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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8859 OF 2016

Shri Noreshwar Raghunathrao Shende
Aged : 51 years, Occ. Government Service
as Director of Town Planning, (M.S.), Pune,
having office at Pune, R/o. Kusumagiri,
Siddhachal, Phase No.3, Thane (W).

..... Petitioner

Vs.

1. Shri Sudhakar Baburao Nangnure
Aged : Adult, working as Joint Director
of Town Planning (Valuation), (M.S.),
Pune, R/at I-703, Ruturang, Aranyeshwar
Road, Near Lokesh Hotel, Pune – 411 009.

2. The State of Maharashtra
through Principal Secretary,
(UD-1), Urban Development Department,
having office at Mantralaya, Mumbai 400032.

3. The Additional Chief Secretary (Service),
General Administration Department,
having office at Mantralaya, Mumbai 400 032.

4. The Secretary in Charge of Desk
16-B, General Administration Department,
having office at Mantralaya, Mumbai 400 032.

..... Respondents

WITH

WRIT PETITION NO. 8860 OF 2016

Shri Noreshwar Raghunathrao Shende
Aged : 51 years, Occ. Government Service
as Director of Town Planning, (M.S.), Pune,
having office at Pune, R/o. Kusumagiri,
Siddhachal, Phase No.3, Thane (W).

..... Petitioner

Vs.

1. Shri Sudhakar Baburao Nangnure
Aged : Adult, working as Joint Director

of Town Planning (Valuation), (M.S.),
Pune, R/at I-703, Ruturang, Aranyeshwar
Road, Near Lokesh Hotel, Pune – 411 009.

2. The State of Maharashtra
through Principal Secretary,
(UD-1), Urban Development Department,
having office at Mantralaya, Mumbai 400032.

3. The Additional Chief Secretary (Service),
General Administration Department,
having office at Mantralaya, Mumbai 400 032.

4. The Secretary in Charge of Desk
16-B, General Administration Department,
having office at Mantralaya, Mumbai 400 032. Respondents

WITH
WRIT PETITION NO. 9291 OF 2016

The State of Maharashtra
through Urban Development Department,
Mantralaya, Mumbai. Petitioner
(Org. Resptd.)

Vs.

1. Shri Sudhakar Baburao Nangnure
working as Joint Director of Town
Planning Valuation, Maharashtra
State, Pune.
Residing at I-703, Ruturang,
Aranyeshwar Road, Near Lokesh Hotel,
Pune 411 009. Respondents
(Org. Appellant)

2. Shri N.R. Shende
Director of Town Planning,
Maharashtra State, Pune.(Org.Resp.No.4)

.....

Mr. Rafiq Dada, Senior Advocate along with Mr. Anil Sakhare, Senior
Advocate Mr. N.V. Bandiwadekar, Mr. Sagar Mane, Mr. Kirankumar
Phakade, Mr. Amit Mane, Mr. Yashwant Dhanegare i/by Mr. Bhushan

A. Bandiwadekar, Advocate for the petitioner in Writ Petition No. 8859/2016 and Writ Petition No.8860/2016 and respondent No.2 in Writ Petition No.9291/2016

Mr. Ravi Kadam, Senior Advocate along with Mr. Mihir Desai, Senior Advocate, Mr. S.B. Talekar, Mr. Sandeep Marne i/by Mr. Sidheshwar N. Biradar, Advocate for the respondent No.1.

Mr. A.B. Vagyan, Government Pleader along with Mr. O.M. Kulkarni, AAGP for the State/petitioner in Writ Petition No.9291/2016 and respondents No.2 to 4 in Writ Petition No.8859/2016 and Writ Petition No.8860/2016.

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**CORAM : SMT. V.K. TAHILRAMANI &
M.S.KARNIK, J.J.**

RESERVED ON : 9th NOVEMBER, 2017.

PRONOUNCED ON: 16th NOVEMBER, 2017.

JUDGMENT (PER M.S. KARNIK, J.) :-

Rule. Rule made returnable forthwith by consent of the parties and heard finally.

2. At the outset we note that the Apex Court by the order dated 9th October, 2017 has directed that the present petitions be heard and disposed of within 10 days from 31st October, 2017. The petitions have been taken up for final hearing at the stage of admission.

3. The petitioner in Writ Petition No. 8860/2016 is the original respondent No.4 in O.A. No.269/2016 filed by the present respondent No.1 before Maharashtra Administrative Tribunal ('the Tribunal' for short). To appreciate the controversy involved it would be material to reproduce the reliefs claimed by the respondent No.1 before the Tribunal, which reads thus :-

“(a) to allow the Original Application.

(b) to quash and set aside the final impugned final seniority list as on 1/1/2015 published by the res.no.1 on 15/1/2016 for the cadre of Joint Director of Town Planning as unconstitutional and illegal and bad in law and also as contrary to the settled legal position in law so far as the consequential seniority for the reserved category promotes is concerned, as settled by the Constitution Bench of the Hon. Supreme Court in the case of M. Nagaraj V/s Union of India.

(c) To direct the Respondent no.1 to review and revise the impugned seniority list for the cadre of Joint Director of Town Planning as on 1/1/2015 by fixing the seniority of the applicant above the Respondent no.4 in conformity with their seniority position in the feeder cadre of Deputy Director of Town Planning and enforce the same expeditiously by processing the selection and consideration for promotion to the post of Director of Town Planning on the basis of the said review and revision of the seniority list for the feeder cadre of Deputy Director of Town Planning.

(d) To restrain the Respondent no.1 from undertaking the exercise of selection and consideration for promotion for the post of Director of Town Planning on the basis of the final seniority list as on 1/1/2015 published by the Respondent no.1 on 15/1/2016 for the cadre of Joint Director of Town Planning, till the said list is reviewed and revised as prayed herein before.”

4. During the course of the hearing of O.A.No.269/2016 the respondent No.1 in Writ Petition No.8860/2016 filed Misc.

Application No.170/2016 for condoning the delay of 199 days occasioned in filing the O.A. By the order dated 13/4/2016 the Tribunal was pleased to condone the delay. Being aggrieved by the order dated 13/4/2016, the petitioner has filed Writ Petition No.8859/2016.

5. The State of Maharashtra is the respondent No.2 in Writ Petition No.8860/2016, has filed Writ Petition No.9291/2016 challenging the impugned order dated 2/5/2016 passed by the Tribunal in O.A.No.269/2016. Thus, the petitioner as well as respondent No.2 State of Maharashtra are aggrieved by the impugned order dated 2/5/2016 have filed separate petitions challenging the same order.

6. As the issues involved in these petitions are common and interlinked, the parties are referred to as per their respective position in the cause-title in Writ Petition No.8860/2016 for convenience .

