Engineer (E) prior to 27.05.2022. It is submitted that the assignment of seniority position in respect of the petitioner, vide the order dated 24.09.2013, in WP(C) No. 11(AP)/2013 purportedly, in terms of the directions passed by this Court, has been now superseded by the decision of the DPC, in its meeting held on 27.05.2022. Accordingly, it is submitted that the petitioner now having been regularly promoted to the cadre of Assistant Engineer (E) w.e.f. the date of the DPC i.e., w.e.f. 27.05.2022; it would not be permissible to the petitioner to claim for grant of retrospective effect to his promotion w.e.f. 24.06.2009.

8. It is further submitted by Mr. Perme, learned Standing Counsel that on account of disputes arising in the matter between Promotee Assistant Engineer (E) and Direct Recruit Assistant Engineer (E), and the pendency of the matters before this Court, there admittedly was a delay in convening of the DPC meeting. Mr. Perme, learned Standing Counsel has further submitted that while the petitioner has prayed for a direction from this Court, to the respondent authorities, for effecting his promotion to the cadre of Assistant Engineer (E) w.e.f. 24.06.2009, the petitioner has not arrayed any regular incumbent in the cadre of Assistant Engineer (E), who would now be effected, in the event this Court grants the prayer

of the petitioner so made herein. In the above premises, Mr. Perme, learned Standing Counsel submits that the promotion now effected in respect of the petitioner herein, w.e.f. 27.05.2022, would not call for any interference.

9. I have heard the learned counsels appearing for the parties and also perused the materials brought on record.

10. It is an admitted position that the petitioner herein, was initially promoted on officiating basis against the post of Assistant Engineer (E) vide an order dated 27.02.2008, however, the said order was withdrawn vide order dated 12.05.2009. Thereafter, in terms of the directions passed by this Court, in proceedings instituted by the petitioner, assailing the order dated 12.05.2009; the petitioner came to be again allowed to hold the post of Assistant Engineer (E) on officiating basis against a deputation vacancy becoming available in the Department. The petitioner has submitted that the deputationist, against whom, he was so allowed to officiate against the post of Assistant Engineer (E) having been absorbed in the borrowing Department, a clear vacancy having arisen, there was no bar for considering the case of the petitioner for regular promotion to the cadre of Assistant Engineer (E).

11. The petitioner had earlier approached this Court, by way of instituting WP(C) No. 11(AP)/2013, *inter alia*, praying for a direction upon the respondents to consider the case of the petitioner by the DPC for his promotion to the cadre of Assistant Engineer (E) with retrospective effect. In the said proceeding, the petitioner has also prayed for assignment of his seniority position in the cadre of Assistant Engineer (E) on being granted such retrospective promotion. This Court had, on consideration of the provisions of the Rules holding the field as well as materials available on record, proceeded to draw the following conclusions:-

“9. From the above, what is seen is that when the two Incumbents named by the petitioner acquired the eligibility criteria well ahead of the petitioner, they became

eligible for consideration for promotion. The fact of the matter is that they were provided with officiating promotion in the year 2007 and eventually the DPC in its meeting held on 24.07.2012 considered their cases along with others for retrospective promotion. As the minutes of the meeting (Annexure- XVI) would reveal that they were promoted w.e.f. 21.03.2007 i.e. the date from which they had been officiating as Assistant Engineers. The other Incumbents numbering 9 (nine) excluding the 2(two) above named incumbents had been given officiating promotion from 21.03.2007 and 21.03.2008, the petitioner does not have any grievance in respect of those incumbents. However, he has stacked hts claim in reference to the aforementioned two incumbents, namely, Shri JanuTaying and Shri PunyoGambo, who have been given officiating promotion w.e.f. 21.03.2007.

10. The petitioner was given officiating promotion after two years of such officiating promotion of the sald two incumbents. Presently, he has been officiating as such. It is because of the requisite length of service as was provided in the 1993 Rules, the petitioner could not be equated with the sald two incumbents. While in case of the sald two Incumbents, the requisite length of service in Junior Engineer is 8(eight) years but for the petitioner, it is 10(ten) years.

11. Above being the position, if the said two incumbents had been given officiating promotion ahead of the petitioner, I am of the considered opinion that no fault can be attributed to the respondents. As stated in the counter affidavit, unless the case of the petitioner is considered for regular promotion and recommended by the, DPC, his name cannot be included in the seniority list.

