

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.9962 of 2016

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1. Ramjee Chaudhary, son of Late Manik Chand Chaudhary, R/o Vishweshwaraiya, Nagar, Nahar Par, Bailey Road, Department of Plastic Surgery, PMCH, Patna- Rupaspur, P.O. Danapur, Cantt., Patna.
 2. Lakshmi Narayan Paswan, son of Late Ram Kishun Paswan R/o Village + P.O.- Bikrampur, Balia, P.S- Sakri, Dist.- Madhubani.
 3. Om Prakash Manjhi, son of Late Lakshmi Manjhi, R/o Village Rajapur, P.O. & P.S. Ekma, Dist.- Chapra, (Saran).

.... Petitioners

Versus

1. The State of Bihar through Chief Secretary.
2. The General Administrative Department, Government of Bihar through its Principal Secretary, Old Secretariat, Patna.
3. The Rural Works Department, Government of Bihar, Patna through the Secretary, Vishweshwaraiya, Bhawan, Bailey Road, Patna.
4. Special Secretary, Rural Works Department, Government of Bihar, Patna.
5. The Road Construction Department, Government of Bihar, Patna through the Secretary, Vishweshwaraiya Bhawan, Bailey Road , Patna.
6. The Water Resources Department, Government of Bihar, Patna, through the Secretary, Sichai, Bhawan, Patna.
7. The Bihar Public Service Commission, through its Secretary, Bailey Road, Patna.
8. Sri Ram Pravesh Kumar Singh, Son of not known, posted as Technical Secretary to Engineer, in Chief, Rural Works Department, Vishweshwaraiya Bhawan, Bailey Road, Patna.
9. Sri Krishna Nand Prasad, son of Late Yoganand Prasad, posted as Superintending Engineer, State Quality Coordinator, Rural Works, Department, Bailey Road, Patna.
10. Sri Shankar Prasad Singh, Son of Late Ram Bachan Singh, posted as Superintending Engineer, Rural Works, Department, Works Circle, Samastipur.
11. Sri Binod Kumar Agarwal, son of Sri Ram Avtaar, Agarwal, posted as Superintending Engineer, Rural Workss Department, Workss Circle, Siwan.
12. Sri Anil Kumar, Son of Late Ram Prasad Sahu, posted as Superintending Engineer, Local Area Engineering Organisation, Planning and Development Department, Patna.
13. Sri Indu Bhushan Prasad Kushvanshi, son of Late Suresh Prasad Kushvanshi, posted as Superintending Engineer, Rural Works Department, Works Circle, Sitamadhi.
14. Sri Rajeev Ranjan Sharma, Son of not known, posted as Technical Secretary to Superitending Engineer cum Superintending Engineer, Rural Works Department, Works Circle Kishanganj.
15. Mr. Sahid Hussain, son of Md. Anwar Alam, Posted as O.S.D., Secretary Cell, Rural Works Department, Patna.
16. Md. Yusuf Zafar, son of Md. Baliuddin, posted as Technical Secretary to Superintending Engineer cum Superintending Engineer, Rural Works Department, Works Circle, Purnea.
17. Sri Subhash Chandra son of Sri Ram Chandra Prasad, posted as Technical Secretary to Superintending Engineer cum Superintending Engineer, Rural Works Department, Works Circle, Darbhanga.
18. Md. Kamar Haved, son of Md. Abdul Gaffar, posted as Technical Secretary to Superintending Engineer cum Superintending Engineer, Rural Works

Department, Works Circle, Sasaram.

19. Md. Riazuddin, son of Md. Sahabuddin, posted as Executive Engineer, Monitoring cum Evaluation, Office of the Chief Engineer-4, Rural Works Department, Vishweshwaraiya Bhawan, Bailey Road, Patna.
20. Md. Kaiser Rasheed, son of Dr. S.K. Rahamtullah, posted as Technical Secretary to Superintending Engineer cum Superintending Engineer, Rural Works Department, Works Circle, Chapra.
21. Sri Praveen Kumar Thakur, son of Late Jagdish Narayan Thakur, posted as Executive Engineer, Rural Works Department, Kharagpur, Tarapur, and holding Additional Charge of Superintending Engineer, Rural Works Department, Works Circle, Munger.
22. Sri Dhruv Ji Prasad, son of Late Shankar Prasad, posted as Executive Engineer, Rural Works Department. Works Division, Kishanganj-2.