7. The brief facts necessary for deciding the present Writ Petitions are stated thus :-

The petitioner belongs to the Scheduled Caste (S.C.) Category. The respondent No.1 belongs to Open Category. As on the date of the filing of the O.A. No.269/2016 on 12/3/2016, the respondent No.1 was working as the Joint Director of Town Planning ('JDTP' for short) since 3/7/2013. The petitioner was junior to the respondent No.1 in the cadre of Deputy Director as per seniority list published on 14/2/2011. One Shri K.S. Akode was promoted by an order dated 25/11/2004 in the post reserved for S.C. When Shri Akode was promoted as Director of Town Planning, the reserved post of JDTP was filled by promoting Shri Shikhare, who also belonged to S.C. Category. On retirement of Shri Shikhare, the post was filled by promotion of the petitioner who also belonged to the S.C. Category on 11/8/2011.

8. Before the Tribunal it was case of the respondent No.1 that when Shri Akode who belonged to S.C. Category was promoted as Director, the resultant vacancy in the post of Joint Director should have been filled from S.T. Category. If no suitable S.T. Category candidate was available, the post should have been kept vacant for three years as per Section 6(1) of the Maharashtra State Public

Services (Reservation for Scheduled Castes, Scheduled Tribes, Denotified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes) Act, 2001 (hereinafter called as “the Reservation Act”). It is the case of the respondent No.1 that any promotion in the said vacancy given to a person from any reserved category other than S.T. Category cannot be called regular Promotion and any such promotion should be treated as Ad-hoc and fortuitous without creating any right of seniority.

9. It is an admitted fact that by circular dated 14th February, 2011, the seniority list of the cadre of Deputy Director, Town Planning was published, where the petitioner was shown junior to the respondent No.1. Thereafter, on 1/8/2011, the Director of Town Planning Group A, Joint Director of Town Planning Group A, Deputy Director of Town Planning Group A, Assistant Director of Town Planning Group A, Town Planner Group A, Assistant Town Planner Grade I, Group B and Assistant Town Planner Grade II, Group B in the Maharashtra Town Planning and Valuation Service in the Directorate of Town Planning and Valuation (Recruitment) Rules, 2011 (hereinafter referred to as 'R.R. Of 2011') came to be enacted.

10. At this stage, it would be pertinent to mention that by a circular dated 27th October, 2008 the State of Maharashtra clarified that in case of small cadres (less than 32) in first vacancy a candidate from S.C. category candidate has to be appointed first. Then ST, VJ/NT & SBC candidates are to be considered as per the 100 point roster. The circular further provided that if no eligible candidates were available from a particular reservation category, the next roster point has to be used for small cadres.

11. By an order dated 11/8/2011, the petitioner was promoted to the post of JDTP on the reserved post on Ad-hoc basis till approval from M.P.S.C.. One of the terms provided in the appointment order mentions that the said promotion is made subject to the outcome of the decision in Writ Petition No.8452/2004.

12. The circular dated 27/10/2008 which formed the basis of the promotion of the petitioner was stayed by the Aurangabad Bench of this Court in Writ Petition No.3077/2011 on 29/9/2011, which petition was filed (not by the respondent No.1) challenging the circular dated 27/10/2008 as being contrary to the provisions of the

Reservation Act which came into force from 29/1/2004.

13. As on 11/8/2011 when the petitioner was promoted to the post of JDTP there were only two posts available. One post was meant for the reserved categories. On 29/12/2012, the posts in the cadre of JDTP were increased to eight. Accordingly, number of reserved posts increased to three.

14. Thereafter, by an order dated 2/7/2013, the respondent No.1 was promoted to the post of JDTP. The said promotion of the respondent No.1 is also on an Ad-hoc basis and is made subject to the outcome of Writ Petition No.8452/2004. The provisional seniority list of JDTPs as on 1/1/2014 was published on 1/6/2014. In the said provisional seniority list the petitioner was shown senior to the respondent No.1. The final seniority list of JDTPs as on 1/1/2014 was published on 28/8/2014 wherein the petitioner was shown senior to the respondent No.1.

15. Writ Petition No.3077/2011 filed before the Aurangabad Bench of this Court for quashing and setting aside the circular dated

27/10/2008 was decided on 9th May, 2013. This Court was pleased to quash and set aside the circular dated 27/10/2008.

16. Shorn of details the Reservation Act was challenged before the Maharashtra Administrative Tribunal. The position as of today is that the Reservation Act of 2001 is valid and holds the field.

17. On 13/1/2015, the provisional seniority list of JDTP as on 1/1/2015 was published. The final seniority list of JDTP as on 1/1/2015 was published on 15/1/2016. The respondent No.1 made a representation dated 11/2/2016 for the first time challenging the seniority list for the cadre of JDTP as on 1/1/2015. On 12/2/2016, the respondent No.1 filed O.A.No.269/2016 before the Tribunal challenging the final seniority list dated 15/1/2016 as on 1/1/2015.

18. During the pendency of the O.A.No.269/2016, by an order dated 30/4/2016 the petitioner was promoted as Director, Town Planning in accordance with the R.R. of 2011. The rules laid down that for appointment to the post of Director, Town Planning, three years experience as Joint Director is the criteria. It is the stand

of the State Government that as the petitioner was the only eligible candidate having requisite experience, he was promoted to the said post. The respondent No.1 did not have requisite experience and therefore, could not be considered for the promotion to the post of Director, Town Planning.

19. The respondent No.1 during the pendency of the O.A.No.269/2016 filed Misc. Application No.170/2016 seeking condonation of delay of 199 days in filing the O.A. The Misc. Application came to be filed on 13/4/2016. In the said Misc. Application it is mentioned that as on 20/8/2014 when the final seniority list of JDTP as on 1/1/2014 was published the respondent No.1 had sufficient reason not to challenge the same at that point of time. It is the case of the respondent No.1 in the Misc. Application that as the promotion given to the petitioner was as per provisions of circular dated 27/10/2008, the respondent No.1 believed that he had no reason to have an objection to the seniority list of JDTP published on 28/8/2014. It is the case of the respondent No.1 that it is only when the final seniority list as on 1/1/2015 was published on 15/1/2016 by the State Government, that in the meantime, the

respondent No.1 got information about decision of the High Court in Writ Petition No.3077/2011 in which the circular dated 27/10/2008 was quashed and set aside as being contrary to the provisions of the Reservation Act, 2004. It is then that the respondent No.1 made a representation dated 11/2/2016. Accordingly, the respondent No.1 prayed for condonation of delay of 199 days in filing O.A.No.269/2016. The said application for condonation of delay was opposed by the petitioner by filing an affidavit-in-reply. By an order dated 13/4/2016 Misc. Application No.170/2016 for condonation of delay was allowed and the delay in filing O.A. was condoned.

20. The Tribunal thereafter proceeded to consider the O.A. on merits and by the impugned order dated 2nd May, 2016 was pleased to allow the O.A. filed by the respondent No.1 thereby quashing and setting aside the seniority list of JDTP as on 1/1/2015 published on 15/1/2016 and further directed the State Government viz. the respondent No.2 to decide the date of regular promotion of the petitioner by calling appropriate review D.P.C. and prepare a fresh seniority list.