12. During the course of hearing, the learned counsel for the petitioner has produced the copy of the order dated 13.08.2013, by which the Govt. of Arunachal Pradesh in the Department of Power Thas appointed as many as 20 Assistant Engineers (Electrical) by way of direct recruitment. By producing the sald order, the learned counsel for the petitioner has argued that the respondents have deliberately left out the case of the petitioner for promotion. Unless it is shown that the direct recruitment has intruded into the quota of promotion, by, producing the sald order, the petitioner cannot project any case of discrimination.

13. *The learned counsel for the petitioner has also referred certain decisions reported in AIR 1990 SC 1607 (Direct Recruit Class-II Vs. State of Maharashtra and others) and 2011 (2) GLT 686 (Dano Belo Vs. State of Arunachal Pradesh &Ors). These two decisions have been referred, so as to argue that the said two incumbents could not be provided with retrospective promotion without considering the case of the petitioner. The ratio laid down in the said two cases is of no help to the case of the petitioner. Although, he was appointed along with the aforesaid two incumbents in the cadre of Junior Engineer, but because of the provision in the Rule of 1993, the said two incumbents could score a march over the petitioner which cannot be faulted with.*

14. *In view of the above, no direction can be issued for inclusion of the name of the petitioner in the impugned gradation list. However, it is hereby provided that depending upon the eligibility and zone of consideration, his case shall be considered for promotion to the post of Assistant Engineer from the due date.”*

12. However, it is seen that on a misinterpretation of the directions in the order dated 24.09.2013, passed by this Court in WP(C) No. 11/2013, the respondent authorities had vide order dated 11.11.2021, proceeded to assign seniority position to the petitioner in the cadre of Assistant Engineer (E).

13. A perusal of the said order dated 11.11.2021, would go to reveal that such assignment of seniority position in respect of the petitioner in the cadre of Assistant Engineer (E) was so made without, he, being regularly promoted to the said cadre. The petitioner could not have been assigned a seniority position in the cadre of Assistant Engineer (E) without he, being first promoted to the said cadre on regular basis. Accordingly, the order dated 11.11.2021, would not advance the case of the petitioner herein. Thereafter, the DPC, in its meeting held on 27.05.2022, proceeded to consider the case of the petitioner for regularization of his officiating promotion in the cadre of Assistant Engineer (E). On consideration of the matter and after perusal of the confidential reports of the petitioner and

finding the same to be satisfactory, the DPC, proceeded to hold that the petitioner was fit for promotion and recommended for promotion of the petitioner to the post of Assistant Engineer (E) w.e.f. the date of the DPC meeting.

14. A perusal of the minutes of the said DPC meeting would reveal that the same was so done strictly, in accordance with the Rules holding the field. In terms of the recommendations made by the DPC in its meeting held on 27.05.2022, the respondent authorities proceeded to issue an order dated 03.06.2022, regularizing the officiating appointment of the petitioner in the grade of Assistant Engineer (E) w.e.f. 27.05.2022. In other words, the petitioner was, vide the order dated 03.06.2022, promoted on regular basis to the cadre of Assistant Engineer (E) w.e.f. 27.05.2022.

15. The grievance raised in the present proceedings, by the petitioner, is that he ought to have been promoted on regular basis to the cadre of Assistant Engineer (E) w.e.f. 24.06.2009, when he was so allowed to officiate against a post in the said cadre. In other words, the petitioner prays in the present proceeding that his officiating appointments w.e.f. 24.06.2009 is to be regularized and he be granted seniority position in the cadre of Assistant Engineer (E) w.e.f. 24.06.2009. Accordingly, the issue arising in the present proceeding is as to whether the petitioner can claim for a promotion with retrospective effect.

16. The said prayer of the petitioner would not merit an acceptance on more than one ground per se, the provisions of the Rules holding the field do not contemplate grant of retrospective promotion to an incumbent covered by the said Rules to the next higher grade/cadre. Further, it is a settled position of law that a person cannot claim seniority in a cadre prior to a date when he was borne therein, in accordance with the provision of the Rules holding the field. In support of the said conclusion as reached by this Court, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **Union of India & Ors. Vs K. K.**

Vadera & Ors., reported in **1989 Supp(2) SCC 625**, wherein, the Hon'ble Supreme Court had in this connection concluded as follows:

“5. we do not know of any law or any rule under which a promotion is to be effective from the date of creation of the promotional post. After a post falls vacant for any reason whatsoever, a promotion to that post should be from the date the promotion is granted and not from the date on which such post falls vacant.”