.... Respondents

with

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Civil Writ Jurisdiction Case No. 10029 of 2016

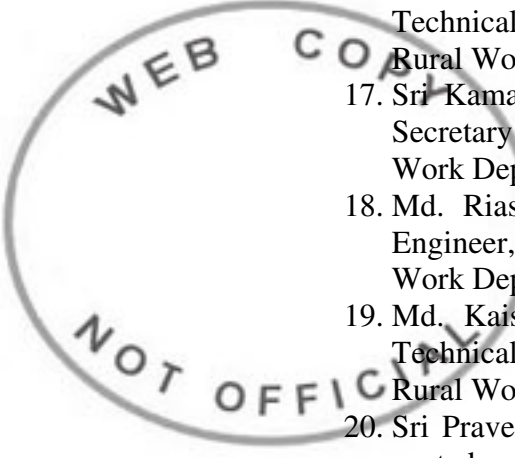
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Arun Kumar Mahto S/o Shri Bilat Mahto resident of 109, Ambajee Apartment, Shekhpura, P.S. Shastrinagar, Town & Patna, at present posted as Superintending Engineer, Advance Planning Circle - Cum - Chief Engineer - 2 (Additional Charge), Rural Works Department, Government of Bihar, Patna

.... Petitioner

Versus

1. The State of Bihar, through the Principal Secretary, Rural Works Department, Government of Bihar, Patna
2. The Principal Secretary, Rural Works Department, Government of Bihar, Patna
3. The Deputy Secretary, Rural Works Department, Government of Bihar, Patna
4. The Special Secretary, Rural Works Department, Government of Bihar, Patna
5. The Principal Secretary, Road Construction Department, Government of Bihar, Patna
6. The Additional Secretary, Road Construction Department, Government of Bihar, Patna
7. Sri Rampravesh Kumar Singh son of name not Known to the Petitioner, at present posted as Technical Secretary to Engineer - in Chief, Rural Work Department, Govt. of Bihar, Bailey Road, Patna
8. Sri Krishna Nand Prasad Son of Late Yoganand Prasad, at Present posted as Superindeng Engineer, State Quality Coordinator, Rural Work Department, Govt. of Bihar, Bailey Road, Patna
9. Sri Shankar Prasad Singh Son of Late Ram Bachan Singh at Present posted as Superintending Engineer, Rural Work Department, Work Circle, Samastipur
10. Sri Binod Kumar Agrawal Son of Sri Ram Avtaar Agrawal, at present posted as Superintending Engineer, Rural Work Department, Works Circle, Siwan
11. Sri Anil Kumar Son of Late Ram Prasad Sahu, at Present Posted as Superintending Engineer, Local Area Engineering Organization, Patna
12. Sri Indu Bhushan Prasad Kushvanshi Son Late Suresh Prasad Kushvanshi, at Present Posted as Superintending Engineer, Rural Work Department, Works Circle, Sitamadhi
13. Sri Rajeev Ranjan Sharma Son of name not Known to the Petitioner, at Present posted as Technical Secretary to Superintending Engineer Cum Superintending Engineer, Rural Work Department, Works Circle, Kishanganj
14. Md. Sahid Hussain Son of Md. Anwar Alam, at Present Posted as O.S.D., Secretary Cell, Rural Work Department, Govt. of Bihar, Bailey Road, Patna

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15. Md. Yusuf Zafar Son of Md. Baliuddin, at present posted as Technical Secretary to Superintending Engineer Cum Superintending Engineer, Rural Work Department, Works Circle, Purnea
 16. Sri Subhash Chandra Son of Sri Ram Chandra Prasad at present posted as Technical Secretary to Superintending Engineer Cum Superintending Engineer, Rural Work Department, Works Circle, Darbhanga
 17. Sri Kamar Javed Son of Md. Abdul Gaffar at present posted as Technical Secretary to Superintending Engineer Cum Superintending Engineer, Rural Work Department, Works Circle, Sasaram
 18. Md. Riassudin Son of Md. Sahabuddin, at Present posted as Executive Engineer, Monitoring Cum Evaluation, office of the Chief Engineer - 4, Rural Work Department, Govt. of Bihar, Bailey Road, Patna
 19. Md. Kaiser Rasheed Son of Dr. S.K. Rahamtullah, at present posted as Technical Secretary to Superintending Engineer Cum Superintending Engineer, Rural Work Department, Works Circle, Darbhanga
 20. Sri Praveen Kumar Thakur Son of Late Jagdish Narayan Thakur, at Present posted as Executive Engineer, Rural Work Department, Kharagpur, Tarapur and holding Additional Charge of Superintending Engineer, Rural Works Department, Works Circle, Munger
 21. Sri Loknath Singh Son of name not Known to the petitioner, at present posted as Technical Secretary to Superintending Engineer Cum Superintending Engineer, Rural Work Department, Works Circle, Bhagalpur

.... Respondents

Appearance :

(CWJC No.9962 of 2016)

For the petitioners	:	Mr. Y.V. Giri, Senior Advocate Mr. Ashish Giri, Advocate
For the State	:	Mr. P.N. Shahi, AAG10
For B.P.S.C.	:	Mr. Sanjay Pandey, Advocate
For Pvt. Res.	:	Mr. Binod Kanth, Senior Advocate
(In both cases)	:	Mr. Bindhyachal Singh, Advocate Mr. Parijat Saurav, Advocate