21. **SUBMISSIONS OF THE LEARNED SENIOR COUNSEL
FOR THE PETITIONER :-**

(A) Learned Senior Counsel Shri Rafiq Dada submits that the promotion order dated 11/8/2011 by which the petitioner was promoted to the post of JDTP was a regular promotion. The same was in accordance with the circular dated 27/10/2008. At the relevant time only two posts were available of which one post was reserved. Though one post was reserved for ST category, after following the appropriate procedure the roster point was changed. Learned Senior Counsel invited our attention to the proposal dated 7th January, 2011 of the State Government for promotion of the petitioner as Deputy Director. In the said proposal, it is mentioned that as no officer from ST category was available and also if it is not possible to fill in the post even by rotation then the post should be filled in from amongst the candidate belonging to the SC as per the circular dated 27/10/2008 This was pursuant to the opinion given by the General Administrative Department. In his submission, a detailed procedure was followed

before the actual order of promotion dated 11/8/2011 promoting the petitioner as JDTP was issued. He submits that therefore, the appointment order dated 11/8/2011 has an imprint of legality on it. According to him it cannot be said to be a void order at its inception having regard to the fact that the post of JDTP was very much available for a reserved category and the roster point was changed after following the due procedure contemplated by the circular dated 27/10/2008. In his submission, the appointment of the petitioner cannot be said to be fortuitous appointment and in fact the same is a regular promotion as the petitioner was selected for appointment to the said post in accordance with the selection procedure laid down by the rules for appointment as JDTP. In his submission, though the word "Ad-hoc" is mentioned in the order of promotion but the same is only styled in that fashion, for even State Government has recognized the said order as a regular order of promotion. He invited our attention to the order dated 2/7/2013 promoting the respondent No.1 to the post of JDTP, which order is of a similar nature as that of the petitioner. The State Government has taken a stand

that the order dated 11/8/2011 as well as the order dated 2/7/2013 promoting the petitioner as well as the respondent No.1 are regular orders of promotion.

(B) Learned Senior Counsel therefore submits that the respondent No.1 having not challenged the promotion order dated 11/8/2011 which is a basic order, challenging the consequential order viz. the seniority list is not permissible. In the submission of the learned Senior Counsel once the petitioner is validly appointed, the issue of seniority follows as a consequence as contemplated by the Seniority Rules referred hereafter.

(C) In the submission of the learned Senior Counsel the approach of the Tribunal that the respondent No.1 was not bound to challenge the promotion since promotion was void, is not available to the contesting respondent No.1 since the question as to whether the promotion is valid or invalid is required to be adjudicated by appropriate application before appropriate forum. The approach of the Tribunal that the order of promotion dated 11/8/2011 is null and void without challenging the promotion order, is contrary to the well established principles of law and

justice. In support of his contention that without challenging the order of promotion the consequential seniority list cannot be challenged, learned Senior Counsel for the petitioner relied upon the following decisions of the Apex Court :-

(a) Roshan Lal & Ors. vs. International Airport Authority of India & Ors. (AIR 1981 SC 597).

(b) P. Chitranjan Menon & ors. vs. A. Balakrishna & ors. ((1997) 3 SCC 255).

(c) Amarjeet Singh vs. Devi Ratan ((2010) 1 SCC 417).

(D) The next submission of the learned Senior Counsel is that even the final seniority list as on 1/1/2014 published on 28/8/2014 has not been challenged. The respondent No.1 did not raise any objection to the provisional seniority list published on 1/6/2014. In the submission of the learned Senior Counsel, the approach of the Tribunal that the 2014 seniority list was not required to be challenged is misconceived and untenable. According to him the 2014 seniority list was valid and thereafter, the 2015 seniority list was published. In his submission, there is no explanation as to why the list of 2014 is not challenged.

(E) Learned Senior Counsel further submits that the judgment

of the Tribunal is totally fallacious as the question whether the seniority can be challenged without challenging the petitioner's promotion is not decided. He invited our attention to para 6 of the order passed by the Tribunal where the Tribunal has indicated that though the issue as regards consequential seniority would be examined subsequently, however in para 22 the Tribunal records that - "it is not necessary to consider the issue of the 'consequential seniority' in this O.A. as without considering that issue this O.A. can be decided.". In the submission of the learned Senior Counsel the Tribunal ought to have addressed this issue.

(F) Learned Senior Counsel further assailed the order of the Tribunal by contending that the Tribunal was not justified in proceeding on the footing that the petitioner's promotion was not a regular promotion but fortuitous promotion. Learned Senior Counsel invited our attention to the provisions of the Rule 3(f) of the Maharashtra Civil Services (Regulation of Seniority) Rules, 1982 ('the Seniority Rules' for short) which explains what a 'fortuitous appointment' means. In his submission a

reading of the definition would indicate that the promotion order of the petitioner dated 11/8/2011 cannot be said to be fortuitous. He also invited our attention to the provision of Rule 4(1) of the said Seniority Rules which provides for “general principles of seniority”. In his submission the said Rules provided that the “a seniority of a government servant in any post shall ordinarily be determined on the length of his continuous service.” In his submission as the petitioner was continuously working in the post of JDTP from the date of his promotion dated 11/8/2011, he was therefore promoted as Director, Town Planning (Maharashtra State) with effect from 30/4/2016.

22. **SUBMISSIONS OF LEARNED COUNSEL FOR THE PETITIONER IN WRIT PETITION NO.8859/2016 (against the decision of the Tribunal condoning the delay in filing O.A.) :-**

(A) In the submission of the learned Counsel Mr. Bandiwadekar, the Tribunal was not justified in condoning the delay in filing O.A. The cause of action arose on 11/8/2011 when the petitioner was promoted as a JDTP. The order dated 11/8/2011 is not challenged. In the

absence of challenge to this order the Misc. Application for the condonation of delay itself is not maintainable. The date of cause of action is 11/8/2011 and the delay has to be calculated accordingly. There is no explanation in the application regards delay for this period. He submits that in any case the seniority list of 2014 which was finalised on 28/8/2024 was not challenged in O.A. and therefore, the Tribunal ought not to have entertained the Misc. Application when the respondent No.1 himself has calculated the delay from 28/8/2014 viz. the publication of the final seniority list of JDTP. In his submission, the circular dated 27/10/2008 was quashed and set aside by this Court on 9/5/2013. The respondent No.1 was promoted as JDTP on 2/7/2013 on which date the circular dated 27/10/2008 was already set aside. He submits that it is the case of the respondent No.1 that he himself chose not to challenge the promotion order dated 11/8/2011 as according to respondent No.1, he was not aware that by an order dated 9/5/2013 the High Court set aside and quashed the circular dated 27/10/2008. He further points out that in Misc. Application for condonation the

respondent No.1 has taken a stand that he believed that he had no reason to raise any objection to the seniority list of JDTP published on 28/8/2014 since the promotion given to the petitioner was as per the provisions of the circular dated 27/10/2008. It is further mentioned by the respondent No.1 in his application that after the seniority list of JDTP as of 1/1/2015 was published on 15/1/2016, he got information about the decision of the Hon'ble Tribunal in O.A.No.927/2012 and the decision dated 9/5/2013 of this Court quashing and setting aside the circular dated 27/10/2008, therefore the learned Counsel submits that the respondent No.1 has not shown sufficient cause for condoning the delay. He urged that firstly the delay has been wrongly calculated and secondly no plausible or satisfactory explanation has been given by the respondent No.1 for the delay. In support of his submissions the learned Counsel has relied on the following decisions of the Hon'ble Supreme Court :-

- (a) P.K. Ramchandran v/s. State of Kerala & ors.,
(1997) 7 SCC 556**
- (b) State of M.P. & anr. v/s. Bhailal Bhai & others.**

AIR 1964 SC 1006

(c) R.B. Ramlingam v/s. R.B. Bhvaneswari

(2009 2 SCC 689

(d) Jahed Naziruddin s/o Zaheeruddin & ors. v/s. State of Maharashtra & ors., 2014 (2) Mh.L.J. 933.