17. The said decision was considered by the Hon'ble Supreme Court with approval in its decision in the case of **Nirmal Chandra Sinha Vs Union of India & Ors.**, reported in **(2008) 14 SCC 29**, wherein, in paragraph No. 7 of the said decision; the Hon'ble Supreme Court had concluded as under:

“7. It has been held in a series of decisions of this Court that a promotion takes effect from the date of being granted and not from the date of occurrence of vacancy or creation of the post vide Union of India Vs K. K. Vadera, State of Uttaranchal Vs Dinesh Kumar Sharma, K. V. Subba Rao Vs Govt. of A.P.3, Sanjay K. Sinha-II Vs State of Bihar, etc.”

18. It is a settled position of law that promotion takes effect from the date of grant and not from the date of occurrence of a vacancy in the promotional post. The Hon'ble Supreme Court, in a recent decision in the case of **Bihar State Electricity Board and Ors., Vs Dharamdeo Das**, reported in **2024 SCC Online SC 1768**, had categorically held that a promotion is effective from the date it is granted and not from the date when a vacancy occurs on the subject post or when the post itself is created. That a right to be considered for promotion has been treated by Courts not just as a statutory right but as a fundamental right, at the same time, there is no fundamental right to promotion itself.

19. The learned Apex Court, in its decision in **Dharamdeo Das (supra)**, further held that retrospective seniority cannot be granted to an employee from the date when he/she was not even borne in the cadre, nor seniority be granted with retrospective effect as that might adversely affect others. The conclusions drawn

by the Hon'ble Supreme Court in the above decision, in this connection being relevant are extracted herein below:-

“18. It is no longer res integra that a promotion is effective from the date it is granted and not from the date when a vacancy occurs on the subject post or when the post itself is created. No doubt, a right to be considered for promotion has been treated by courts not just as a statutory right but as a fundamental right, at the same time, there is no fundamental right to promotion itself. In this context, we may profitably cite a recent decision in Ajay Kumar Shukla v. Arvind Rai where, citing earlier precedents in Director, Lift Irrigation Corporation Ltd. v. PravatKiranMohanty and Ajit Singh v. State of Punjab, a three Judge Bench observed thus:

41. This Court, time and again, has laid emphasis on right to be considered for promotion to be a fundamental right, as was held by K. Ramaswamy, J., in Director, Lift Irrigation Corpn. Ltd. v. PravatKiranMohanty in para 4 of the report which is reproduced below:

“4.....There is no fundamental right to promotion, but an employee has only right to be considered for promotion, when it arises, in accordance with relevant rules. From this perspective in our view the conclusion of the High Court that the gradation list prepared by the corporation is in violation of the right of respondent-writ petitioner to equality enshrined under Article 14 read with Article 16 of the Constitution, and the respondent-writ petitioner was unjustly denied of the same is obviously unjustified.”

42. A Constitution Bench in Ajit Singh v. State of Punjab¹⁰, laying emphasis on Article 14 and Article 16(1) of the Constitution of India held that if a person who satisfies the eligibility and the criteria for promotion but still is not considered for promotion, then there will be clear violation of his/her's fundamental right. Jagannadha Rao, J. speaking for himself and Anand, C.J., Venkataswami, Pattanaik, Kurdukar, JJ., observed the same as follows in paras 22 and 27:

“Articles 14 and 16(1) : is right to be considered for promotion a fundamental right

22. Article 14 and Article 16(1) are closely connected. They deal with individual rights of the person. Article 14 demands that the ‘State shall not deny to any person equality before the law or the equal protection of the laws’. Article 16(1) issues a positive command that:

‘there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State’.

It has been held repeatedly by this Court that clause (1) of Article 16 is a facet of Article 14 and that it takes its roots from Article 14. The said clause particularises the generality in Article 14 and identifies, in a constitutional sense “equality of opportunity” in matters of employment and appointment to any office under the State. The word “employment” being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. Article 16 (1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be “considered” for promotion. Equal opportunity here means the right to be “considered” for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be “considered” for promotion, which is his personal right.

“Promotion” based on equal opportunity and seniority attached to such promotion are facets of fundamental right under Article 16.