(In CWJC No.10029 of 2016)

For the Petitioners	:	Mr. P.K. Shahi, Senior Advocate Mr. Raj Kishore Prasad, Advocate
For the State	:	Mr. Kumar Manish, S.C.5

CORAM: HONOURABLE MR. JUSTICE AJAY KUMAR TRIPATHI

CAV JUDGMENT

Date: 28-09-2016

In both the writ applications the notification no.6716, dated 01.06.2016 issued under the signature of one Ram Bujhaban Choudhary, Special Secretary, Rural Works Department is under challenge. By virtue of this notification, the final seniority list of Executive Engineers has been fixed which has become a bone of



contention for the petitioners in both the writ applications because according to them, these petitioners have been shown to be junior to the private respondents, which they are not, according to their stand. All the petitioners started their career under the State of Bihar primarily under the Road Construction Department or the Water Resources Department as Assistant Engineers. They have earned their promotion on the post of Executive Engineer and even Superintending Engineer in some case. Over a period of time, in the rearrangement of the cadre and allocation in the departments, the petitioners are now working under the Rural Works Department. The necessity for publication of a gradation list showing seniority of the Engineers, working under the department was felt, which culminated into the notification dated 01.06.2016, which is Annexure-8 to CWJC No.9962 of 2016 and Annexure-11 to CWJC No.10029 of 2016. The notification itself would indicate that the final seniority list has been published after inviting objections.

2. The brief facts which have been culled out from CWJC No.9962 of 2016 are that petitioner no. 1 was initially appointed in the Road Construction Department, Govt. of Bihar as an Assistant Engineer (Civil) in the year 1985. Subsequently he was promoted in Class I services as Executive Engineer, Road Construction Department, Government of Bihar in the year 1993 vide

notification no. 4313(s) dated 14.07.1993. Thereafter the petitioner has also been promoted to the post of Superintending Engineer dated 23.09.2006 and since then has been rendering his service as Superintending Engineer.

3. Petitioner no. 2 was initially appointed in the post of Assistant Engineer, in Road Construction Department, Govt. of Bihar, Patna in the year 1987 and was subsequently promoted to the post of Executive Engineer, Road Construction Department, Government of Bihar, Patna in the year 1996 vide notification dated 27.08.1996 in which the name of petitioner no. 2 appears at serial no. 48. He was subsequently promoted to the post of Superintending Engineer in the year 2008 vide notification dated 30.07.2008 in the name of the petitioner appears at serial no. 7 and since then has been rendering his services as Superintending Engineer.

4. Petitioner no. 3 was initially appointed in the post of Assistant Engineer, in the Water Resources Department, Government of Bihar, Patna in the year 1989 and was subsequently promoted to the post of Executive Engineer, Water Resources Department, Govt. of Bihar, Patna in the year 1999 w.e.f. 1997 vide notification no. 2408 dated 04.08.1999 in which the name of petitioner no. 3 appears at serial no. 42. He was subsequently promoted to the post of Superintending Engineer in the year 2009 and

since then has been rendering his services as Superintending Engineer.

5. It is stated that these departments comes under the public works department and as per the Bihar Public Works Department Code, (herein referred to as "PWD Code") the establishment of Public Works Department consist of as following:-

- (a) The Bihar Engineering Service, Class-I
- (b) The Bihar Engineering Service, Class-II
- (c) The Bihar Subordinate Engineering Service
- (d) Revenue establishment
- (e) Office establishment
- (f) Petty establishment

6. It is stated that the Bihar Engineering Service Class-I Cadre consist of post of Executive Engineer which is entry level post, the Superintending Engineer, the Chief Engineer and Engineer-in-Chief. Whereas the Bihar Engineering Service Class-II Cadre consist of post of only Assistant Engineer. Thus the pay scale of the post of Assistant Engineer and the pay scale of the post of Executive Engineer are also different.

7. The PWD Code itself provides for the recruitment to the said post which is by direct recruitment as well as by promotion from the Bihar Engineering Service Class-II Cadre.



8. Rule 27 of the PWD code provides that the seniority in the service shall be determined by the date of the officers substantive appointment to the service irrespective of the Pay drawn by him provided that a member of the service who holds a superior post substantively shall always be deemed senior to an officer who holds an inferior post substantively. "The service" has been defined under Rule 2(a) to mean the Bihar Engineering Service Class-I and the member of service has been defined to mean a Government Servant appointed to a post in the cadre of this service, but does not include a member of the Indian Service of Engineers.

9. It is worth mentioning that subsequently by the order of the Road Construction Department dated 29.07.2013 the Engineering Cadre post of the Road Construction Department was thus divided into Building Construction Department and Rural Works Department and similarly the vide notification dated 23.01.2014 the Engineering Cadre post of the Water Resources Department was divided into Minor irrigation Department and Rural Works Department.