(e) Rajendra Singh & others v/s. Santa Singh & others (1973) 2 SCC 705

(f) M/s. Tilokchand and Motichand & ors. v/s. H.B. Munshi & others, 1969 (1) SCC 110

(B) In his submission the delay is condoned by the Tribunal without there being a satisfactory explanation and good cause for condoning the delay, the same prejudicially affects the petitioner as the petitioner has been holding the post of JDTP right since 11/8/2011 and now he has been promoted as a Director, Town Planning. In these circumstances condoning the delay without recording satisfactory reasons prejudices the petitioner. He further urged that the conduct of the petitioner in approaching the Court after such gross delay and that too without challenging his order of promotion dated 11/8/2011 was sufficient reason for the Tribunal to have rejected the application for condonation of delay.

WRIT PETITION NO.9291/2016 :-

(A) Learned Government Pleader has in substance raised the same contentions which have been argued by the learned Senior Counsel Shri Dada. Learned Government Pleader invited our attention to the affidavit-in-reply filed before the Tribunal in support of his contentions. In his submission the petitioner was appointed when the circular dated 27/10/2008 was in force. The said circular dated 27/10/2008 was quashed and set aside by this Court after the petitioner was appointed. In his submission the roster point was reserved for ST category, however, after following the procedure laid down by the circular dated 27/10/2008 the petitioner came to be appointed as JDTP by the order dated 11/8/2011. In his submission, the petitioner was regularly selected to the said post after following selection procedure as laid down by the relevant rules. In his submission, as the petitioner was regularly appointed as a JDTP with effect from 11/8/2011, after following the procedure prescribed at the relevant point of time, the respondent No.1 ought to have challenged the

promotion order dated 11/8/2011. The respondent No.1's O.A. only for declaring the seniority list as illegal cannot be maintained unless respondent No.1 succeeds in getting the promotion order of the petitioner quashed. By relying on the Rule 4 of the Seniority Rules of 1982, the learned Government Pleader contends that seniority of the petitioner is to be determined on the length of his continuous service in the post of JDTP. In his submission, the promotion of the petitioner is not fortuitous as the petitioner was promoted in accordance with the relevant recruitment rules then prevailing. It is his submission that merely because the circular dated 27/10/2008 has been subsequently quashed and set aside will not automatically render the order dated 11/8/2011 as illegal and bad-in-law unless the same is challenged before the appropriate forum in appropriate proceedings. In his submission, in the challenge to the order of promotion the State would be entitled to raise various contentions regarding delay in approaching the Court, the conduct of the respondent No.1 in filing the O.A. belatedly and also the legality of the orders made under circular dated 27/10/2008 which

circular is subsequently quashed and set aside. These issues can be decided only if the order of promotion dated 11/8/2011 is challenged. Learned Government Pleader also adopted the contentions raised by Shri Bandiwadekar, learned Counsel for the petitioner in Writ Petition No.8859/2016 in support of his case that the Tribunal should have dismissed the O.A. on the ground of delay and laches.

(B) He has also contended that even when the respondent No.1 was appointed as a JDTP in 2013, the said appointment order also mentions the same is on ad-hoc basis subject to the outcome of the Writ Petition No.8452/2004. In his submission, in view of the fact that all the promotions to the said post were made subject to the outcome of the Writ Petition that the orders of promotions are so styled. Nonetheless these are regular promotion orders after following the due selection procedure and therefore, the Tribunal was not justified in proceeding on the footing that the appointment of the petitioner is fortuitous.

24. **SUBMISSIONS ON BEHALF OF RESPONDENT NO.1 :-**

Per contra, learned Senior Counsel Shri Ravi Kadam submitted that :-

- (A) The promotion of the petitioner was completely contrary to the provisions of the Reservation Act. In his submission, the petitioner was appointed as per the circular dated 27/10/2008 and if this Court has quashed and set aside the circular dated 27/10/2008 then whatever has been done and also all actions taken under the said circular will be null and void. Learned Senior Counsel invited our attention to the proposal dated 7th January, 2011 for promoting the petitioner to the post of JDTP. In the said proposal it was clearly mentioned that the post was reserved for ST. The petitioner belonged to the SC. The said proposal clearly mentions that the roster point is changed to ST in view of the circular dated 27/10/2008. In the submission of the learned Senior Counsel this was impermissible. Once the circular dated 27/10/2008 itself is quashed and set aside, the promotion of the petitioner itself became an illegal appointment and contrary to the

Service Rules. In his submission, the right to seniority derives from an appointment which is lawfully made.

(B) Learned Senior Counsel would further submits that as the petitioner's appointment in the face of Section 4, Section 6 and Section 11 of the Reservation Act is null and void, the said appointment of the petitioner made contrary to the Rules is merely fortuitous and such fortuitous appointment cannot confer a benefit of seniority on the petitioner over and above the regular/substantive appointees to the service.

(C) Learned Senior Counsel would submit that since a fortuitous appointee can be allowed to hold a post, it is not necessary to challenge his appointment/promotion, but as he does not have a right to seniority, his seniority can be challenged without challenging his appointment/promotion. In his submission the vacancy of the post of JDTP in which the petitioner was appointed by an order dated 11/8/2011 was meant for ST category as per roster GR dated 18/10/1997. He, therefore, submits that in case of non availability of eligible candidate belonging to the category for which the post is reserved under the roster,

the reservation in that category is required to be carried forward for a period of three years.

(D) Learned Senior Counsel submits that in departure to the provisions of the GR dated 5/12/1994 and the provisions of Section 6(1) of the Reservation Act, 2001, a mere circular was issued on 27/10/2008 making exception in the case of smaller cadres for shifting of reservation from one reserved category to another in case of non-availability of candidate in the category falling under the roster which is not permissible. The said 'clarificatory circular' could not override the provisions of the Reservation Act and 1994 GR. It was only on account of erroneous clarificatory circular dated 27/10/2008 that the petitioner came to be promoted to the post of JDTP on 11/8/2011 by shifting the reservation from ST category to SC category.

(E) In his submission, therefore, once circular dated 27/10/2008 has been quashed and set aside by this Court's judgment, the same would have retrospective effect since the same has not been declared to be prospective and also because the power of prospective

overruling is vested only in the Supreme Court. Therefore, the law declared by this Court is assumed to be law from inception.