27. In our opinion, the above view expressed in Ashok Kumar Gupta [Ashok Kumar Gupta v. State of U.P., and followed in Jagdish Lal [Jagdish Lal v. State of Haryana, and other cases, if it is intended to lay down that the right guaranteed to employees for being “considered” for promotion according to relevant rules of recruitment

by promotion (i.e. whether on the basis of seniority or merit) is only a statutory right and not a fundamental right, we cannot accept the proposition. We have already stated earlier that the right to equal opportunity in the matter of promotion in the sense of a right to be “considered” for promotion is indeed a fundamental right guaranteed under Article 16(1) and this has never been doubted in any other case before Ashok Kumar Gupta [Ashok Kumar Gupta v. State of U.P.], right from 1950.”

19. A similar view has also been expressed earlier hereto in K.V. Subba Rao v. Government of Andhra Pradesh, Union of India v. K.K. Vadera, Sanjay Kumar Sinha-II v. State of Bihar, State of Uttaranchal v. Dinesh Kumar Sharma, Nirmal Chandra Sinha (supra) and recently in Manpreet Singh Poonam (supra).

20. In State of Bihar v. Akhoury Sachindra Nath, it was held that retrospective seniority cannot be given to an employee from a date when he was not even borne in the cadre, nor can seniority be given with retrospective effect as that might adversely affect others. The same view was reiterated in Keshav Chandra Joshi v. Union of India, where it was held that when a quota is provided for, then the seniority of the employee would be reckoned from the date when the vacancy arises in the quota and not from any anterior date of promotion or subsequent date of confirmation. The said view was restated in Uttaranchal Forest Rangers’ Assn. (Direct Recruit) v. State of U.P., in the following words:

“37. We are also of the view that no retrospective promotion or seniority can be granted from a date when an employee has not even been borne in the cadre so as to adversely affect the direct recruits appointed validly in the meantime, as decided by this Court in Keshav Chandra Joshi v. Union of India, held that when promotion is outside the quota, seniority would be reckoned from the date of the vacancy within the quota rendering the previous service fortuitous. The previous promotion would be regular only from the date of the vacancy within the quota and seniority shall be counted from that date and not from the date of his earlier promotion or subsequent

confirmation. In order to do justice to the promotees, it would not be proper to do injustice to the direct recruits.....

38. This Court has consistently held that no retrospective promotion can be granted nor can any seniority be given on retrospective basis from a date when an employee has not even been borne in the cadre particularly when this would adversely affect the direct recruits who have been appointed validly in the meantime.”

(emphasis added)

21. In Nani Sha v. State of Arunachal Pradesh, it was observed that mere existence of a vacancy is not sufficient for an employee to claim seniority and the date of actual appointment has to be in accordance with the prescribed procedure. In Dinesh Kumar Sharma¹⁶ (supra), the following pertinent observations were made:

“34. Another issue that deserves consideration is whether the year in which the vacancy accrues can have any relevance for the purpose of determining the seniority irrespective of the fact when the persons are recruited. Here the respondent's contention is that since the vacancy arose in 1995-1996, he should be given promotion and seniority from that year and not from 1999, when his actual appointment letter was issued by the appellant. This cannot be allowed as no retrospective effect can be given to the order of appointment order under the Rules nor is such contention reasonable to normal parlance. This was the view taken by this Court in Jagdish Ch. Patnaik v. State of Orissa.”

22. The spirit behind elevating the right for being considered for promotion to a fundamental right is enshrined in the principle of “equality of opportunity” in relation to matters of employment and appointment to a position under the State. Once employed, the employees are entitled for being considered for promotion to the next higher post subject to their satisfying the eligibility criteria, as per the applicable rules. Failure to consider an employee for promotion even after satisfying the eligibility criteria would violate her fundamental right. However, a clear distinction has been drawn between the stage of considering an employee for

being promoted to taking the next step of recognizing the said right as a vested right for promotion. That is where the line has to be drawn. Stated differently, a right to be considered for promotion being a facet of the right to equal opportunity in employment and appointment, would have to be treated as a fundamental right guaranteed under Articles 14 and 16(1) of the Constitution of India but such a right cannot translate into a vested right of the employee for being necessarily promoted to the promotional post, unless the rules expressly provide for such a situation. The view that seniority can neither be reckoned from the date when a vacancy arises, nor can it be granted retrospectively unless the service rules specifically provide for such a situation, is fortified by the decision of this Court in K.K. Vadera (supra) which has emphasised in no uncertain terms the settled position in law that promotion to a post should only be granted from the date of the promotion and not from the date on which a vacancy may have arisen. In Ganga Vishan Gujarati v. State of Rajasthan, this Court had reiterated the principle that retrospective seniority cannot be granted to an employee from the date when she was not even borne on the cadre. This principle has been built upon by a line of precedents starting with the decision of the Constitution Bench of this Court in Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra, followed in Akhouri Sachindra Nath (supra), Dinesh Kumar Sharma (supra) and several other cases.