10. Thus due to the said bifurcation the service of petitioner no. 1 was allotted in the Rural Works Department from Road Construction Department whereas the service of the petitioner no. 2 was allotted in the Rural Works Department from Road

Construction Department in the post of Superintending Engineers and petitioner no. 3 in the Rural Works Department from Water Resource Department respectively.

11. It is not out of place to mention that the promotion from Class-II services to Class-I services is one of the mode of fresh appointment to the post of Class-I services. The General Administration Department, Govt. of Bihar, Patna has also specified the same vide letter dated 01.06.2010 clearly stating that any promotion from any class to a higher class would be deemed to be treated as a appointment.

12. Accordingly after the bifurcation as has been stated earlier the service of the petitioner were allotted in the Rural Works Department. Accordingly in the year 2014 vide notification no. 13236 dated 13.11.2014, a provisional gradation list in the class-I services which was prepared on the basis of the date of appointment by way of promotion to the respective post of Class-I service and not considering the services rendered in the post of Class-II services. In the said provisional gradation list of Superintending Engineers, the name of the petitioner no. 1 appears at serial no. 2 whereas the name of the petitioner no. 2 at serial no. 5 and petitioner no. 3 at serial no. 9.

13. It is also stated that the same procedure is followed in preparing the gradation/seniority list by the department in

relation to the Bihar Engineering Service Class-II from amongst promotees from the Bihar Subordinate Engineer Service. Thus the period of services rendered in the Bihar Subordinate Engineer Services is not taken into consideration for fixing the seniority of the promotees to the Bihar Engineer Service Class-II but it is the date of such appointment by way of promotion to Class-II service.

14. Despite the above background, showing the petitioners junior to the private respondents is the reason for the present dispute.

15. Learned senior counsel representing these petitioners submits that the seniority is not required to be counted from the date of the initial entry in the Class-II Engineering Service but from the date these petitioners were 'appointed' in the Bihar Engineering Service Class-I which is the post of Executive Engineer. The stand of the senior counsel for the petitioners is that since there are rules in place which govern the appointment therefore seniority of these petitioners has to be maintained. Some of the decisions pressed into service is *State of Bihar & Ors. v. Akhouri Sachindra Nath & Ors.*, 1991 Supp. (1) SCC 334 para 11 & 12, *Uttaranchal Forest Rangers' Assn. (Direct Recruit) & Ors. v. State of U.P. & Ors.*, (2006) 10 SCC 346, para 20, 33, 34, 38, *P. Satyanarayana Rao & Anr. v. S.V.P. Sarvani & Ors.*, (2009) 1 SCC 419 para 4 & 5,

CMD/Chairman, Bharat Sanchar Nigam Limited & Ors., v. Mishri Lal & Ors., (2011) 14 SCC 739 para 12 to 18.

16. On the submission that vested right cannot be divested, emphasis is on the decision rendered in *J.S. Yadav v. State of Uttar Pradesh & Anr., (2011) 6 SCC 570 para 22 to 27* and *State of Uttar Pradesh & Ors. v. Mahesh Narain & Ors., (2013) 4 SCC 169, para 13, 14 & 16.*

17. Learned senior counsel for the petitioners on the basis of the PWD Code Volume-2, Rule 2A, Rule 4, Rule 19 and 20 as well as Rule 27 has tried to impress upon the Court that since these petitioners came to be 'appointed' on the post of Executive Engineer, therefore, their 'appointment' on the post of Executive Engineer will form the basis for counting their seniority. The initial appointment on the post of Assistant Engineer cannot form the basis for reworking the seniority of these petitioners and they have been wrongly shown to be junior to the private respondents in the impugned notification.

18. The learned senior counsel representing the private respondents however submits that the decision taken by the petitioners to assail the seniority list is totally misplaced, keeping in mind the historical background to such issues. The emphatic stand of the private respondents is that in the State of Bihar there has never been any direct appointment or recruitment on the post of Executive



Engineers in Class-I service. Executive Engineers have been appointed by promotion from the cadre of Assistant Engineers. Assistant Engineers have been appointed by direct recruitment and at time even by promotion from the post of Junior Engineers. These contestants came to be appointed as assistant engineers through Bihar Public Service Commission which fact can not be disputed.

19. As per the respondents, the grievance of the petitioners is with regard to seniority on the post of Executive Engineers. They have no grievance against the gradation list of Class-II employees i.e. Assistant engineers. When recruitment and appointments were made on the post of Assistant Engineers on the basis of recommendation of Bihar Public Service Commission, the private respondents have figured over and above the present petitioners and that position remained so. However, by virtue of the fact that the petitioners belong to Scheduled Caste and Scheduled Tribe and because of the constitutional provision which have been talked about in Article 313 and Article 372 of the Constitution of India and the corresponding amendments and provision in Article 16(4) and Article 16 (4A), they earned their promotion as Executive Engineer earlier than the private respondents. The petitioners had not been granted promotion under Rule 17 of the PWD Code.