(F) Learned Senior Counsel relied upon the following decisions in support of his contention that the judgment of the High Court is retrospective in its operation :-

(a) Sureshchandra Varma vs. Nagpur University, ((1990) 4 SCC 55) ;

(b) P.V. George vs. State of Kerala, ((2007) 3 SCC 557) ;

(c) GM, Uttaranchal Jal Sansthan vs. Laxmi Devi, ((2009) 7 SCC 205) ;

(d) B.A. Linga Reddy vs. Karnataka State Transport Authority, ((2015) 4 SCC 515).

(G) Learned Senior Counsel relied upon the decision of this Court which has quashed and set aside in circular dated 27/10/2008 (reported in 2013 (5) Mh.L.J. 640). Learned Senior Counsel would submit that the principle of law is applicable to all cases irrespective of its stage of pendency and hence promotion of the petitioner based on the G.A.D. Circular dated 27/10/2008 is illegal and bad-in-law.

(H) Learned Senior Counsel would thus contend that upon setting aside the circular dated 27/10/2008, a situation is

created where there is no post available for the petitioner for being promoted as JDTP in SC category as on 11/8/2011. Learned Senior Counsel relied upon the decisions of the Hon'ble Supreme Court in the case of **(a) Sanjay K. Sinha-II v/s. State of Bihar, ((2004) 10 SCC 734);**

(b) Ajit Singh (II) vs. State of Punjab, ((1999) 7 SCC 209);

(c) Bhupendra Nath Hazarika vs. State of Assam, ((2013) 2 SCC 516), in support of his submission that if the order of promotion itself is void then what required to be challenged is only the seniority granted to the petitioner on account of such fortuitous appointment.

- (I) Learned Senior Counsel also would submit that Rule 4 (1) of the Rules of 1982 provides that the service rendered as a result of a fortuitous appointment shall be excluded for the purpose of seniority and the appointee shall be deemed to be appointed to the post only on the date on which his regular appointment is made in accordance with the provisions of Recruitment Rules. In his submission, it

was therefore, not necessary for the respondent No.1 to have challenged the promotion of the petitioner and challenge to petitioner's seniority by respondent No.1 by filing O.A. was sufficient.

(J) Learned Senior Counsel would further contend that the objection of the petitioner that the seniority list dated 28/8/2014 as on 1/1/2014 was not challenged in O.A. Is baseless inasmuch as at the time of filing O.A. on 12/3/2016, the seniority list dated 15/1/2016 as on 1/1/2015 was already published by the State. The seniority list dated 28/8/2014 ceased to exist with the issuance of seniority list dated 15/1/2016 and in that sense merged with the later seniority list. As at the time of filing O.A., the only list which was operational was the seniority list dated 15/1/2016. The respondent No.1 was therefore justified in challenging only the seniority list dated 15/1/2016.

(K) Learned Senior Counsel would further contend that neither the Reservation Act nor the Seniority Rules, 1982 provides for the promotion with consequential seniority. Learned Senior Counsel relied upon the decisions of the

Apex Court in (a) **Panneer Selvam vs. Govt. of Tamil Nadu**, ((2015) 10 SCC 292) and (b) **B.K. Pavitra vs. Union of India**, ((2017) 4 SCC 620, in support of his submission that Article 16 (4A) of the Constitution does not automatically give the consequential seniority in addition to accelerated promotion to the roster point promotees and in absence of express provision for consequential seniority in the Reservation Act or in the Seniority Rules, the Catch Up Rule will be applicable and the roster point 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 in view of law laid down by the Apex Court in the above decisions. Learned Senior Counsel would therefore submits that the Tribunal has by a well considered order allowed the O.A. and hence, there is no merit in these petitions.

25. **SUMMISSIONS OF LEARNED SENIOR COUNSEL FOR RESPONDENT NO.1 IN WRIT PETITION NO.9291/2016 :-**

(A) Learned Senior Counsel Mr. Mihir Desai appearing for the present respondent No.1, who is also respondent No.1 in Writ Petition No.9291/2016 filed by the State has generally canvassed the same contentions as advanced by the Senior Counsel Shri Ravi Kadam. He has also invited our attention to the provisions of the Reservation Act and that the appointment/promotion of the petitioner as JDTP is completely contrary to the provisions of the Reservation Act and hence void. He invited our attention to the findings recorded by the Tribunal to contend that the Tribunal was justified in allowing O.A. filed by the respondent No.1.

26. SUBMISSIONS OF LEARNED COUNSEL FOR
RESPONDENT NO.1 IN WRIT PETITION NO.8859/2016 :-

(A) Shri Talekar, learned Counsel for the respondent No.1 in Writ Petition No.8859/2016 has supported the order passed by the Tribunal in Misc. Application No.179/2016 for condonation of delay. In his submission, in view of the stand taken by the learned Senior Counsel

Mr. Ravi Kadam, it was not necessary for the respondent No.1 to have challenged the order of promotion of the petitioner. Shri Talekar submits that the Tribunal has given cogent reasons for condoning the delay and found that the explanation offered by the respondent No.1 was sufficient. In his submission, upon publication of the seniority list on 28/8/2014 as on 1/1/2014, the applicant has sufficient reason not to file O.A. at that time. It is only after getting knowledge about the correct position in law and after the petitioner having got information about the decision of this Hon'ble Tribunal in the case of V.R. Naik in O.A.No.927/2012 and the judgment of this Court at Aurangabad Bench in Writ Petition No.3077 of 2011 in which the circular dated 27/10/2008 was quashed and set aside as being contrary to the provisions of the Reservation Act that the O.A. was filed. Though the respondent No.1 protested against his lower placement vis-a-vis the petitioner in the seniority list by making representation dated 11/2/2016, his grievance was not redressed. It is in these circumstances that there was delay of 199 days in filing O.A. which Tribunal has rightly

condoned in the interest of justice. He further submits that the petitioner cannot be allowed to take advantage of void appointment order and hence the order passed by the Tribunal condoning the delay calls for no interference according to him. Mr. Talekar relied upon the decision of the Apex Court in the case of **Shiba Shankar Mohapatra and ors. v. State of Orissa and ors. (2010) 12 SCC 471**, wherein the Apex Court contend that even 3-4 years is a reasonable period for challenging the seniority and in case someone agitates the issue of seniority beyond this period, he has to explain the delay and laches in appropriating the adjudicatory forum by furnishing satisfactory reasons. Shri Talekar also relied upon the decisions in the case of:

(a) **Ramchandra Shankar Deodhar v. The State of Maharashtra & ors., (1974) 1 SCC 317 ;**

(b) **N. Balakrishnan v. M. Krishnamurthy, (1998) 7 SCC 123 ;**

(c) **Dinkar Anna Patil and another v. State of Maharashtra and others, (1999) 1 SCC 354 ;**

(d) **Sanjay Jadhav v. Joint DHE Aurangabad, (2016) 2 Mh.L.J. 126**, which lay down what are the decisive factors to be taken into consideration in the

matter of condonation of delay. Mr. Talekar therefore submitted that no interference in the view taken by the Tribunal condoning the delay is warranted.