20. Applying the decision of the Hon'ble Supreme Court to the facts of the present case, the petitioner not having been borne in the cadre of Assistant Engineer (E) prior to 27.05.2022, the petitioner cannot be assigned seniority in the said cadre from a date prior to the said date of his regular promotion. Further, a perusal of the Rules holding the field would go to reveal that there is no provision in the said Rules for providing retrospective promotion to an incumbent against a post covered by the said Rules.

21. A Co-ordinate Bench of this Court, in the case of **Marto Kamgo Vs State of A.P. and 23 Ors.**, reported in **2024 0 Supreme (Gau) 1122**, involving promotion to the cadre of Assistant Engineer (E) of the same very Department, wherein the petitioner is so working, and on consideration of the decision of the

Hon'ble Supreme Court had drawn the following conclusions:-

“32. Needless to observed that on mere completion of length of service for consideration for promotion would not mean that an incumbent has to be promoted to the promotional post and it is prerogative of the government as to when the promotional post is to be filled up. As noted above, in the present case there were no promotional vacancies when the petitioners completed their qualifying length of service for being eligible for consideration for promotion to the next higher post of Assistant Engineer (Electrical). Mere existence of the vacancy may not create an indefeasible right in favour of an employee, but in a given case refusal to consider for promotion without valid reason despite clear vacancy, while allowing an employee to continue on officiating basis would be an arbitrary.

33. There is no manner of doubt that the notification dated 01.07.2022 was issued in respect of officiating/functional promotions against clear vacancies being available in the promotional quota which certainly would apply to the case of petitioners provided there was a clear vacancy. As noted above, the petitioners were either promoted on officiating basis against deputation vacancy or vacancies meant for direct recruits and were to be reverted back to their substantive posts of Junior Engineer (Electrical) once the same are filled up by direct recruits.

34. Having observed the above position, it is difficult to fathom, how the State respondents could submit that there were vacancies available and attempt had been made to have review DPC to consider the grievance of the petitioners for promotion/ regularisation to the post of Assistant Engineer (Electrical) with retrospective effect, however, could not be materialized on the flimsy excuse of not having been approved by the competent authority. If at all, there were clear vacancies and the authorities want to extend benefit to the petitioners, in my view, there would not be any absolute bar to consider the same, of course strictly in accordance with law. However, except the stand of the State respondents in their affidavit, record made available to this Court, does not support and fortifies the said stand, rather is contrary to the same as the minutes of the DPC dated 24.07.2012 wherein 11 Junior Engineers (Electrical), who were admittedly seniors to the writ petitioners were promoted, reveals that 8 (eight) posts meant for direct

recruitment were converted to promotional quota coupled with sending of requisition to APPSC culminating into appointment of direct recruits, which makes it evidently clear that as on 24.07.2012 there were no post available under the promotional quota for the petitioners to be recommended for promotion. Admittedly, the petitioners were promoted on officiating basis in the year 2008 to 2011 that too either promoted on officiating basis against deputation vacancy or vacancies meant for direct recruits and were to be reverted back to their substantive posts of Junior Engineer (Electrical) once the same are filled up by direct recruits.

35. It is noticed that the respondent No. 5 to 24 were recommended for appointment as Assistant Engineer (Electrical) by the APPSC and have been appointed pursuant to the advertisement (supra). That apart, there are another 11 (eleven) direct recruit Assistant Engineers (Electrical) who were appointed on various dates from 2009 to 2017, however, they are not impleaded as party respondents, which would cause prejudice, in the event the relief sought for by the petitioners is granted.