20. A case is sought to be made out on behalf of the



petitioners as if it was a case of 'appointment' on the post of Executive Engineer and not a case of promotion. They are only indulging in jugglery with words to hang on to the benefit which they got by virtue of being given a particular status earlier. However, since the 'Catch-up Rule' came into play on the post of Executive Engineer, the petitioners are trying to make out as if the official respondents have treated them unfairly. The petitioners, who were junior to the private respondents were given accelerated promotion to the next higher post under constitutional scheme of things. However, as and when the private respondents have also been promoted to the next higher post, they have only gained their original seniority by virtue of the Catch-up Rule. The impugned notification only restores that position and there is no other mystery involved thereto. The factual and legal position as per the private respondents emerges from their counter affidavit is:

"That the backward classes of citizen were provided the benefit of reservation in the initial appointment by virtue of Article 16(4) of the Constitution of India. The SCs and STs have been enjoying the facility of reservation in initial appointment and also in promotion since 1995. In the state of Bihar, reservation in promotion has been in effect since 1971. The Hon'ble Supreme Court in its judgment dated 16.11.1992 in the case of Indira Sawhney v. Union of India reported in 1992 Supl (3) SCC 217 laid down that the reservation in services under Article 16(4) of the Constitution of India is confined to initial appointment and can not be extended in the matter of promotion.



That in view of the commitment of the Government to protect the interest of the Scheduled Caste and Scheduled Tribes, the central government decide to continue the reservation in promotion for the SCs and STs. It was felt necessary to amend Article 16 of the Constitution by inserting a new clause (4-A) in the said Article to provide for reservation in promotion for the SCs and STs. Accordingly clause (4-A) was inserted in Article 16 of the Constitution by way of the Constitutional (77th Amendment) Act, 1995, which says that nothing in the said article shall prevent the State from making any provision for reservation in matters of promotion to any class(es) of posts in the services under the State in favour of the SCs and STs which, in the opinion of the State, are not adequately represented in the services under the State.

That after the said 77th Amendment to the Constitution, the Hon'ble Apex Court stepped in to balance the conflicting interests. The Hon'ble Apex Court in the cases of (i) Ajit Singh Januja v. State of Punjab reported in (1996) 2 SCC 715, (ii) Union of India v. Virpal Singh Chauhan reported in (1995) 6 SCC 684 and (iii) Ajit Singh (II) v. State of Punjab reported in (1999) 7 SCC 209 held that a roaster point promotee getting the benefit of accelerated promotion on account of reservation could not get consequential seniority and the seniority will be governed by the panel position. The government felt that the aforesaid decisions of the Hon'ble Supreme Court in the case of Virpal Singh as well as Ajit Singh (I) and (II) bringing in the concept of "**Catch Up Rule**" adversely affected the interests of members of SCs and STs in the matter of the seniority on promotion to the next higher grade.

That accordingly the Constitutional (85th Amendment) Act, 2001 was introduced whereby the benefit of consequential seniority was given in addition to

accelerated promotion to the roaster promotion promotee.

Clause (4-A) of Article 16 then read as follows:

"Nothing in this Article
Shall prevent the State from making any
provision for reservation in matters of
promotion, with consequential seniority, to any
class or classes of posts in the services under
the State in favour of the Scheduled Castes and
the Scheduled Tribes which, in the opinion of
the State, are not adequately represented in the
services under the State."

The respondent State of Bihar has been following the rule of promotion in reservation with consequential seniority. To that effect, recently resolution contained in memo no. 11635 dated 21.08.2012 was issued, thereby granting reservation in promotions with consequential seniority to the SC and ST members in the services of the State Govt. The said memo no. 11635 dated 21.08.2012 was successfully challenged before this Hon'ble Court in CWJC No. 19114 of 2012 (Sushil Kumar Singh v. The State of Bihar), in which the Hon'ble writ court, vide judgment dated 04.05.2015, has been pleased to quash the said memo no. 11635 dated 21.08.2012. The judgment is reported in 2015 (2) PLJR 844. The state government has assailed the aforesaid judgment dated 04.05.2015 in LPA No. 1066 of 2015 and 1071 of 2015. The Hon'ble Division bench has been pleased to dismiss the appeal vide judgment dated 30.07.2015, which is reported in 2015 (3) PLJR 593 (DB).

That thus, the "**catch up rule**" will be applicable and the roaster point reserved category promotees cannot count their seniority in the promoted category from the date of their promotion and the senior general category candidates if later reach the promotional level, general candidates will regain their seniority. The

aforesaid position of law has been settled by the Hon'ble Supreme Court in the case of S. Panneer Selvam and ors. v. Government of Tamil Nadu and Ors, reported in 2015 (4) PLJR (SC) 298. The Hon'ble High Court of Orissa in the case of Lagnajit Ray and others v. State of Orissa and ors., W.P. (C) No. 6781 of 2008 and analogous cases, in its judgment dated 24.12.2010 has also held the same.