27. Having heard the submissions advanced, we now proceed to consider the submissions on merits. At the outset, we may indicate that though the petitioner has tried to make out a case that the change in roster point is not only under 2008 circular but independent of 2008 circular, however, we find from the stand taken by the State Government and from the proposal for the petitioner's promotion, the petitioner, in fact is appointed as JDTP after changing the reservation from ST to SC in accordance with the circular of 2008.

28. The petitioner, who belongs to SC category, was promoted by an order dated 11/8/2011 as JDTP as against the post reserved for ST category by changing the reservation. The petitioner is working as JDTP with effect from 11/8/2011. The respondent No.1 is promoted as JDTP with effect from 2/7/2013. Admittedly, the respondent No.1 was senior to the petitioner in the feeder cadre post

of Deputy Director, Town Planning. The provisional seniority list of JDTP was published on 14/6/2014 when the petitioner was shown as senior to the respondent No.1. No objections were raised to the said provisional seniority list. The final seniority list of JDTP was published on 28/8/2014 when the respondent No.1 was shown senior to the respondent No.1. On 13/1/2015, the provisional seniority list of JDTP as on 1/1/2015 was published which also was not objected by the respondent No.1. On 15/1/2016, the final seniority list as on 1/1/2015 was published where-after the representation was made by the respondent No.1 on 11/2/2016. The O.A. is filed on 12/2/2016 before the Tribunal. These facts have been repeated by us in a nutshell to appreciate the controversy in the light of the submissions made by the learned Counsel.

29. As indicated earlier the petitioner was appointed on 11/8/2011, upon changing the roster point in accordance with the 2008 circular. It is thereafter that the Aurangabad Bench of this Court in Writ Petition No.3077/2011 quashed and set aside the circular dated 27/10/2008 by its judgment and order dated 9th May, 2013. Before the Tribunal the petitioner's order of promotion dated

11/8/2011 is not challenged as in the submission of the learned Senior Counsel for the respondent No.1, in view of the quashment of the circular dated 2008 being contrary to the Reservation Act, consequently any action taken/order passed under the circular is null and void since inception. In his submission the petitioner, therefore, cannot claim seniority on the basis of such a void promotion order dated 11/8/2001 and hence the appointment of the petitioner in the said post is fortuitous.

30. Admittedly, the promotion order dated 11/8/2011 of the petitioner has not been challenged in O.A.. It would be material to consider the following relevant statutory provisions for deciding the controversy :-

(A) **Reservation Act – Section 4** :- (1) Unless otherwise provided by or under this Act, the posts reserved for the Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes shall not be filled in by the candidates not belonging to that castes, tribe, category or class for which the posts are reserved.

(2) Subject to other provisions of this Act, there shall be posts reserved for the persons belonging to the Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Special Backward Category and Other Backward Classes, at the stage of direct recruitment.

Section 6 :- (1) If in respect of any recruitment year, any vacancy reserved for any category of persons under sub-section (2) of section 4 remains unfilled, such vacancy shall be carried forward upto five years in case of direct recruitment and three years in case of

promotion :

Provided that, on the date of commencement of this Act, if any Government order regarding filling up the posts, in case of non availability of Backward Class candidates are in force, such Government orders shall continue to be in force unless modified or revoked, by Government.

(2) When a vacancy is carried forward as provided in sub-section (1) it shall not be counted against the quota of the vacancies reserved for the concerned category of persons for the recruitment year to which it is carried forward :

Provided that, the appointing authority may, at any time undertake a special recruitment drive to fill up such unfilled vacancies and if such vacancies remain unfilled even after such special recruitment drive then, it shall be filled up in the manner prescribed by Government.

Section 11 :- Any appointments made, in contravention of the provisions of this Act shall be void.

- (B) **Recruitment Rules of 2011 – Rule 3** :- Appointment to the post of the Director of Town Planning, Group-A shall be made by promotion of a suitable person on the basis of strict selection with due regard to seniority, from amongst the persons holding the post of Joint Director of Town Planning in the Directorate, having not less than three years regular service in that post.
- (C) **The Maharashtra Civil Services (Regulation of Seniority) Rules, 1982 – Rule 3 (f)** : “Fortuitous Appointment” means a temporary appointment made pending a regular appointment in accordance with the provisions of the relevant recruitment rules.

Rule 4 : General Principles of Seniority :-

(1) Subject to the other provision of these rules, the seniority of a Government servant in any post, cadre or service shall ordinarily be determined on the length of his continuous service therein :

Provided that, for the purpose of computing such service, any period of absence from the post, cadre or service due to leave, deputation for training or otherwise or on foreign service or temporary officiation in any other post shall be taken into account, if the competent authority certifies that the Government servant concerned would have continued in the said post, cadre or service during such period, had he not proceeded on leave or deputation or been appointed temporarily to such other post :

Provided further that, the service, if any, rendered by him as a result of a fortuitous appointment *[except in a case where the competent authority certifies that, it was not expedient/possible or practicable to make a regular appointment strictly in accordance with the ratio

of recruitment as prescribed in the relevant recruitment rules, with the brief reasons recorded therefor,] shall be excluded in computing the length of service and for the purposes of seniority he shall be deemed to have been appointed to the post or in the cadre or service on the date on which his regular appointment is made in accordance with the provisions of the relevant recruitment rules.

31. After going through the proposal dated 7th January, 2011, it is very clear that post in which the petitioner was promoted was reserved for ST candidate. In view of the circular dated 27/10/2008 the roster point was changed and the petitioner who belonged to the SC category was appointed in the reserved post meant for ST by an order dated 11/8/2011. At the relevant time, when the petitioner's case came up for consideration in 2011 there were two posts of JDTP. One was already filled in from the Open Category and the other was meant for ST category. As no eligible ST candidate was available the roster point was changed in view of the circular dated 2008 and the petitioner was selected for appointment as JDTP after changing the roster point. By following the procedure laid down in the circular of 2008 the roster point was changed from ST to SC and the petitioner came to be selected. As per the rules the petitioner was only eligible reserved category candidate and therefore though he belonged to SC category he was promoted as JDTP after changing the roster point. The said appointment was not a temporary

appointment made pending a regular appointment. It is the specific case of State Government that after changing the roster point in accordance with then existing circular of 2008 that the petitioner was selected and petitioner's promotion was a regular promotion only subject to the outcome of the Writ Petition No.8452/2004. In our opinion, the promotion of the petitioner, therefore, cannot be said to be a fortuitous having regard to the definition of the Rule 3 (f) of the Seniority Rules of 1982.