36. Having regard to submission of learned counsel for petitioners that it is a settled position of law that if the initial appointment is not made by following the procedure law laid down by the rules, but the appointee continues in the post uninterrupted, till the regularization of his service accordance with rules, the period of officiating service shall be counted from the date of his appointment not accordingly to date of his confirmation of the service, in my view, is absolutely inapplicable in the present case. The other submission for a direction to promote/regularise the petitioners to the post of Assistant Engineers (Electrical) by following the Next Below Rule is also totally misconceived and fallacious as the Next Below Rule, as rightly submitted by the learned counsel for the private respondents, in service jurisprudence, is a proposition which seeks to ensure that if a junior employee is given promotion without considering his senior, then the senior employee can claim the right to be considered for such promotion with effect from the date on which the junior was so promoted, whereas, no junior to the petitioners have been promoted in the present case. The petitioner have claimed for promotion/regularization on the posts of Assistant Engineer (Electrical) with retrospective effect from the date of their officiating promotion at par with their

seniors who have been promoted with retrospective effect in the year 2012 which is not a genuine claim in the facts of the present case.

37. This court is of the firm view that the judgment of this court heavily relied upon by the learned counsel for the petitioners in the case of Moli Tatu (Supra) is clearly distinguishable. In that case the petitioners had all the requisite eligibility for promotion in terms of the Recruitment Rules, at the relevant point of time when they were promoted on adhoc basis. Having been considered that the petitioners being Graduates in Civil Engineering having more than five (5) years regular service in the feeder grade, senior-most APST Junior Engineers and also having passed the Promotional Accounts Examination and falls for consideration as the APST candidates within the 80:20 ratio of Reservation Policy of the State within the promotional quota, this Court has held that the petitioners were entitled to be promoted/regularized by the DPC w.e.f. the date of ad-hoc promotion in view of the fact that there exists clear vacancies and the petitioners were allowed to work continuously on ad-hoc basis due to delay in convening of DPC. In the present case, I have no manner of doubt that the present petitioners have completed their qualifying years of service to be considered for promotion to the post of Assistant Engineer (Electrical) and other eligibility criteria in terms of Rules and there is a delay in convening of DPC, However, the petitioners have failed to demonstrate that there were vacancies available at the relevant point of time, although, the State respondents, vaguely, have made an attempt to show that there were some vacancies which is contrary to the record made available before this court. Thus, the above case, on facts, is totally different and distinct.”

22. By applying the aforesaid conclusions, the Co-ordinate Bench of this Court, in the above noted decision had rejected the prayer of the petitioners therein, for grant of retrospective effect to their promotion to the cadre of Assistant Engineer (E), in the Department of Power w.e.f. the date of their officiating promotion against posts in the said cadre.

23. At this stage, the decision relied upon by the learned counsel for the petitioner in the case of **Moli Tato (supra)** is required to be considered. It is to be noted that the said decision was considered by the Co-ordinate Bench of this Court in the case of **Marto Kamgo (supra)** and had concluded that the said decision is distinguishable basing on the facts as available in the said case. This Court is in respectful agreement with the conclusions so reached in the matter by the Co-ordinate Bench of this Court in the case of **Marto Kamgo (supra)** and accordingly, holds that the reliance placed by the learned counsel for the petitioner in the decision of this Court in the case of **Moli Tato (supra)** would not advance the case of the petitioner herein. Further, the reliance placed by the learned counsel for the petitioner in the case of **P. N. Premachandran (supra)** would also not advance the case of the petitioner in view of the recent decision of the Hon'ble Supreme Court on the issue involved, in the case of **Dharamdeo Das (supra)**.

24. In view of the decision of the Hon'ble Supreme Court in the case of **K. K. Vadera (supra)**, **Nirmal Chandra Sinha (supra)** and **Dharamdeo Das (supra)** and the decision of the Co-ordinate Bench of this Court, in the case of **Marto Kamgo (supra)**, this Court is of the considered view that the prayer of the petitioner in the present proceedings cannot be acceded to and accordingly, no direction can be issued to the respondent authorities for promoting the petitioner herein, to the cadre of Assistant Engineer (E) from a date prior to 27.05.2022. In other words, no direction can be issued to the respondent authorities to promote the petitioner w.e.f. 24.06.2009 i.e. w.e.f. the date of his officiating promotion against the post of Assistant Engineer (E).

25. In view of the above discussions, this Court is of the view that the present writ petition is devoid of any merit and accordingly, the same stands dismissed. However, there would be no order as to costs.

JUDGE

Comparing Assistant