That it is humbly stated and submitted that the post of Assistant Engineer is the feeder post for promotion to the post of Executive Engineer. The post of Executive Engineer is the feeder post for promotion to the post of Superintending Engineer. The avenue for posting on the higher post is through promotions to the incumbents posted at the lower position. In the said promotions, the petitioners belonging to the reserved category of SC/ST, were given accelerated promotions, thereby gaining the higher posts before their seniors from the general category. However, the seniority will be considered accordingly to the "catch-up rule" and not on account of accelerated promotions." (emphasis mine)

21. The private respondents of CWJC No.10029 of 2016 have gone further to say this in emphatic terms in their counter affidavit as under:-

"That with regards to the statements made at para 6 of the writ application under reply it is humbly stated and submitted that the letter dated 18.05.1990 is not applicable to the present case as the Assistant Engineers are posted as Executive Engineer upon promotion and there is no fresh appointment. In the state of Bihar, nobody is directly recruited in any services to the Class I post. In all services, the incumbents are promoted from Class II posts being the feeder post, to Class I post. In the case of the Engineers, direct appointment is confined to



the post of Assistant Engineers only through the Bihar Public Services Commission. The letter dated 18.05.1990 is merely a letter sans statutory force and can not go beyond Article 16(4A) of the Constitution and dictum of the Supreme Court in several cases decided by the Hon'ble Supreme Court as stated above. The letter dated 18.05.1990 can not be relied upon. Also the letter dated 18.05.1990 stands impliedly repealed by letter no. 2763 dated 23.02.2016 and letter no. 4800 dated 01.04.2016 (Annexure 7 and 8 to the writ application).

That with regards to the statements made at para 8 and 9 of the writ application under reply it is humbly stated and submitted that the petitioner was promoted to the post of Executive Engineer from the feeder post of Assistant Engineer on the basis of reservation in roaster clearance and not on account of his merit, which is apparent from the perusal of Annexure 3 to the writ application. The petitioner was also further promoted to the post of Superintending Engineer again on the basis of reservation in roaster clearance and not on account of his merit.

That with regards to the statements made at para 10 of the writ application under reply it is humbly stated and submitted that the letter no. 5134 dated 01.06.2010 is not applicable to the present case as the Assistant Engineers are posted as Executive Engineer upon promotion and there is no fresh recruitment. In the state of Bihar, nobody is directly recruited in any services to the Class I post. In all services, the incumbents are promoted from Class II posts being the feeder post, to Class I post. In the case of the Engineers, direct recruitment is confined to the post of Assistant Engineers only through the Bihar Public Services Commission. The letter dated 01.06.2010 is merely a letter sans statutory force and can not go beyond the Article 16(4A) of the Constitution and dictum of the

Supreme Court in several cases decided by the Hon'ble Supreme Court as stated above. The letter dated 01.06.2010 can not be relied upon. The letter dated 01.06.2010 also stands impliedly repealed by letter no. 2763 dated 23.02.2016 and letter no. 4800 dated 01.04.2016 (Annexure 7 and 8 to the writ application).

That with regards to the statements made at para 11 of the writ application under reply it is humbly stated and submitted that the said provisional gradation list dated 13.11.2014 (Annexure 6) was formulated when memo no. 11635 dated 21.08.2012 was yet not struck down by the Hon'ble writ court. The provisional gradation list dated 13.11.2014 (Annexure 5) was turned down and a fresh gradation list was published as per the guidelines specified in the letter dated 01.04.2016 (Annexure 8), which clearly states that the basis of seniority will be the seniority of the basic post / cadre and not by date of promotion and all letters and orders issued prior to letter dated 01.04.2016 are set aside. The final gradation list was published on 01.06.2016 after considering the objections by the petitioner upon the provisional gradation list.

That with regards to the statements made at para 15 of the writ application under reply, the same has been replied in the previous paragraphs. It is further humbly stated and submitted that as for the post of Assistant Engineer (Bihar Engineering Service Class-II), there is direct appointment as well as promotions in view of the provisions of Rule 11 of the PWD Code, Vol II, the direct recruitment is done through BPSC. Thus, there the seniority is counted by date of appointment / promotion. However in the post of Executive Engineer (Bihar Engineering Service Class-I), there is posting by way of promotions only and no direct appointment is made, the seniority is to be counted from the feeder post.

That it is pertinent to state and submit here that the private respondents are senior to the petitioner as per the Notification No. 3869(S) dated 14.06.2001 of the Road Construction Department, Bihar, which are framed in light of the direction of the Hon'ble Supreme Court.