32. Insofar as the contention of the learned Senior Counsel for respondent No.1 that the promotion of the petitioner being void since inception as the same is contrary to the statutory provisions and rules in force, we of the opinion that at the relevant time when the petitioner was appointed on 11/8/2011 the circular dated 2008 was holding the field. Based on this circular the roster point underwent a change and the petitioner was duly selected for promotion. No doubt, the circular dated 27/10/2008 has been subsequently quashed and set aside by this Court by judgment and order dated 9th May, 2013. In our opinion, learned Senior Counsel Shri Dada is justified in contending that at the relevant time, when the petitioner was

promoted, there was an imprint of legality to the said promotion. We find that even the respondent No.1 has so understood and hence taken a specific stand that since the said promotion was given to the petitioner as per the government circular dated 27/10/2008 the respondent No. 1 believed that he could have no reason to raise any objection to the seniority list of JDTP published on 28/8/2014 (para 6 of the Misc. Application for condonation of delay). The respondent No.1 has further taken a stand that after he got knowledge of the order of this Court in Writ Petition No.3077/2011 and decision of the Tribunal in O.A.No.927/2012 that he decided to contest the seniority list published on 15/1/2016.

33. The arguments of learned Senior Counsel Shri Ravi Kadam though at the first blush seems attractive, however having regard to the fact that at the relevant point of time the order of promotion had an imprint of legality, which pursuant to the decision of this Court renders itself open to challenge on account of the quashment of the circular dated 27/10/2008, we are, therefore, unable to persuade ourselves to accept the contention of the learned Senior Counsel Shri Ravi Kadam that without challenging the order

of promotion, only seniority list can be challenged. The order of promotion is dated 11/8/2011. Respondent No.1 is appointed on 2/7/2013. It is only when the second seniority list was finalized on 15/1/2016 that the respondent No.1 chose to file O.A. in February, 2016. Even the reason for the delay offered by the respondent No.1 in filing O.A. is lack of knowledge of the order passed by this Court in Writ Petition No.3077/2011 quashing the circular dated 27/10/2008. In our opinion, having regard to these circumstances, when the petitioner has worked on the promoted post of JDTP right from 11/8/2011, without challenge to the order of promotion the consequential seniority cannot be challenged.

34. In this regard we may usefully refer to the decision of the Apex Court in the Case of **Roshan Lal** (supra) more particularly para 4 which reads thus :-

“4. One of the principal submissions made by Smt. Shyamla Pappu, learned Counsel for the petitioners was that the appointment of the respondents as Air port Officers (Ops.) was made at a time when there was no sanction for such posts and therefore their appointment was illegal. Other reasons were also advanced in support of the claim that the respondents were irregularly appointed as Airport Officers. We are afraid that it is rather late in the day for the petitioners to question the appointment of the respondents as Airport Officers (Ops.). The respondents were appointed as Airport Officers in 1975 and the present Writ Petitions were filed in 1978. We do not think we will be justified in reopening the question of the legality of the

appointment of respondents as Airport Officers several years after their appointment. We also notice that the prayer in the Writ Petitions also is confined primarily to the seniority list and the consequences flowing from the seniority list.”

35. A profitable reference can also be made to the decision of the Apex Court in the case of **P. Chitranjan Menon** (supra), the relevant portion of paras 5 and 9 which reads thus :-

“5. The respondents who were the petitioners in the writ petition were integrated in the service. The Government passed orders laying down the principles of integration of the District Board employees and the Panchayat Executive Officers and Panchayat Officers. The impugned orders under the writ petition are Ext. P-10, Ext. P-12 and Ext. P-15. It is also prayed that Ext. P-17 may be quashed. The Government in Ext. P-10 came to the conclusion that the vacancies on the advice of the Public Service Commission and the appointment of those that had been advised on December 28, 1961, arose only on the dates enumerated in the order Ext. P-10 commencing from December 30, 1961, and ending with January 2, 1962 and that the appointment can only be on occurrence of the vacancies. We do not see on what basis Ext. P-10 could be challenged. Ext. P-10 refers to GO MS 93/62 dated February 13, 1962. By the GO of 1962, 16 respondents in the writ petition were promoted as Executive Officers Grade I on the advice of the Public Service Commission. The promotion of the respondents in the writ petition having been ordered as early as February 13, 1962, without challenging that order a subsequent order which determined the date of their commencement of service cannot be challenged. In fact, the respondents were appointed to the higher posts on December 28, 1961, and they took charge on December 30, 1961, December 31, 1961, January 1, 1962 and January 2, 1962. The respondents in this petition were integrated into the service only on January 1, 1962. Their position in the service was to be determined by the Government later. If the respondents were aggrieved at the posting to the higher post of the present appellants and others they ought to have even challenged promotion which was made on January 1, 1962. Not having questioned the legality of the promotion or the GO of 1962 it is too late for them to question the validity of the GO of 1969 by filing a writ petition in the year 1972.”

9. While the earlier judgments were all decided against the

respondents, the Kerala High Court in the judgment under appeal took a different view. The decision under appeal proceeds on the basis that a regrettable mistake crept into the judgment in O.P. 1431 of 1970 and the earlier decision proceeded on the basis that there was a III Grade mentioned in G.O. 814 dated November 17, 1962. The High Court was of the view that there was a III Grade under the G.O. Above referred to, the earlier decision missed the fact that these grades were not applicable on January 1, 1962. Though G.O. 814 of 1962 was not placed before us we are not sure whether there was any mistake in the earlier judgment for the G.O. MS 97/67 dated March 18, 1967, refers to persons being transferred from the Malabar District Board as Panchayat Executive Officers III Grade. Be that as it may, we are satisfied that the respondents are not entitled to the reliefs prayed for by them in the writ Petitions. As the appellants were promoted to a higher post before the respondents were integrated into the Government service on January 1, 1962. Further throughout the appellants have been treated as occupying a higher post and respondents much lower post. Though the promotion of the appellants was before January 1, 1962, and was confirmed by various orders of the Government the respondents herein did not choose to challenge the orders till the year 1974. In the circumstances, we are satisfied that the order of the Kerala High Court has to be set aside and the appeal is allowed with costs.

36. We may also refer to the decision of the Apex Court in the case of **Amarjeet Singh** (supra) more particularly paras 27, 28 and 29.

“27. In H.V. Pardasani etc. Vs. Union of India & ors., AIR 1985 SC 781, this Court observed that if "petitioners are not able to establish that the determination of their seniority is wrong and they have been prejudiced by such adverse determination, their ultimate claim to promotion would, indeed, not succeed."

28. A similar view had been reiterated by this Court in Government of Maharashtra & ors. Vs. Deokar's Distillery, (2003) 5 SCC 669.

These appeals are squarely covered by the aforesaid judgments. We are of the considered opinion that in absence of challenge to the promotion of the appellants, relief of quashing the consequential seniority list could not have been granted.

29. Sum up:

Admittedly, the respondents were over and above the appellants in the seniority list of Excise Inspectors. The rules of 1992 were amended in the year 1994, changing the criterion for promotion from "merit" to "seniority subject to rejection of unfit". Forty two posts of AEC were to be filled up from the Excise Inspectors, as no Excise Superintendent was available for being considered for promotion to the post of AEC. The State Government wanted to fill up the said vacancies by applying the amended rules. On being challenged by some of the appellants, the High Court held that the vacancies which occurred prior to the amendment of 1992 Rules, namely, 10.10.1994 had to be filled up according to the unamended rules. The operation of the judgment and order of the High Court was stayed by this Court making it crystal clear that promotions so made under the amended rules would be subject to the decision in special leave petition. Accordingly, 61 Officers/respondents were promoted. Subsequently, this Court dismissed the SLP vide order dated 18.8.1998 in limine. The officers/ respondents so promoted were not reverted. The DPC was held on 19.12.1998 to fill up said 42 vacancies, but only 30 candidates/appellants were found eligible to be promoted to the post of AEC. The respondents were found unsuitable. In order to give the said respondents a second chance, the State Government carried forward the remaining 12 vacancies and directed to fill up the same under the amended Rules, and for that purpose another DPC was convened on 22.1.1999 and they were promoted on the basis of different criterion. Promotions were made with retrospective effect determining the yearwise vacancies. Appellants had been given promotion notionally against the vacancies, occurred in the recruitment year 1995 while the respondents were promoted notionally against the vacancies of the recruitment years 1996 and 1997. Thus, the High Court committed an error while recording the finding of fact that both set of officers had been promoted notionally from one and the same date. Admittedly, promotions were not made with effect from one and the same date. Appellants and respondents were promoted against the vacancies which had occurred in different recruitment years under different Rules and on different criterion. Thus, the respondents would rank below the appellants in seniority. Therefore, there could be no justification to hold that their inter se seniority in the feeding cadre would be relevant for determining the seniority of AECs. More so, had the interim order not been passed by this Court, the appellants could have been promoted under the unamended rules much earlier. Thus, they are entitled for equitable relief, as the effect of the interim order of this Court was required to be neutralised. The appellants had been promoted with an earlier date, thus, are bound to be senior than respondents who had been promoted with respect from a later date. No employee can claim seniority prior to the date

of his birth in the cadre.”

37. In our opinion reliance placed by the learned Senior Counsel for the respondent No.1 on the decision of the Apex Court in the case of Sanjay K. Sinha (supra) and Ajit Singh (supra) can have no application to the facts of the present case. In the case of Bhupendra Nath Hazarika (supra) in para 27 the observations made in Roshan Lal (supra) are considered. As already observed herein before, at the time when the petitioner was promoted the same was not dehors the Recruitment Rules but it is only later upon setting aside the circular of 2008 that the order of promotion became open to challenge. In a challenge to the order of promotion pursuant to the quashment of the circular dated 27/10/2008, the petitioner would have a right to defend his promotion on the grounds available in law.

38. It is only on the count of the circular being struck down which has made the action taken under the circular open to challenge. It is not as if the petitioner was promoted dehors the Rules prevailing at the time of his promotion. Even the respondent No.1 in his belated challenge to the seniority list explained that there was no reason for him to challenge the promotion order at the relevant time

as the circular of 2008 was in force and as the petitioner was promoted under the said circular. The respondent No.1 chose to challenge the seniority list only when he got knowledge about the quashment of the circular. Moreover in respect of the promotion effected on 11/8/2011, the O.A. is filed by the respondent No.1 only in February, 2016 almost after more than 5 years. Even the circular of 2008 was struck down by this Court in 2013 and it is obvious that at the stage of consideration of the petitioner as Director, Town Planning that the seniority list is challenged by the respondent No.1. It is in these circumstances, in our opinion the petitioner is justified in objecting to the filing of the O.A. on the ground that as the order of promotion is not challenged, only the seniority cannot be challenged. The law laid down by the Hon'ble Supreme Court on the aspect of retrospectivity of the decision of this Court is very clear. In a challenge to the circular of 2008 this Court has quashed and set aside the circular of 2008. In the fact situation of the present case the petitioner is entitled to raise all contentions available to him in law as permissible in an appropriate challenge to the promotion order and as to the consequence and legal effect of quashment of the circular which formed the basis of issuance of the promotion order.

39. We, therefore, are of the opinion that without challenging the promotion order dated 11/8/2011 of the petitioner, the Tribunal was not justified in proceeding on the footing that the appointment of the petitioner is a fortuitous appointment being in contravention of the Recruitment Rules. Whether the order of promotion is valid or invalid is required to be adjudicated before going into the question of legality of the seniority list. In our opinion, the Tribunal ought to have dismissed the O.A. on the count that the order of promotion dated 11/8/2011 which forms the basis of the seniority has not been challenged.

40. In the light of the view taken by us the O.A. must fail on the ground that the promotion order dated 11/8/2011 has not been challenged. In this view of the matter the cause of action would relate back to 11/8/2011. Consequently the O.A. must also fail on the ground of delay as the delay has been explained only from 28/8/2014. In our opinion even this delay has not been explained satisfactorily. We find that the Tribunal was not justified in condoning the delay in filing the O.A. The respondent No.1 himself has taken a position that it is only upon knowledge of the order of this Court in

Writ Petition No.3077/2011 passed on 9/5/2013 quashing the circular of 2008, which knowledge he derived sometime after the publication of the second seniority list on 15/1/2016 that the respondent No.1 protested against the seniority list. Even after the promotion of the respondent No.1 in 2013 and after publication of the first provisional seniority list of JDTP on 1/6/2014, the respondent No.1 took no objection to the seniority list. The respondent No.1 has taken a stand that he had no reason to raise any objection to the seniority list published on 28/8/014 as he believed that the promotion was given to the petitioner as per the provisions of the circular dated 27/10/2008. Even after the provisional seniority list of JDTP as on 1/1/2015 was published on 13/1/2015, the respondent No.1 never raised any objection. He raised objection for the first time on 11/2/2016 after the final seniority list of JDTP as on 1/1/2015 was published on 15/1/2016. The respondent No.1 has thus accepted the position that the appointment of the petitioner was in accordance with the circular dated 27/10/2008 and it is only after deriving knowledge that the said circular has been set aside that he chooses to file the O.A. In our opinion, the respondent No.1 has not acted with due diligence and having regard to what is stated hereinabove we are inclined to hold that the Misc. Application filed

by the respondent No.1 ought to have been dismissed by the Tribunal on the ground of delay and laches. We may hasten to add that the objection of the petitioner as regards delay in filing the O.A. is considered by us only in the context of the respondent No.1's challenge to the seniority as we have taken a view that the respondent No.1 should have challenged the order of promotion which forms the basis of seniority.

41. In the light of the view taken by us, we have not gone into the other contentions raised by the learned Senior Counsel Shri Dada. Hence the following order :-

ORDER

1. Writ Petition No.8860/2016 and Writ Petition No.9291/2016 are allowed. The impugned order dated 2/5/2016 (corrected vide order dated 16/6/2016) passed by the Maharashtra Administrative Tribunal, Mumbai, in O.A.No.269/2016 is quashed and set aside. Consequently, O.A.No.269/2016 is dismissed.
2. Writ Petition No.8859/2016 is allowed in terms of prayer Clause (b).
3. Rule accordingly made absolute with no order as to costs.

(M.S. KARNIK, J.)

(SMT. V.K. TAHILRAMANI J.)