That it would be relevant to state here that the petitioner was placed senior to the private respondents in the post of Superintending Engineer only after the 85th Amendment and they were given promotions. The private respondents were also senior in the post of Assistant Engineer. However, as the notification granting consequential seniority with accelerated promotions to the SC/ST employees stands quashed, the private respondents have regained their seniority by application of catch-up rule. The private respondents are all senior to the petitioner."

22. The learned senior counsel for respondents also places reliance on a recent decision of the Hon'ble Supreme Court, reported in *S. Panneer Selvam & Ors. vs. Secretary, State of Tamilnadu & Ors.*, (2015) 10 SCC 292. A reading of para 9, 11 to 16 para 18, 19 and 36 gives a complete picture and answer as to why the petitioners have now figured below the private respondents in the seniority lists. The above paragraphs are reproduced as below:-

"9. The concept of the "catch-up rule" and "consequential seniority" is judicially evolved concepts to control the extent of reservation. The question of reservation and the associated promotion and the consequential seniority have been the matter of discussion in various decisions of this Court. The matter regarding reservation in promotions was considered by a nine-Judge Bench of this Court in *Indra Sawhney v. Union of India*, and this Court held that the

reservation under Article 16(4) of the Constitution of India is confined only to initial appointment and cannot extend to reservation in the matter of promotion. In order to nullify the effect of the aforesaid dicta, there was an amendment to Article 16 by the Constitution (Seventy-seventh Amendment) Act, 1995 with effect from 17-6-1995. Vide this amendment, after clause (4), clause (4-A) was inserted in Article 16 of the Constitution.

11. Article 16(4) of the Constitution of India enables the State to make a provision for reservation for appointments or posts in favour of any backward class of citizens which in its opinion is not adequately represented in the services under the State. The constitutional position on the insertion of Clause (4-A) in Article 16 is that the State is now empowered to make provision for reservation in the matter of promotions as well, in favour of SCs and STs wherever the State is of the opinion that the SCs and STs are not adequately represented in the service under the State. Clause (4-A) of Article 16 of the Constitution is only an enabling provision which empowers the State to make any provision for reservation for SC and ST candidates in the matter of promotion as well.

12. In *Union of India v. Virpal Singh Chauhan* a question had arisen as to whether a person in SC or ST category who gets accelerated promotion because of reservation would also get consequential seniority in the higher post if he gets that promotion earlier than his senior in general category and this Court held that such an employee belonging to SC/ST category on promotion would not get consequential seniority and his seniority will be governed by the panel position. It was held as under: (SCC p. 701, para 24)

"24. ... In short, it is open to the State, if it is so advised, to say that while the rule of reservation shall be applied and the roster followed in the matter of promotions to or within a particular service, class or category, the candidate

promoted earlier by virtue of rule of reservation/roster shall not be entitled to seniority over his senior in the feeder category and that as and when a general candidate who was senior to him in the feeder category is promoted, such general candidate will regain his seniority over the reserved candidate notwithstanding that he is promoted subsequent to the reserved candidate. There is no unconstitutionality involved in this. It is permissible for the State to so provide."

13. The decision in *Virpal Singh Chauhan case* led to another Constitution Amendment and Parliament enacted the Constitution (Eighty-fifth Amendment) Act, 2001 whereby clause (4-A) of Article 16 was further amended enabling the State to make a provision for reservation in matters of promotion with consequential seniority. Amended clause (4-A) reads as under:

"16. (4-A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State."

The Eighty-fifth Amendment was made effective retrospectively from 17-6-1995, that is, the date of coming into force of the original clause (4-A) of Article 16 of the Constitution of India.

14. In *Ajit Singh Januja v. State of Punjab*, by placing reliance on the principle laid down in *Indra Sawhney case* and also the Constitution Bench judgment in *R.K. Sabharwal v. State of Punjab*, a three-Judge Bench accepted the principle of the "catch-up rule" as laid down in *Virpal Singh Chauhan case* observing that the balance must be maintained in such a manner that there was no reverse discrimination against the general category candidates and that any rule/circular or order which gives seniority to the reserved

category candidates promoted at the roster point would be violative of Articles 14 and 16 of the Constitution of India.

15. In *Jagdish Lal v. State of Haryana*, another three-Judge Bench opined that seniority granted to the Scheduled Caste and Scheduled Tribe candidates over a general category candidate due to his accelerated promotion does not in all events got wiped out on promotion of general category candidate.

16. In *Ajit Singh (2) v. State of Punjab*, the Constitution Bench was concerned with the issue whether the decisions in *Virpal Singh Chauhan* and *Ajit Singh Januja case* which were earlier decided to the effect upholding the "catch-up rule", that is, the seniority of general category candidates is to be confirmed or whether the later deviation made in *Jagdish Lal case* against the general category candidates. In *Ajit Singh (2) case*, inter alia, the following points arose for consideration:

(i) Can the roster-point promotees count their seniority in the promoted category from the date of their continuous officiation vis-à-vis general candidates who were senior to them in the lower category and who were later promoted to the same level?

(ii) Have *Virpal* and *Ajit Singh* been correctly decided and has *Jagdish Lal* been correctly decided?

(iii) Whether the "catch-up" principles are tenable?

18. Constitutional validity of clauses (4-A) and (4-B) of Article 16 of the Constitution was challenged in *M. Nagaraj v. Union of India*. The question that came up for consideration was whether by virtue of impugned constitutional amendments, the power of Parliament was so enlarged as to obliterate any or all of the constitutional limitations and requirements upholding the validity of the said articles with certain riders. On the concept of the "catch-up rule" and consequential seniority, this Court held as under:

(SCC p. 259, para 79)

"79. Reading the above judgments, we are of the view that the concept of 'catch-up' rule and 'consequential seniority' are judicially evolved concepts to control the extent of reservation. The source of these concepts is in service jurisprudence. These concepts cannot be elevated to the status of an axiom like secularism, constitutional sovereignty, etc. It cannot be said that by insertion of the concept of 'consequential seniority' the structure of Article 16(1) stands destroyed or abrogated. It cannot be said that 'equality code' under Articles 14, 15 and 16 is violated by deletion of the 'catch-up' rule. These concepts are based on practices. However, such practices cannot be elevated to the status of a constitutional principle so as to be beyond the amending power of Parliament. Principles of service jurisprudence are different from constitutional limitations. Therefore, in our view neither the 'catch-up' rule nor the concept of 'consequential seniority' is implicit in clauses (1) and (4) of Article 16 as correctly held in *Virpal Singh Chauhan*."

19. In *Nagaraj case* the Court further considered two questions viz.: (SCC pp. 250-51, para53)

"(1) Whether there is any upper limit beyond which reservation is not permissible?

(2) Whether there is any limit to which seats can be reserved in a particular year; in other words, the issue is whether the percentage limit applies only on the total number of posts in the cadre or to the percentage of posts advertised every year as well?"

Answering the said questions in paras 121 and 123, this Court held as under: (*Nagaraj case*, SCC p. 278)

"121. The impugned constitutional amendments by which Articles 16(4-A) and 16(4-B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors

or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBCs on one hand and SCs and STs on the other hand as held in *Indra Sawhney*, the concept of post-based roster with inbuilt concept of replacement as held in *R.K. Sabharwal*.

* * *

123. However, in this case, as stated above, the main issue concerns the 'extent of reservation'. In this regard the State concerned will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SCs/STs in matters of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely."

The Constitution Bench judgment in *Nagaraj case* was subsequently followed in *Shiv Nath Prasad v. Saran Pal Jeet Singh Tulsi* and *Central Bank of India v. SC/ST Employees Welfare Assn.*

36. In the absence of any provision for consequential seniority in the rules, the "*catch-up rule*" will be applicable and the roster-point reserved category promotees cannot count their seniority in the promoted category from the date of their promotion and the senior general candidates if later reach the promotional level, general candidates will regain their seniority. The Division Bench appears to have proceeded on an erroneous footing that Article 16(4-A) of the Constitution of India automatically gives the consequential seniority in addition to accelerated promotion to the roster-point promotees and the judgment of the Division Bench cannot be sustained."

23. A counter affidavit on behalf of the respondents-State has also been filed. From a reading of the same, it is evident that they have supported the stand of the private respondents. They also accept the position which has been indicated by the private respondents both factually and legally. The petitioners had been granted accelerated promotion on the post of Executive Engineer by virtue of reservation which was not a case of appointment but a case of promotion. When the private respondents have caught up with them, the seniority list has been redrawn and the initial seniority position at the time of recommendation by the Bihar Public Service Commission and their date of appointment as Assistant Engineers have been maintained in the impugned notification.

24. Having taken note of the provisions as well as the law pressed into service on behalf of the petitioners and the respondents, the sum essence of the dispute is that the petitioners and

the private respondents entered service as Assistant Engineers. Under constitutional scheme of things, noted in the earlier part of the order, the petitioners earned accelerated promotion/position on the post of Executive Engineer. It was not a case of appointment/recruitment on the post of Executive Engineer. It is further buttressed by the fact that till date no recruitment on the post of Executive Engineer has been made in the State of Bihar and since the private respondents have now caught up with the petitioners on the post of Executive Engineers, the seniority at the time of entry into service has been restored and this is how the private respondents have been shown senior to the petitioners in the notification contained in Annexure-8 and Annexure-11 respectively.

25. The notifications, therefore, are not required to be interfered with as they do not suffer from any vice.

26. Both the writ applications, therefore, are dismissed.

(Ajay Kumar Tripathi, J.)

S.Kumar/-

AFR/NAFR	AFR
CAV DATE	09.08.2016
Uploading Date	29.09.2016
Transmission Date	